Morsy v Call a Cab Transp, Inc.
2019 NY Slip Op 33046(U)
October 15, 2019
Supreme Court, Suffolk County
Docket Number: 9136/2015
Judge: William G. Ford

SHORT FORM ORDER **INDEX NO.: 9136/2015** COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

HON. WILLIAM G. FORD
JUSTICE of the SUPREME COURT

Motion Date: 10-18-18
Motion Adjourn Date: 06-27-19
Motion Seq #: 02 - MG; CASE DISP

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EZZELDIN MORSY,

Plaintiff,

-against-

CALL A CAB TRANSPORT INC., MAJID ZARINFAR, PENSKE TRUCK LEASING CORPORATION, PENSKE TRUCK LEASING CO. L.P. and JEREMY HATFIELD,

Defendants.

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PLAINTIFF'S ATTORNEY:
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DEFENDANT'S ATTORNEY: *Call A Cab and M. Zarinfar*
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Read on this motion by Defendant pursuant to CPLR § 3212 seeking summary judgment based on plaintiff's failure to meet the requirements of Insurance Law 5102(d), Affirmation of Simon P. Werchberger, Esq. and exhibits A-I, and the Affirmation in Opposition of John Aviles, Esq. and exhibits 1-7, and due deliberation thereon; it is

ORDERED that, if applicable, within 30 days of the entry of this decision and order, that defendant's counsel is also hereby directed to give notice to the Suffolk County Clerk as required by CPLR 8019(c) with a copy of this decision and order and pay any fees should any be required; and it further

ORDERED that the motion is determined as outlined below.

BACKGROUND

This negligence action arises from a motor vehicle collision which occurred on Sunday May 25, 2014 at about 9:30 am, on Motor Parkway, approximately 200 ft. east of its intersection with Marcus Boulevard, in the Town of Smithtown, Suffolk County, New York. A summons and complaint was served on May 29, 2015 and issue was joined as to defendants Call a Cab and Zarinfar, by service of an answer on July 1, 2015. Issue was joined as to defendants Penske and Hatfield by service of an answer on June 24, 2015. Discovery was completed and Note of Issue was filed on or about August 27, 2019. This motion was filed prior to the Note of Issue.

Plaintiff was a 48 years old passenger in a taxicab that collided with another vehicle, a tractor trailer truck, which side-swiped the taxicab as the truck was making a right hand turn into a parking lot.

According to plaintiff's EBT testimony, following the impact he was able to exit the cab, declined an ambulance, made no complaints of pain or injury at the scene, and he thereafter continued on his way , in the same cab, to his destination, which was a friend's place of employment. Thereafter, that day, he and the friend traveled to New York City where they went to a coffee shop and hookah lounge and then returned home. The plaintiff sought treatment the next day at Southside Hospital , where he was seen in the Emergency Dept. He was treated and released from the ER with no medications, prescriptions or medical devices.

STANDARD OF REVIEW

The proponent on a motion of summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985];]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). If the moving party fails in meeting this burden, the motion must be denied. If, however, this burden is satisfied, then the burden shifts to the opposing party to establish the existence of material issues of fact requiring a trial (*see* ***Zuckerman v City of New York***, *supra*). The function of the court in determining a motion for summary judgment is issue finding, not issue determination (***Pantote Big Alpha Foods, Inc. v Schefman,*** 121 AD2d 295, 503 NYS2d 58 [1st Dept. 1986]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept. 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept. 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept. 1987]). The law is well-established that summary judgment is a drastic remedy to be granted only when there is clearly no genuine issue of fact to be presented at trial (*see* ***Andre v Pomeroy,*** 35 NY2d 361, 362 NYS2d 131 [1974]; ***Benincasa v Garrubo,*** 141 AD2d 636, 529 NYS2d 797 [2d Dept. 1988]).

In order to effectuate the purpose of no-fault legislation to reduce litigation, a court is required to decide, in the first instant, whether a plaintiff has made out a *prima facie* case of "serious injury" sufficient to satisfy the statutory requirements (***Licari v Elliott,*** 57 NY2d 230, 455 NYS2d 570 [1982]; ***Brown v Stark,*** 205 AD2d 725, 613 NYS2d 705 [2d Dept. 1994]). If it is found that the injury sustained does not fit within the definition of "serious injury" under Insurance Law § 5102(d), then the plaintiff has no judicial remedy and the action must be dismissed (***Licari v Elliott,*** *supra,* at 57 NY2d 238; ***Velez v Cohan,*** 203 AD2d 156, 610 NYS2d 257 [1st Dept. 1994]). A "serious injury" is defined as a personal

injury which "results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitutes such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment" (Insurance Law § 5102 [d]).

