

**Ilboudo v Rigo Limo-Auto, Corp.**

2019 NY Slip Op 35113(U)

August 8, 2019

Supreme Court, Bronx County

Docket Number: Index No. 31468/2017E

Judge: Mary Ann Brigantti

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: I.A.S. PART 15

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MOHAMADI ILBOUDO,

Plaintiff, DECISION AND ORDER

- against - Index No. 31468/2017E

RIGO LIMO-AUTO, CORP., RIGO-FL1 LLC and  
"JOHN DOE," name being fictitious, unknown and meant  
to represent the driver of the vehicle,

Defendants.

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Mary Ann Brigantti, J.

Upon the foregoing papers, the defendants move for summary judgment dismissing the complaint of plaintiff for his failure to satisfy the "serious injury" threshold as defined by New York Insurance Law § 5102(d). Plaintiff cross-moves for summary judgment on the issue of "serious injury" on the basis that he sustained a "fracture."

"[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 do not meet the threshold" (*Linton v Nawaz*, 62 AD3d 434, 438 [1st Dept 2009], *affd* 14 NY3d 821 [2010]). "Such evidence includes affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (*Spencer v Golden Eagle, Inc.*, 82 AD3d 589, 590 [1st Dept 2011]). Once the defendant's initial threshold is met, the burden shifts to the plaintiff to raise a material issue of fact using objective, admissible medical proof (*see Franchini v Plameri*, 1 NY3d 536 [2003]; *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350 [2002]). If the defendant fails to meet his or her prima facie burden, the burden does not shift to plaintiff and the motion for summary judgment can be denied without the need to consider plaintiff's showing in opposition (*see Karounos v Doulalas*, 153 AD3d 1166, 1167 [1st Dept 2017]).

In this case, plaintiff bicyclist alleges injuries to his knees and lumbar spine as a result of the subject November 16, 2016 motor vehicle accident. Plaintiff alleges serious injuries under the

categories of significant disfigurement, fracture, permanent loss of use, permanent consequential limitation, significant limitation and a 90/180-day injury.

Defendants submitted the affirmed report of emergency medicine specialist, Rikki Lane, M.D., orthopedic surgeon, Ronald L. Mann, M.D., neurologist Michael J. Carciente, M.D. and radiologist, Jessica F. Berkowitz. Defendants also relied on certified medical records from Mount Sinai Beth Israel (“Beth Israel”) and plaintiff’s testimony from his June 4, 2018 examination before trial.

Plaintiff submitted his affidavit dated December 4, 2018, a certified police accident report, the sworn reports of radiologist, Steve B. Losik, the affirmation and certified records of treating physician, Yvette Abraham, M.D., and the affirmation and certified records of orthopedic surgeon, Mark Kramer, M.D.

Defendants argue that following a course of treatment of approximately one and a half years, plaintiff stopped treatment. However, in a final narrative report dated December 30, 2017, Dr. Abraham found that plaintiff had sustained permanent and significant losses of function and use of his knees and lumbar spine, that plaintiff had achieved maximum medical benefit and that further treatment would be palliative. At that time, plaintiff was discharged from formal treatment with instructions to continue at home exercises. Thus, having offered an explanation for his cessation of treatment, the claimed gap in treatment is not dispositive (*see Ortiz v Boamah*, 169 AD3d 486, 489 [1st Dept 2019]).

#### **LEFT KNEE FRACTURE AND TEAR**

Plaintiff alleged a left knee fractured patella as a result of the subject accident. “A fracture constitutes a ‘serious injury’ under Insurance Law § 5102(d)” (*Perez-Hernandez v M. Marte Auto Corp.*, 104 AD3d 489, 490 [1st Dept 2013]; *see Joyce v Lacerra*, 41 AD3d 236, 237 [1st Dept 2007]).

Defendants’ expert Dr. Lane reviewed the verified bill of particulars, police accident report of

November 16, 2016, prehospital care report summary and emergency department records from Beth Israel. Dr. Lane points out that plaintiff presented to Beth Israel on November 16, 2016 with complaints of left knee pain. The examination was normal except for left knee laxity, and valgus and varus stress with minimal edema; and no erythema, lacerations or abrasions. No radiological studies were performed. Plaintiff was discharged with a diagnosis of left knee pain. He was prescribed a knee immobilizer, crutches, anti-inflammatory pain medication and referred to an orthopedist. The Beth Israel records also note a normal gait and that plaintiff was able to ambulate safely and independently without assistive device. Based upon his review of the records, Dr. Lane concluded that the claimed knee injuries alleged by the plaintiff are not supported by the emergency department records because there was minimal swelling and no erythema, indicating no major acute trauma. He further opined that had there been significant acute injuries to the knee, swelling ecchymosis, tenderness and decreased range of motion would have been present.

In addition, Dr. Berkowitz, who reviewed the films from the December 9, 2016 MRI of plaintiff's left knee, found no evidence of an acute traumatic injury to the left knee such as a fracture, traumatic bone marrow edema or meniscal or ligamentous tears. Dr. Berkowitz concluded that there was no causal relationship between the MRI findings and the subject accident.

Accordingly, defendants' evidence was sufficient to demonstrate prima facie that plaintiff did not sustain a left knee fracture (*see Frias v Gonzalez-Vargas*, 147 AD3d 500, 501 [1st Dept 2017]; *Jackson v Delossantos-Diaz*, 82 AD3d 489, 489 [1st Dept 2011]; *see also Streety v Toure*, \_\_\_AD3d\_\_\_, 2019 NY Slip Op 04487, \*1 [2019] [conclusion of defendant's expert emergency medicine physician that the emergency room examination showed findings inconsistent with plaintiff's claimed injuries was sufficient to meet defendant's prima facie burden on the issue of causation]).

In opposition, plaintiff raised a triable issue of fact as to whether he sustained a left knee

patella fracture as a result of the subject accident (*see Seidel v Rabassa*, 170 AD3d 430, 430-431 [1st Dept 2019]; *Lavy v Zaman*, 95 AD3d 585 [1st Dept 2012]). Dr. Abraham examined plaintiff on November 23, 2016, finding decreased range of motion of the left knee, evidence of tenderness, crepitus, effusion and joint line pain. Plaintiff commenced a course of physical therapy. On December 16, 2016, Dr. Kramer examined plaintiff, finding left knee tenderness and positive McMurray sign, with reduced strength. Dr. Kramer also notes that he reviewed a left knee X ray performed on October 10, 2016, that predated the subject accident, and that the results were normal. Dr. Kramer recommended left knee surgery, which he performed on June 12, 2017. During surgery Dr. Kramer found a flap fracture of the medial patella and removed the fractured portion and overlying cartilage. Both Drs. Kramer and Abraham opined that the left knee fracture was causally related to the subject accident.

The conflicting expert opinions as to the existence and cause of a left knee fracture precludes summary judgement on the serious injury category of “fracture” (*see Seidel v Rabassa*, 170 AD3d at 430-431; *Bailey v Islam*, 99 AD3d 633, 633 [1st Dept 2012]).

In addition to the above discussed left knee fracture, plaintiff alleges a tear of the lateral meniscus and synovitis in the left knee as a result of the subject accident.

Dr. Mann’s August 2, 2018 examination of plaintiff’s left knee revealed healed arthroscopic scars, mild tenderness upon palpation and range-of-motion restrictions in flexion. Dr. Mann includes in his report MRI and postoperative findings of a lateral meniscus tear. Dr. Mann diagnosed plaintiff with residual injuries to the left knee “due to the surgery and injury.”

However, defendants’ evidence is sufficient to meet their prima facie burden on the issue of causation. Dr. Lane noted that upon plaintiff’s presentation to Beth Israel, plaintiff’s medical history included a recent MRI and diagnosis of left knee medial meniscus tear. Dr. Lane opines that there was no significant acute injury to the left knee because there was minimal swelling and no erythema

indicating no major acute trauma. He concluded that had there been significant acute injury to the knee swelling ecchymosis, tenderness and decreased range of motion would have been present. In addition, Dr. Berkowitz reviewed the films from the December 9, 2016 MRI of plaintiff's left knee, finding internal degeneration in the posterior horn of the medial meniscus, that the lateral meniscus was intact and no evidence of traumatic injury such as meniscal or ligamentous tears or traumatic bone marrow edema. Dr. Berkowitz concluded that there was no causal relationship between plaintiff's accident and the MRI findings.

In opposition, plaintiff avers that two weeks prior to the subject accident he had left knee pain due to his use of a bicycle as his primary source of transportation and for his job as a bicycle deliveryman. Plaintiff contends that he underwent an MRI and was advised that he had left knee problems "due to overuse." Plaintiff avers that he was prescribed medication and that the pain was gone at the time of the subject accident.<sup>1</sup>

Dr. Kramer examined plaintiff in December 2016 and diagnosed plaintiff with bilateral tenderness/meniscal tears and positive McMurray sign with reduced strength. Dr. Kramer performed left knee arthroscopy finding a tear of the posterior horn of the lateral meniscus and opining that plaintiff sustained aggravation of a medial meniscus tear. Dr. Kramer reviewed the films and report related to a November 2, 2016 MRI of plaintiff's left knee, predating the subject accident, that revealed a tear of the medial meniscus, medial patellar arthropathy and a distal quadriceps tendinopathy. Plaintiff's post-accident MRI revealed the previously diagnosed medial meniscus tear and a new anterior horn lateral meniscal tear. Dr. Kramer causally related plaintiff's left knee injuries, and aggravation of his prior injuries, to the subject accident.

Dr. Abraham treated plaintiff from November 23, 2016 to December 30, 2017 for complaints

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<sup>1</sup> Plaintiff testified, contrary to his current averments, that prior to the subject accident he was never diagnosed with any problems in his knees or lower back, and never injured the claimed body parts.

related to his left knee. Dr. Abraham concluded based upon her objective findings and review of plaintiff's studies and treatment records that plaintiff sustained injuries to his left knee resulting in permanent and significant losses of function and use. Based upon plaintiff's presentation following the accident, his premorbid status and objective findings on physical examinations, Dr. Abraham concluded that plaintiff's left knee injuries were causally related to the subject accident. Accordingly, plaintiff has raised an issue of fact with respect to this body part.

### LUMBAR SPINE

Plaintiff alleges "permanent consequential" and "significant" limitations of use of his lumbar spine, as a result of injuries including L3-L4 and L4-L5 disc bulges and radiculopathy at the L4 through S1 levels.

Dr. Carciente reviewed plaintiff's records and performed a neurological examination on July 25, 2018, finding plaintiff's examination completely normal, with no correlation between the reported disc bulges and his examination. Dr. Carciente found no myotomal weakness, dermatomal sensory deficits, asymmetric reflexes or atrophy that would support the presence of radiculopathy in the lumbar spine. Dr. Carciente further opined that disc bulges are not related to trauma and are commonly seen in completely asymptomatic and atraumatic individuals.

Additionally, Dr. Mann found range-of-motion limitations in the lumbar spine, based upon his August 2, 2018 examination. Dr. Mann, however, did not address these limitations, and concluded that plaintiff's lumbar spine injuries were resolved.

Nevertheless, Defendants met their prima facie burden of showing that plaintiff did not suffer a serious injury to his lumbar spine through expert evidence that such injuries were not causally related to the subject accident (*see Vasquez v Almanzar*, 107 AD3d 538, 539 [1st Dept 2013]; *Prescod v O'Brien*, 101 AD3d 421, 421 [1st Dept 2012]). In this regard, Dr. Berkowitz reviewed films from the December 21, 2016, MRI of plaintiff's lumbar spine. While Dr. Berkowitz found slight disc

bulges and slight spondylosis, she concluded that these conditions were chronic and degenerative in origin. Dr. Berkowitz found no evidence of an acute traumatic injury and no causal relationship between the plaintiff's MRI findings and the subject accident (*see Auquilla v Singh*, 162 AD3d 463, 463 [1st Dept 2018]). Furthermore, Dr. Lane concluded that plaintiff's claimed lumbar spine injuries were inconsistent with plaintiff's presentation to Beth Israel (*see Streety v Toure*, \_\_\_AD3d\_\_\_, 2019 NY Slip Op 04487, \*1 [2019]). Dr. Lane points out that when plaintiff presented to Beth Israel on November 16, 2016 he made no complaints of back pain. Plaintiff's examination was normal except for left knee pain and left finger lacerations. Plaintiff's examination was negative for back pain. Based upon his review of the records, Dr. Lane concluded that the back injuries alleged by the plaintiff are not supported by the emergency department records because had there been significant back injuries there would have been positive findings of difficulty ambulating, decreased range of motion, numbness, weakness or radiculopathy. Moreover, no specialist consultations or diagnostic studies were requested, as they were not clinically indicated.

In opposition, Dr. Abraham first treated plaintiff on November 23, 2016 for back and bilateral knee pain. Dr. Abraham's initial examination revealed range of motion limitations and positive objective findings in the lower back, which Dr. Abraham deemed significant losses. Plaintiff underwent an EMG on January 3, 2017 revealing evidence of bilateral L4-L5 and L5-S1 radiculopathies and bilateral tibial motor neuropathy. As plaintiff's lumbar spine injuries were not responding to physical therapy, plaintiff underwent lumbar epidural steroid injection in January and February 2017. Dr. Abraham noted positive lumbar spine MRI findings of bulging discs with compression of the thecal sac and impingement of bilateral neural foramen. Dr. Abraham examined plaintiff on November 20, 2018 finding continuing significant restrictions in lumbar spine range of motion.

Based upon plaintiff's presentation following the accident, the absence of prior similar

symptomatology and Dr. Abraham's objective findings during treatment, Dr. Abraham concluded that plaintiff's lumbar spine injuries were caused by the subject accident and permanent in nature. Accordingly, plaintiff's submissions were sufficient to raise a triable issue of fact as to whether he sustained permanent consequential and significant limitations of use of his lumbar spine causally related to the subject accident (*see Ortiz v Boamah*, 169 AD3d at 488; *McIntosh v Sisters Servants of Mary*, 105 AD3d 672, 673 [1st Dept 2013]).

### RIGHT KNEE

Dr. Mann's recent examination of plaintiff revealed insignificant right knee range-of-motion restrictions of 135 degrees out of a normal 150 degrees, and concluded that the right knee injury was resolved (*see Sone v Qamar*, 68 A.D.3d 566 [1st Dept 2009], and *Style v. Joseph*, 32 A.D.3d 212, 214 n [1st Dept 2006]). Moreover, defendants met their prima facie burden of showing that plaintiff's claimed right knee injury was not causally related to the subject accident (*see Vasquez v Almanzar*, 107 AD3d at 539; *Prescod v O'Brien*, 101 AD3d at 421). In this regard, Dr. Lane concluded that plaintiff's claimed injuries were inconsistent with plaintiff's presentation to Beth Israel (*see Streety v Toure*, \_\_\_ AD3d \_\_\_, 2019 NY Slip Op 04487, \*1 [2019]). Upon his plaintiff presented to Beth Israel on November 16, 2016 he made no complaints of right knee pain and no findings as to the right knee were made. Dr. Berkowitz additionally reviewed plaintiff's December 9, 2016 right knee MRI finding evidence of internal degeneration in the posterior horn of the medial meniscus, and no evidence of acute traumatic injury to the knee such as a fracture, traumatic bone marrow edema, meniscal or ligamentous tear (*Auquilla v Singh*, 162 AD3d at 463). Dr. Berkowitz concluded that there was no causal relationship between the subject accident and the right knee MRI findings.

In opposition, plaintiff's submissions were sufficient to raise a triable issue of fact as to causation and whether plaintiff sustained a "significant" limitation (*see Prescod v O'Brien*, 101 AD3d at 422; *Vasquez v Almanzar*, 107 A.D.3d 538, 539-540 [1st Dept 2013]). Dr. Losik's review of films

from the December 9, 2016 MRI of plaintiff's right knee revealed tears of the medial meniscus and lateral meniscus; and anterior subcutaneous soft tissue swelling, edema and moderate joint effusion consistent with recent trauma. Dr. Abraham's initial 2016 examination of plaintiff's right knee revealed range-of-motion restrictions and joint line pain. Plaintiff's records demonstrate that plaintiff sustained ongoing restrictions of use of his right knee for several months despite treatment. Dr. Abraham causally related plaintiff's right knee injuries to the subject accident.

In addition, Dr. Kramer examined plaintiff's right knee on December 29, 2016, finding tenderness to the medial and lateral joint line and a positive McMurray sign. Dr. Kramer diagnosed plaintiff with a right knee meniscal tear and recommended a right knee arthroscopy and meniscectomy, pending Worker's Compensation board approval. Dr. Kramer examined plaintiff again on May 12, 2017 noting continuing right knee tenderness and positive McMurray sign and Apley's compression test. Dr. Kramer does not discuss any findings with regard to plaintiff's right knee upon his most recent October 31, 2018 examination of plaintiff.

As none of plaintiff's doctors recently examined his right knee for range of motion limitation, plaintiff has failed to raise an issue of fact as to whether he sustained a "permanent consequential limitation" of injury (*see Kone v Rodriguez*, 107 A.D.3d 537, 538 [1st Dept 2013] [significance established with objective testing "a year and three months" following accident]; *Vasquez v Almanzar*, 107 A.D.3d 538, 540-541 [1st Dept 2013] ["'permanent consequential limitation' requires a greater degree of proof than a 'significant limitation'"]). Accordingly, plaintiff has only raised an issue of fact as to whether he sustained a "significant" limitation to his right knee as a result of this accident.

### **90/180-DAY INJURY**

With respect to his 90/180-day claim, plaintiff's verified bill of particulars alleges that he was confined to his bed for two months and confined to his home intermittently from the time of the accident until present. At the time of the accident plaintiff was employed as a food deliveryman.

Plaintiff testified that he missed four to five months of work following the accident. Plaintiff testified that he is presently unable to sit or walk for long periods of time.

With respect of this category of injury, defendants met their initial burden by showing lack of causation as to all body parts (*Vargas v Marte*, 123 AD3d 471, 472 [1st Dept 2014]). Accordingly, the burden shifted to the plaintiff to raise an issue of fact as to whether the accident resulted in “a medically determined injury or impairment of a non-permanent nature” (Insurance Law § 5102[d]).

In opposition, plaintiff raised an issue of fact as to causation with regard to his claimed injuries, thus, raising a triable issue of fact as to whether he sustained a 90/180-day injury (*see Vargas v Marte*, 123 AD3d at 472; *Venegas v Singh*, 103 AD3d 562, 563 [1st Dept 2013]). Moreover, plaintiff’s medical records, dated December 29, 2016 and May 12, 2017, noted that plaintiff was out of work and totally disabled.

#### **SIGNIFICANT DISFIGUREMENT/ PERMANENT LOSS OF USE**

It is obvious that plaintiff did not sustain a permanent loss of use. Such loss must be total (*see Oberly v Bangs Ambulance Inc.*, 96 NY2d 295 [2001]), and evidence of mere limitations of use are insufficient (*see Byong Yol Yi v Canela*, 70 AD3d 584, 585 [1st Dept 2010]). Further, the record shows no evidence that would support plaintiff’s claims that he sustained “significant disfigurement” within the meaning of Insurance Law § 5102(d) (*see Brackenbury v Franklin*, 93 AD3d 423, 423 [1st Dept 2012]).

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Accordingly, it is hereby,

ORDERED, that defendants' motion for summary judgment is granted to the extent that plaintiff's claim of a "serious injury" under the Insurance Law § 5102(d) categories of "permanent loss of use" and "significant disfigurement" are dismissed; and it is further,

ORDERED, that plaintiff's claim that he sustained a "permanent consequential limitation" to his right knee is dismissed, and it is further,


ORDERED, that the remaining branches of Defendants' motion are denied, and it is further,

ORDERED, that plaintiff's cross-motion for summary judgment on the Insurance Law § 5102(d) category of "fracture" is denied.

This constitutes the Decision and Order of this Court.

Dated: \_\_\_\_\_

8/8/19

  
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Mary Ann Brigantti, J.S.C.