

<b>Rodriguez v Mamoun</b>
2019 NY Slip Op 32477(U)
August 21, 2019
Supreme Court, New York County
Docket Number: 150196/2016
Judge: Adam Silvera
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ADAM SILVERA PART IAS MOTION 22

Justice

JONATHAN RODRIGUEZ, Plaintiff, - v - MOHAMMED MAMOUN, DAN-ED CAB CORP, Defendant. INDEX NO. 150196/2016 MOTION DATE 01/28/2019 MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 39, 40, 41, 42, 43, 44, 45, 46 were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, it is ORDERED that defendants Mohammed Mamoun and Dan-Ed Cab Corp.'s motion, for summary judgment, pursuant to CPLR 3212, against plaintiff Jonathan Rodriguez on the issue of "serious injury" as defined under Section § 5102(d) of the Insurance Law is granted. The matter at issue stems from a motor vehicle accident which occurred on July 14, 2015, on 72nd Street near 1st Avenue in the County, City and State of New York when defendants' vehicle struck plaintiff's vehicle which allegedly led to his serious injury.

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (Winegrad v New York University Medical Center, 64 NY2d 851, 853 [1985]). Once such entitlement has been demonstrated by the moving party, the burden shifts to the party opposing the motion to "demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure ... to do [so]" (Zuckerman v City of New York, 49 NY2d 557, 560 [1980]).

In order to satisfy their burden under Insurance Law § 5102(d), a plaintiff must meet the “serious injury” threshold (*Toure v Avis Rent a Car Systems, Inc.*, 98 NY2d 345, 352 [2002] [finding that in order establish a prima facie case that a plaintiff in a negligence action arising from a motor vehicle accident did sustain a serious injury, plaintiff must establish the existence of either a “permanent consequential limitation of use of a body organ or member [or a] significant limitation of use of a body function or system”]).

Defendants allege that plaintiff has failed to demonstrate the existence of a “serious injury” as defined under Section 5102(d) of the Insurance Law. Defendants allege that the injuries plaintiff is seeking relief for are not causally related to the underlying accident and are a result of degenerative disc disease and a prior 2010 workplace accident. In support of their motion defendants attach plaintiff’s Bill of Particulars, the deposition of plaintiff, the affirmations of Dr. Robert S. April and Dr. Mark J. Decker (Mot, Exh B, D, E, & F).

Defendants aver that plaintiff is unable to seek refuge under the ninth category of serious injury, that is, inability to perform his customary daily activities for at least 90 days out of the first 180 days immediately after the accident. Defendants further point to the deposition of plaintiff where he testified that he was involved in a 2010 accident which caused him to suffer back pain (Mot, Exh D at 89-90).

Dr. April examined plaintiff on April 18, 2017 and found that plaintiff had a normal range of motion except for the lower back which was decreased (Mot, Exh E). Dr. April “concluded with reasonable medical certainty that the accident of record did not produce a neurological diagnosis, disability, limitation or need for further intervention. Much of his behavior was exaggerated and not consistent with any significant neurological injury” (*id.*). Dr. Decker, who reviewed CT scans, taken on August 17, 2015, of plaintiff’s cervical spine, lumbar

spine, and thoracic spine, concluded that plaintiff's injuries "are all degenerative, longstanding and not causally related to the date of the accident of 7/14/2015" (*id.*, Exh F). Thus, defendants have made a prima facie showing of entitlement to summary judgment and the burden shifts to plaintiff to raise an issue of fact.

In opposition, plaintiff attaches the affirmation of Dr. Arden Kaisman who reviewed the August 17, 2015 CT scans and conducted range of motion testing on plaintiff on November 5, 2017 (Aff in Op, Exh B). Dr. Kaisman found a decrease in range of motion of plaintiff's lumbar spine and concluded with a reasonable degree of medical certainty that plaintiff's alleged injuries are causally related to the underlying accident (*id.*). The Court notes that plaintiff's responding medical submission by Dr. Kaisman fails to raise a triable issue of fact as to plaintiff's injuries.

In *Rosa v Delacruz*, 32 NY3d 1060, 2018 N.Y. Slip Op. 07040 [2018], the Court of Appeals found that where a plaintiff's doctor opined that tears were causally related to the accident, but did not address findings of degeneration or explain why the tears and physical deficits found were not caused by the preexisting degenerative conditions, plaintiff failed to raise a triable issue of fact as it "failed to acknowledge, much less explain or contradict, the radiologist's finding. Instead, plaintiff relied on the purely conclusory assertion of his orthopedist that there was a causal relationship between the accident" (*See id.*)

Here, like the plaintiff in *Rosa*, plaintiff, fails to submit an opinion from his doctors which explain why plaintiff's injuries were not caused by preexisting degenerative conditions but rather due to the accident at issue. Thus, the Court finds that plaintiff has not suffered a serious injury and defendants' motion for summary judgment to dismiss plaintiff's complaint on the grounds that the injuries alleged by plaintiff do not constitute a "serious injury" is granted.

Accordingly, it is

ORDERED that defendants' motion for summary judgment, on the grounds that plaintiff Jonathan Rodriguez has not sustained a "serious injury" as defined in 5102 and 5104 of the Insurance Law, is granted; and it is further

ORDERED that defendants' motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that within 30 days of entry, defendants shall serve a copy of this decision/order upon all parties with notice of entry.

This constitutes the Decision/Order of the Court.



8/21/2019  
DATE

ADAM SILVERA, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE