

Marti v Luong Le Thy
2020 NY Slip Op 30853(U)
February 28, 2020
Supreme Court, Kings County
Docket Number: 520861/2018
Judge: Carl J. Landicino
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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 28th day of February, 2020.

P R E S E N T:
HON. CARL J. LANDICINO,

Justice.

-----X

RAUL MARTI,

Plaintiff,

Index No.: 520861/2018

- against -

DECISION AND ORDER

LUONG LE THY, LUONG THACH A MUI,
and LUONG BANG,

Defendants.

Motion Sequence #1

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Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

	<u>Papers Numbered</u>
Notice of Motion/Cross Motion and	
Affidavits (Affirmations) Annexed.....	1/2. _____
Opposing Affidavits (Affirmations).....	3. _____
Reply Affidavits (Affirmations).....	4. _____

After a review of the papers and oral argument the Court finds as follows:

This action concerns a motor vehicle incident that occurred on June 5, 2018. The Plaintiff, Raul Marti (hereinafter "the Plaintiff"), while riding his bicycle, was involved in a motor vehicle accident with a vehicle owned by Defendants Luong Le Thuy and Luong Thach A Mui and operated by Defendant Luong Bang (hereinafter "the Defendants"). The Plaintiff claims in his Verified Bill of Particulars (Defendants' Motion Exhibit C, Paragraph 15), that as a result of the accident he sustained a full rupture of his left achille's tendon requiring surgical repair. The Plaintiff also alleges, *inter alia*, that he has sustained "a non-permanent medically determined injury that prevented plaintiff from the performance of their usual and customary daily activities for 90 of 180 days."

The Defendants move (motion sequence #1) for an order pursuant to CPLR 3212, granting summary judgment and dismissing the complaint of the Plaintiff on the ground that none of the

injuries allegedly sustained by the Plaintiff meet the “serious injury” threshold requirement of Insurance Law § 5102(d). The Plaintiff opposes the motion and argues that it should be denied.

It has long been established that “[s]ummary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it ‘should only be employed when there is no doubt as to the absence of triable issues of material fact.’” *Kolivas v. Kirchoff*, 14 AD3d 493 [2nd Dept, 2005], citing *Andre v. Pomeroy*, 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. See *Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2nd Dept, 2004], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2nd Dept, 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. See *Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 A.D.3d 518, 520, 824 N.Y.S.2d 166, 168 [2nd Dept, 2006]; see *Menzel v. Plotnick*, 202 A.D.2d 558, 558–559, 610 N.Y.S.2d 50 [2nd Dept, 1994].

In support of their motion the Defendants proffer affirmed medical reports from Andrew Robert Miller, M.D. Dr. Miller purportedly examined the Plaintiff on May 23, 2019, more than eleven months after the accident. Dr. Miller conducted range of motion testing with the use of a goniometer in relation to the Plaintiff’s lumbar spine, left hip, left ankle and left foot. Dr. Miller found “limited range of motion of the lumbar spine with forward flexion to 50 degrees (60

normal), extension to 20 degrees (25 normal), right lateral bending to 20 degrees (25 normal) and left lateral bending to 20 degrees (25 normal).” Dr. Miller found no limitation of motion in the Plaintiff’s left hip. Dr. Miller also found limited range of motion of the left ankle “with dorsiflexion to 15 degrees (20 normal), plantar flexion to 30 degrees (40 normal), inversion to 25 degrees (30 normal), and eversion to 15 degrees (20 normal).” Dr. Miller opined that “[d]ecreased range of motion exhibited on exam is a subjective response not substantiated by objective findings.” Dr. Miller also stated that “[w]ith regard to the left ankle/foot, the claimant has made an excellent recovery.”

Turning to the merits of the motion by the Defendants, the Court finds that there is an issue of fact that would prevent this Court from granting the motion. While Dr. Miller states that the Plaintiff’s decreased ranges of motion were subjective, he “...failed to adequately explain and substantiate his belief that the limitation of motion” “...was self-imposed.” *India v O’Connor*, 97 AD3d 796, N.Y.S.2d 678 [2nd Dept, 2012]; *Rivas v. Hill*, 162 AD3d 809, N.Y.S.3d 225 [2nd Dept, 2018]; *Mercado v. Mendoza*, 133 A.D.3d 833, 834, 19 N.Y.S.3d 757 [2nd Dept, 2015]; *Nash v. MRC Recovery, Inc.*, 172 A.D.3d 1213, 1215, 101 N.Y.S.3d 376 [2nd Dept, 2019]; *Castro v. Anthony*, 153 A.D.3d 655, 656, 57 N.Y.S.3d 895 [2nd Dept, 2017]; *Protonentis v. Battaglia*, 150 A.D.3d 1286, 52 N.Y.S.3d 888 [2nd Dept, 2017].

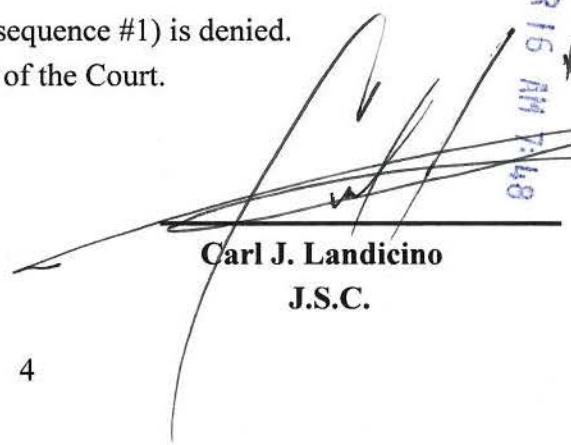
What is more, the Court finds that there is an issue of fact regarding whether the Plaintiff sustained a medically determined injury or impairment of a nonpermanent nature which prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident. In this case, the Plaintiff was not examined by the Defendants’ orthopedist until more than eleven months after the accident, and he failed to relate his findings to the 90/180 category of serious injury for the period of time immediately following the accident. *Rouach v. Betts*, 71

A.D.3d 977, 977, 897 N.Y.S.2d 242, 243 [2nd Dept, 2010]; *see also Epstein v. MTA Long Island Bus*, 161 A.D.3d 821, 823, 75 N.Y.S.3d 532, 534 [2nd Dept, 2018]; *Stead v. Serrano*, 156 A.D.3d 836, 837, 67 N.Y.S.3d 244 [2nd Dept, 2017]; *Nembhard v. Delatorre*, 16 A.D.3d 390, 791 N.Y.S.2d 144 [2nd Dept, 2005]; *Peplow v. Murat*, 304 A.D.2d 633, 758 N.Y.S.2d 160, 161 [2nd Dept, 2003]; *Frier v. Teague*, 288 A.D.2d 177, 732 N.Y.S.2d 428 [2nd Dept, 2001]. Where the Bill of Particulars contains conclusory allegations of a 90/180 claim and the Deposition and/or affidavit of Plaintiff does not support, or reflects that there is no, such claim, Defendant movant may utilize those factors in support of its motion. *See Master v. Boiakhtchion*, 122 A.D.3d 589, 590, 996 N.Y.S.2d 116, 117 [2nd Dept, 2014]; *Kuperberg v. Montalbano*, 72 A.D.3d 903, 904, 899 N.Y.S.2d 344, 345 [2nd Dept, 2010]; *Camacho v. Dwelle*, 54 A.D.3d 706, 863 N.Y.S.2d 754 [2nd Dept, 2008]. However, in the instant proceeding, the Verified Bill of Particulars states that the Plaintiff was confined to his home for approximately eight weeks. (See Defendants' Motion, Exhibit "C", Paragraph 11). Moreover, the Plaintiff's deposition indicates that he used crutches for the months of June, July, August and September. (See Defendants' Motion, Exhibit "E" Page 29). "Since the defendants failed to meet their *prima facie* burden, it is unnecessary to determine whether the papers submitted by the plaintiff in opposition were sufficient to raise a triable issue of fact." *Trivedi v. Vural*, 90 A.D.3d 1031, 1032, 934 N.Y.S.2d 861 [2nd Dept, 2011].

Based on the foregoing, it is hereby ORDERED as follows:

The motion by the Defendants (motion sequence #1) is denied.
This constitutes the Decision and Order of the Court.

ENTER:



Carl J. Landicino
J.S.C.

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KINGS COUNTY CLERK