

Fajardo v Aboubakar
2019 NY Slip Op 32839(U)
September 26, 2019
Supreme Court, New York County
Docket Number: 152888/2017
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

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MANUEL FAJARDO,

Plaintiff,

- v -

OMAR ABOUBAKAR, STYLE COACH CORP.

Defendant.

-----X

INDEX NO. 152888/2017

MOTION DATE 03/19/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41 were read on this motion to/for JUDGMENT - SUMMARY.

Before the Court is defendants Omar Aboubakar and Style Coach Corp.’s motion for summary judgment pursuant to CPLR 3212 to dismiss plaintiff, Manuel Fajardo’s Complaint on the grounds that plaintiff has failed to demonstrate that plaintiff has suffered a “serious injury” as defined under Section 5102(d) of the Insurance Law. Plaintiff opposes the motion and cross-moves for an Order granting plaintiff summary judgment on the issue of “serious injury” as against defendants and in favor of plaintiff on the basis that plaintiff has sustained a fracture.

This matter stems from a motor vehicle incident which occurred on December 23, 2014, on the roadway of West 207 Street in the County, City and State of New York, which allegedly led to plaintiff’s serious injury. Defendants’ motion for summary judgment, pursuant to CPLR 3212, against plaintiff on the issue of “serious injury” as defined under Section § 5102(d) of the Insurance Law is denied.

“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 changes. Defendants attach the report of Dr. Robert Tantleff who found that plaintiff’s MRI’s of the lumbar and cervical spine reveal preexisting degeneration and that plaintiff’s injuries are not attributable to the accident at issue (Mot, Exh E). Thus, defendants have made a prima facie showing of entitlement to summary judgment on the issue of serious injury and the burden now shifts to plaintiff.

In opposition, plaintiff’s responding medical submissions fail to raise a triable issue of fact as to plaintiff’s alleged degenerative injuries in the lumbar and cervical spine but raise an issue of fact as to plaintiff’s alleged tibial plateau fracture. 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, plaintiff’s physicians do not discuss degeneration and fail to address the lumbar and cervical spine in contrast to defendants’ physicians’ findings. Plaintiff’s medical reports do however, raise an issue of fact in that New York Presbyterian Hospital medical records and the affirmation of Dr. Arnold Wilson, demonstrate the existence of a tibial plateau fracture and medial malleolus fracture (Cross-Mot, Exh E, F & G). “A fracture of plaintiff’s knee as a result of the accident is, by itself, sufficient to establish a serious injury under the Insurance Law” *Joyce v Lacerra*, 41 AD3d 236, 237 [1st Dept 2007] citing *Lanpont v. Savvas Cab Corp.*, 244 A.D.2d 208, 211–212 [1st Dept 1997]).

Thus, the Court finds that defendants’ motion is granted in part to dismiss the portion of plaintiff’s Complaint alleging “serious injury” to the cervical and lumbar spine and is denied in part to dismiss plaintiff’s complaint. Plaintiff has raised an issue of fact precluding summary judgment to dismiss the Complaint for failure to demonstrate a “serious injury” as defined in 5102 of the Insurance Law.

Accordingly, it is

ORDERED that defendants’ motion for summary judgment to dismiss plaintiff’s Complaint on the grounds that plaintiff allegedly has not sustained a “serious injury” as defined in 5102 of the Insurance Law is denied; and it is further

ORDERED that plaintiff's cross-motion for an Order finding that plaintiff has suffered a "serious injury" as defined in 5102 of the Insurance Law is granted; and it is further

ORDERED that all parties appear for a blockbuster settlement conference on November 25, 2019, at 9:30AM in room 136 of 80 Centre Street; and it is further

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

This constitutes the Decision/Order of the Court.

9/26/19
DATE


ADAM SILVERA, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE