

Lindsey v Miller

2019 NY Slip Op 35189(U)

August 27, 2019

Supreme Court, Queens County

Docket Number: Index No. 712937/17

Judge: Robert I. Caloras

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ROBERT I. CALORAS

PART 36

Justice

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WILLIAM LINDSEY,

**Index No. 712937/17
Motion Date: 7/18/19
Motion Cal. No. 17, 18
Seq. No. 1, 2**

Plaintiff,

-against-

SCOTT L. MILLER and TIMOTHY T. ALLEN,

Defendants.

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The following papers numbered E20-E38, E46-E56, 60-E61 read on this motion by both defendant Scott L. Miller and defendant Timothy T. Allen for an order pursuant to CPLR 3212 granting summary judgment pursuant to Insurance Law Section 5102(d).

	<u>PAPERS NUMBERED</u>
Notice of Motion-Affirmation-Exhibits.....	E20-E32
Affirmation in Opposition-Exhibits.....	E38, E46-E54
Reply Affirmation.....	E60-E61
Stipulation.....	E37
Notice of Motion-Affirmation-Exhibits.....	E33-E36
Affirmation in Opposition-Exhibits.....	E55-E56

Upon the foregoing papers, it is ordered that defendants' motions are determined as follows:

In the Complaint, plaintiff alleges that he suffered personal injuries as a result of a motor vehicle accident, which occurred on December 12, 2016, at or near the intersection of 83rd Avenue and 135th Street, Queens County, when defendant Miller's vehicle, which plaintiff was a passenger in, made contact with defendant Allen's vehicle. Plaintiff alleges that as a result of this accident, he sustained injuries to his lumbar and thoracic spine, and right ribs.

Defendant Miller now moves for summary judgment dismissing the Complaint, alleging that plaintiff did not suffer a "serious injury" within the meaning of Insurance Law §5102 (d). In his motion, defendant Allen adopts and incorporates the facts, legal arguments and exhibits and procedural history set forth in defendant Miller's motion for summary

judgment. Defendant Miller has submitted, among other things, the following: an attorney affirmation; the Bill of Particulars; Dr. Stacey M. Donegan's affirmation; Police Report; Emergency Room records from Long Island Jewish Forest Hills Hospital; Dr. Jessica R. Berkowitz's affirmation; Dr. Steven Alex Renzoni's affirmation; and plaintiff's deposition transcript.

Upon reviewing plaintiff's Bill of Particulars, police report and the emergency department report from Long Island Jewish Forest Hills Hospital on December 12, 2016, Dr. Donegan, Board Certified in Emergency Medicine, opined that the injuries plaintiff alleged in his Bill of Particulars are not supported by plaintiff's own claims to EMS and/or ER staff and unsupported by their findings and examination. Dr. Donegan further opined that the records she reviewed are inconsistent with the injuries plaintiff allegedly sustained, and show that the claimed injuries do not have an acute traumatic origin, and could not be causally related to the accident on December 12, 2016.

Dr. Berkowitz performed a radiological evaluation on the MRI file, dated February 6, 2017, of plaintiff's lumbar spine. Dr. Berkowitz found plaintiff's MRI to his lumbar spine to reveal disc bulges, which were degenerative. Dr. Berkowitz also found that plaintiff had small central to right central disc herniation impinging on the thecal sac and right S1 nerve roots, L5-S1. However, Dr. Berkowitz stated that similar disc herniations to that noted at L5-S1 are common findings in the general population and unlikely to be related to an acute traumatic injury. Dr. Berkowitz further found no causal relationship between the plaintiff's alleged accident and the findings on the MRI examination.

Dr. Renzoni, Board Certified Orthopedic Surgeon, examined plaintiff on December 4, 2018. Prior to this exam, Dr. Renzoni reviewed plaintiff's Verified Bill of Particulars. Using a goniometer, Dr. Renzoni's examination of plaintiff's lumbar spine revealed the following normal range of motion: flexion to 90 degrees, right and left lateral bending to 25 degrees and extension to 25 degrees. Dr. Renzoni found plaintiff's alleged injuries to his lumbar spine sprain/strain and thoracic spine sprain/strain to be resolved. Dr. Renzoni also found that plaintiff's right rib contusion was healed, and that he presented with a normal orthopedic examination on all objective testing with no orthopedic limitations in use of the body parts examined. Dr. Renzoni further found that plaintiff is capable of functional use of the examined body parts for normal activities of daily living as well as usual daily activities including regular work duties.

At his deposition, plaintiff testified he received physical therapy at NY Med until July 26, 2017. Plaintiff testified that at the time of accident he was working for Burlington Coat Factory as a loss prevention manager, and he left this job in the summer of 2017. Plaintiff

testified that he missed one month of work after the accident.

Based on the medical evidence submitted coupled with plaintiff's own testimony, defendants argue that plaintiff's alleged injuries were not caused by this accident, that no trauma was sustained, and/or the alleged injuries do not rise to the level of impairment sufficient to qualify under any category of the statute.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case (see Alvarez v Prospect Hosp., 68 NY2d 320 [1986]). Once this showing has been made, the burden shifts to the non-moving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution (see Alvarez v Prospect Hosp., supra; Zuckerman v City of New York, 49 NY2d 557 [1980]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]).

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred by the No-Fault Insurance Law bears the initial burden of establishing a *prima facie* case that the plaintiff did not sustain a "serious injury" (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]; Beltran v Powow Limo, Inc., 98 AD3d 1070 [2d Dept. 2012]). When such a defendant's motion relies upon the findings of the defendant's own witnesses, those findings must be in admissible form, such as affidavits and affirmations, and not unsworn reports, to demonstrate entitlement to judgment as a matter of law (see Brite v Miller, 82 AD3d 811 [2d Dept. 2011]; Damas v Valdes, 84 AD3d 87 [2d Dept. 2011], citing Pagano v Kingsbury, 182 AD2d 268 [2d Dept. 1992]). A defendant also may establish entitlement to summary judgment using the plaintiff's deposition testimony (see Beltran v Powow Limo, Inc., supra; Bamundo v Fiero, 88 AD3d 831 [2d Dept. 2011]; McIntosh v O'Brien, 69 AD3d 585 [2d Dept. 2010]). Once a defendant meets this burden, the plaintiff must present proof, in admissible form, which creates a material issue of fact (see Gaddy v Eyler, supra; Zuckerman v City of New York, supra; Beltran v Powow Limo, Inc., supra).

Here, the Court finds that defendants have failed to meet their *prima facie* burden of demonstrating that plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102(d) as a result of the subject accident (see Toure v Avis Rent A Car Sys., supra; Gaddy v Eyler, 79 NY2d 955 [1992]; Carballo v Pacheco, 85 AD3d 703 [2d Dept. 2011]; Ranford v Tim's Tree & Lawn Serv., Inc., 71 AD3d 973 [2d Dept. 2010]). Dr. Donegan merely reviewed plaintiff's Bill of Particulars, the police report and the emergency department records in preparing her report. Dr. Donegan failed to review or address any of

the medical records from NY Med. In Dr. Berkowitz's report, she found that there was a "small central to right central disc herniation impinging on the thecal sac and right S1 nerve roots, L5-S1". Although Dr. Berkowitz stated that L5-S1 are common findings in the general population and unlikely to be related to an acute traumatic injury, she did not state what this finding was based on. Significantly, both Dr. Donegan's and Dr. Berkowitz's report failed to address treatment plaintiff may have received for the entire 90/180 period, as claimed in the Bill of Particulars. As to Dr. Renzoni's report, he only reviewed plaintiff's Bill of Particulars, and therefore his report is deficient (see Shumway v Bungeroth, 58 AD3d 431 [1st Dept. 2009] [defendant's expert only reviewed the police report and the Bill of Particulars]). Consequently, the defendants failed to meet their *prima facie* burden of showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law 5102(d) (see Toure v Avis Rent A Car Sys., supra; Gaddy v Eyler, supra).

Since defendants failed to establish a *prima facie* case, it is unnecessary to consider plaintiff's opposition (see Smith v Rodriguez, 69 AD3d 605 [2d Dept. 2010]; Washington v Asdotel Enters., Inc., 66 AD3d 880 [2d Dept. 2009]). Accordingly, both defendants' motion for summary judgment is denied

Dated: August 27, 2019



ROBERT I. CALORAS, J.S.C.