In a motor vehicle case, a defendant moving for summary judgment on the issue of whether the plaintiff sustained a serious injury has the initial burden of presenting competent evidence establishing that the injuries sustained do not meet the threshold (*see* ***Pagano v Kingsbury***, 182 AD2d 268, 587 NYS2d 692 [2d Dept. 1992]). A defendant may satisfy this burden by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim that a serious injury was sustained as a result of the subject accident (***Grossman v Wright***, 268 AD2d 79, 707 NYS2d 233 [2d Dept. 2000]). Once this showing has been made the burden shifts to the plaintiff to produce evidentiary proof in admissible form sufficient to overcome the defendant's submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law (*see* ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Grossman v Wright***, *supra*; ***Pagano v Kingsbury***, *supra*; *see also* ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, *supra*). A defendant may submit unsworn medical reports and records of the injured plaintiff's physicians in support of a motion for summary judgment in order to demonstrate the lack of a serious injury (***Kearse v New York City Tr. Auth.***, 16 AD3d 45 at 47, 789 NYS2d 281[2d Dept. 2005], citing ***Pagano v Kingsbury,*** 182 AD2d 268, 271, 587 NYS2d 692 [1992]).

In order to recover under the "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance***, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed, or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (*see* ***Perl v Meher***, 18 NY3d 208 [2011]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]).

DISCUSSION

This court reviewed defendants' motion to dismiss the complaint against them seeking summary judgment as a matter of law that plaintiff has failed to sustain a "serious injury" within the meaning of Insurance Law § 5102. In support of this application, they submit a copy of the pleadings, plaintiff's deposition transcript, and IME reports. Defendants argue plaintiff has failed to demonstrate by competent, admissible objective evidence that his alleged injuries constituted "permanent consequential limitation of use of a body organ or member" or that he sustained a "medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute a person's usual and customary daily activities for not less than 90 days during the 180 days immediately following the injury or impairment."

Plaintiff opposes defendants' motion, arguing that defendants have failed to make out a

prima facie entitlement to judgment as a matter of law, or in the alternative, that a triable issue of fact exists precluding summary judgment.

Dr. Paynter

In support of their motion, defendants offer the affirmation of Ronald A. Paynter, M.D. a medical doctor board certified in emergency medicine. Dr. Paynter reviewed the Bill of particulars, police report, and the emergency room records from Southside Hospital.He notes that the plaintiff's vital signs were normal, that he had no midline spinal pain, no back pain, had a normal range of motion in his neck with no pain, his back had no tenderness to palpation, and was ambulatory with a normal gait. There were no complaints of pain or injury to the back. The diagnosis at the ER was neck sprain and a contusion to the right elbow. Dr. Paynter concluded that the injuries claimed in the Bill of Particulars are inconsistent with the emergency room records and that the records show that the claimed injuries do not have an acute traumatic origin.

Additionally, in his affirmation dated May 2, 2016 Dr. Paynter opines that his impression is supported by the fact that there were no consults of specialists requested at the ER, no orthopedic referrals, no x-rays, CT scans or MRIs requested. Further he observes that plaintiff was not admitted to the hospital for observation or further evaluation, and on discharge was not provided with a cervical collar, immobilizer or other device.

Dr. Buckner

Defendants also offer the affirmation and exhibits of Dr. John H. Buckner, M.D., who reviewed all of plaintiff's medical records and films and concluded that based on all the clinical and radiological findings contained in those records, taken cumulatively it is his opinion to a reasonable degree of medical certainty that the injuries contained in the Bill of Particulars are inconsistent with a one-time traumatic event and thus are not casually related to the subject accident.

Dr. Weiland

Defendant also offers the independent medical examination of Dr. Edward Weiland a board certified Neurologist who examined the plaintiff and provided a report date July 6, 2017. His examination of plaintiff's cervical spine revealed flexion of 50°(normal 50 degrees), extension 60°(normal 60 degrees), right and left lateral rotation to 80°(normal 80 degrees), and right and left lateral flexion to 45°(normal 45 degrees). Further, his examination showed negative results for all of the following tests: Foraminal compression test, Shoulder depressor test, Soto-Hall test, Valsalva maneuver test.

Additionally, his examination of the lumbar spine revealed flexion to 60° (normal 60 degrees), extension to 25° (normal 25 degrees), right and left flexion to 25° (normal 25 degrees), and the Babinski test result-negative; Waddell test-negative; Fabere-Patrick sign-negative; straight-leg raising test-unlimited at 90°. He noted subjective complaints of pain with light palpation over the left cervical and lumbar paraspinous regions, but did not observe any signs of active tissue inflammation or soft tissue swelling in those areas or any other axial structures. His ultimate impression was: **1**. Alleged injury to cervical spine-resolved. **2**. Alleged injury to lumbosacral spine- resolved. **3**. Normal neurological examination.

Dr. Tantleff

Lastly, defendant offers the report of Dr. A. Robert Tantleff a radiologist, who conducted a review of the MRI of plaintiff's lumbar spine, the radiology report of the MRI, (*the report referenced a prior MRI study of 8/25/08, but those films were not reviewed*) and the Bill of Particulars.

Dr. Tantleff concluded in his impression that the plaintiff's MRI was consistent with longstanding chronic degenerative discogenic disc disease and thoraco-lumbar spondylosis as described with advanced discogenic changes most pronounced at L5-S1 which were manifested by degeneration, dessication, real loss of height and spondylitic spurring indicative of and consistent with long standing chronic degenerative disc disease.

Significantly, he saw no evidence of acute disc herniations, acute exacerbatory change or evidence of recent trauma to the regional soft tissue structures including the cartilaginous end plates and regional osseous structures. These findings he states, are consistent with the plaintiff's age and are not causally related to the accident date of 5/24/14 which was approximately one month prior to the MRI examination. Further he opined that the finding on the MRI are chronic long-standing processes which require years to develop and are consistent with the wear and tear of the aging process.

Lastly, he opined that potential non-disc related causes of pain which were identified on the date of the examination which are unrelated to the date of the accident are: degenerative disc disease, degenerative neural foraminal stenosis, Scheuermann's disease, or juvenile discogenic disease; Schmorl's nodes, congenital transitional lumbosacral junction; or Modic reactive change.

Having reviewed the motion record, this Court finds that defendants have met their burden entitling them to judgment as a matter of law dismissing plaintiff's complaint for his failure to demonstrate that he sustained a "serious injury" within the contemplation of Insurance Law § 5102. With submission of both the radiological and neurological IME reports, defendants have sustained their burden of demonstrating that plaintiff's cervical, thoracic or lumbar sprains/strains were resolved by the time of her orthopedic examination and/or were not causally related as post-traumatic injuries. Plaintiff's range of motion was found within normal range at the time of his examination, conducted [3] years after the occurrence ***Willis v New York City Tr. Auth.,*** 14 AD3d 696, 789 NYS2d 223 [2d Dept 2005].

The burden, therefore, shifted to plaintiffs to raise a triable issue of fact *see* ***Gaddy v Eyler***, *supra*. A plaintiff claiming injury within the "limitation of use" categories must substantiate his or her complaints of pain with objective medical evidence showing the extent or degree of the limitation of movement caused by the injury and its duration *see* ***Ferraro v Ridge Car Serv.***, 49 AD3d 498, 854 NYS2d 408 [2d Dept 2008]; ***Mejia v DeRose,*** 35 AD3d 407, 825 NYS2d 772 [2d Dept 2006]; ***Laruffa v Yui Ming Lau***, 32 AD3d 996, 821 NYS2d 642 [2d Dept 2006]).

In opposition, plaintiff offers the unsworn examination and report of Dr. Erik K. Fanaee, MD who, in a report dated September 30, 2014; approximately four months post accident, reports:

Musculoskeletal: Muscle tone and joint stability are within normal limits, range of motion over major joimnts are within normal limits;
Neurological: Lower extremity motor strength 5/5 from hip flexion to ankle plantar flexion ; Upper extremity motor strength is 5/5 from deltoid to hand intrinsics. Hoffman and Spurling signs are negative. No sensory deficit or clonus.

Spine: Normal shape and contour of the lumbar spine. Palpation over the bony landmarks is non-tender, palpation over PSIS is non-tender. Straight leg raising test is negative bi-laterally. Patrick's and Gaenslen's sign tests are negative. Facet joint Loading maneuver is negative.

Dr. Fanaee's review of the MRI imaging reveals: MRI of the lumbar spine shows L4-5 facet and ligamentum hypertrophy as wells as L5-S1 facet and ligamentum hypertrophy. At L5-S1 there is a broad based central disc herniation and a slightly eccentric towards the right S1 nerve root impingement. His diagnosis is Lumbar spondylosis, Lumbosacral radiculitis, and lumbar herniated disc.

Plaintiff also offers the sworn records of treating physician Dr. Miguel Vargas, whose report of examination dated 10/06/14 reveals: **Neck:** cervical ROM restricted on flexion 50°(normal 60 degrees), extension 40°(normal 45 degrees), right rotation 60 °(normal 80 degrees) left rotation 45° (normal 80 degrees) **Back:** Lumbar ROM restricted upon: flexion 60°(normal 90 degrees), extension 20°(normal 30 degrees), right rotation 20°(normal 30 degrees), left rotation 20°(normal 30 degrees). His impression is cervical myofascial derangement, and lumbar myofascial derangement.

To prove significant physical limitation, a plaintiff must present either objective quantitative evidence of the loss of range of motion and its duration based on a recent examination of the plaintiff or a sufficient description of the"qualitative nature" of plaintiff 's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part *see* ***Perl v Meher***, *supra*; ***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2002]; ***Rovelo v Volcy***, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]. A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (see ***Licari v Elliott***, *supra*; ***Cebron v Tuncoglu***, *supra*. Furthermore, a plaintiff claiming serious injury who ceases treatment after the accident must offer a reasonable explanation for having done so ***Pommells v Perez***, 4 NY3d 566, 574, 797 NYS2d 380 [2005]; *see* ***Vasquez v John Doe #1***, 73 AD3d 1033, 905 NYS2d 188 [2d Dept 2010]; ***Rivera v Bushwick Ridgewood Props., Inc***., 63 AD3d 712, 880 NYS2d 149 [2d Dept 2009]).

Simply put, plaintiff's examinations are too remote in time, and the reported limitations are not enough to overcome defendants showing.

Accordingly, defendants having met their initial burden of establishing that plaintiff did not sustain a permanent consequential limitation of use of a body organ or member or significant limitation of use of a body function or system, and that he was not prevented from performing substantially all of his usual and customary daily activities for 90 of the first 180 days following the accident within the meaning of Insurance Law § 5102 (d) *see* ***Gonzalez v Green***, 24 AD3d 939, 805 NYS2d 450 [3d Dept 2005].

Plaintiff did not show by objective credible medical evidence that he met the 90/180 threshold determination either. Based on the parties' submission and the motion record, plaintiff's deposition testimony established that his injuries did not prevent him from performing " substantially all" of the material acts constituting his customary daily activities during at least 90 out of the first 180 days following the accident *see* ***Burns v McCabe***, 17 AD3d 1111, 794 NYS2d 267 [4th Dept 2005];

It is clear on this record, plaintiff failed to offer competent evidence that he sustained nonpermanent injuries that left him unable to perform his normal daily activities for at least 90 of the

180 days immediately following the accident *see* ***John v Linden***, 124 AD3d 598, 1 NYS3d 274 [2d Dept 2015]; ***Il Chung Lim v Chrabaszcz***, 95 AD3d 950, 944 NYS2d 236 [2d Dept 2012]).

Accordingly, defendants' motion for summary judgment dismissing the complaint on the ground that plaintiff's injuries failed to meet the serious injury threshold of Insurance Law § 5102 (d) is **granted;** and it is further

ORDERED that plaintiff's complaint is accordingly dismissed as against the defendants; and it is further

ORDERED that counsel for defendants' is hereby directed to serve a copy of this decision and order with notice of entry on counsel for plaintiff.

The foregoing constitutes the decision and order of this Court.

Dated: October 15, 2019
Riverhead, New York

WILLIAM G. FORD, J.S.C.

_X_ FINAL DISPOSITION **____ NON-FINAL DISPOSITION**

GRANTED

OCT 15 2019

Judith A. Pascale
CLERK OF SUFFOLK COUNTY