

Bux v Uddin
2020 NY Slip Op 32169(U)
May 8, 2020
Supreme Court, Queens County
Docket Number: 702646/2017
Judge: Leslie J. Purificacion
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

Part 39

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QUEENS COUNTY

SHAMSUNDAR BUX,

Plaintiff,

Index No: 702646/2017

-against-

Motion Seq. # 6

KAMAL UDDIN and VENA CONIGLIO

DECISION/ORDER

Defendants.

The following papers numbered 1 to 41 read on defendant Kamal Uddin's motion (Seq. # 6) to restore his previous motions and cross motions that had been marked off for his failure to appear, to wit: defendant Uddin's (Seq. # 4) motion for summary judgment pursuant to CPLR §3212 for summary judgment against co-defendant Vena Coniglio on the issue of liability and plaintiff's cross motion for leave to amend his bill of particulars; and defendant Kamal Uddin's motion (Seq. # 5) and Vena Coniglio's cross motion seeking to dismiss the complaint on the grounds that plaintiff's alleged injuries fail to meet the serious injury threshold requirement of Insurance Law §5102(d).

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Upon the foregoing papers, it is ordered that this motion is determined as follows:

This is an action to recover for personal injuries allegedly sustained by plaintiff Shamsundar Bux (hereinafter "plaintiff") in a motor vehicle accident that occurred on December 15, 2015 on 89th Street and 103rd Avenue in Queens County, New York. At the time of the accident, plaintiff was a passenger in defendant Kamal Uddin's (hereinafter "Uddin") taxi cab that came in contact with co-defendant Vena Coniglio's (hereinafter "Coniglio") vehicle. On May 14, 2019, defendant Uddin moved for summary judgment on liability (Seq. # 4) against co-defendant Coniglio. Plaintiff cross moved for leave to amend his bill of particulars. On May 21, 2019 Uddin moved for summary judgment against the plaintiff on the issue of threshold (Seq. # 5). Co-defendant Coniglio cross moved for threshold as well. The motions were scheduled before the undersigned for September 5, 2019. On that date, Uddin failed to appear and all the motions and cross motions were marked off. Uddin now moves (Seq. # 6) to restore the motions to the calendar.

In support of his application to restore the motion, Uddin submits an affirmation from his counsel, Young Choo Esq., who states she was assigned by her law firm to appear on Uddin's behalf on September 5, 2019, for his summary judgment motions. Ms. Choo claims that she was not aware that there were two Supreme Court courthouses in Queens County and appeared at the wrong one. She further claims

that when she finally arrived for the motion calendar in the correct courthouse, the motions had been marked off the court's calendar.

Plaintiff and co-defendant oppose the motion on the grounds that restoration of the motions would be prejudicial to the parties and that this matter is currently on the trial calendar.

Since the submission of this motion, the note of issue has been vacated and the matter removed from the trial calendar. As such, the court finds no prejudice in restoring the two summary judgment motions and cross motions to the calendar and issuing a determination.

In his verified bill of particulars, plaintiff alleges that he suffered: "a permanent loss of use of a body organ, member, function or system"; "a permanent consequential limitation of use of a body organ or member; a significant limitation of use of a body function or system; and "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 such person's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment" (Insurance Law §5102[d]). Movants assert that plaintiff's alleged injuries do not meet the threshold requirement of Insurance Law §5102(d), and therefore summary judgment dismissing plaintiff's complaint is warranted.

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, (see CPLR §3212[b]; Alvarez v Prospect Hosp., 68 N.Y.2d

320; Winegrad v New York Univ. Med. Ctr., 64 N.Y.2d 851; Zuckerman v City of New York, 49 N.Y.2d 557). The question of whether plaintiff sustained a “serious injury” as defined by Insurance Law §5102(d) is one of law that can be disposed of by summary judgment and defendant in seeking same has the burden to show that plaintiff’s injuries do not rise to the level of those set forth in the statute (see Gaddy v Eyler, 79 N.Y.2d 955; Licari v Elliot, 57 N.Y.2d 230). This may be accomplished through submission of plaintiff’s deposition testimony and/or affidavits, affirmations or sworn reports of medical experts who examine the plaintiff and conclude that no objective medical findings support the plaintiff’s claim (see Grossman v Wright, 268 A.D.2d 79; Toure v Avis Rent A Car Sys., 98 N.Y.2d 345).

In support of the motion and cross motion for summary judgment on the issue of threshold, defendants submit, *inter alia*, the properly affirmed reports of Edward Weiland, M.D., A. Robert Tantleff, M.D., Bernard Chang, M.D., Ph.D. and plaintiff’s examination before trial testimony.

On September 12, 2017, Dr. Weiland performed a neurological evaluation and range of motion testing of plaintiff’s cervical, lumbar and thoracic spine. His neurological findings were all normal and he found no limitations of range of motion. He opined that plaintiff’s cervical spine sprain/strain, thoracic spine sprain/strain and lumbar spine sprains/strains had resolved and that he was not suffering from any neurological disabilities.

Dr. A. Robert Tantleff performed a radiological review dated August 12, 2017, of plaintiff’s lumbar spine MRI taken on April 27, 2017. His impression was that plaintiff

suffered from longstanding chronic degenerative discogenic disc disease, spondylosis and congenital transitional lumbosacral junction all unrelated to the subject accident. Dr. Tantleff also performed a radiological review on same date of plaintiff's cervical spine MRI taken on April 27, 2017. His impression was that plaintiff suffered degenerative disc disease and osteodiscal complex in his cervical spine that was unrelated to the subject accident.

Defendants' submissions establish prima facie that the plaintiff did not sustain a "serious injury" as a result of the motor vehicle accident that is the subject of this action. In addition, defendants have, through plaintiff's examination before trial testimony and bill of particulars, sustained their burden to establish prima facie that plaintiff has not sustained a medically determined injury or impairment of a non permanent nature that prevented her from performing substantially all of the material acts constituting her customary daily activities during at least 90 out of the first 180 days following the accident. Thus, the burden shifts to the plaintiff to come forward with sufficient evidence that she sustained serious injuries (see, Gaddy v Eyler, 79 NY2D 955).

In opposition to the motion, plaintiff submits a narrative report from his treating orthopedist Alexandre B. De Moura, M.D.; an operative report from Yeseniya Aronova M.D. of Precision Pain Medicine documenting plaintiff's discectomy on his L4/5 level on July 22, 2019; and an post-operative report, dated dated July 24, 2019, from Dr. Yeseniya Arononva.

The court finds that the plaintiff has failed to sustain his burden. Plaintiff has not submitted any medical evidence contemporaneous with the accident to prove that he

sustained a serious injury as a result of this accident. Dr. De Moura stated in his narrative that the first time he examined the plaintiff was March 27, 2017, which is two years after the subject accident. While Dr. De Moura also stated that patient had physical therapy intermittently from 2016 through 2019 and that the plaintiff underwent a discectomy in 2015, Dr. De Moura was not his treating doctor and is merely reciting the plaintiff's medical history. Since plaintiff fails to annex any proof of his treatment prior to 2017, he cannot proffer any proof of causation of his alleged injuries to the subject accident (see Pajada v. Pedone, 303 A.D.2d 729). Plaintiff also failed to raise a triable issue of fact with respect to whether he suffered "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 such person's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment".

Accordingly, defendant Uddin's motion and co-defendant Coniglio's cross motion is granted and the complaint is dismissed. Since the complaint is dismissed, the plaintiff's cross motion and defendant Uddin's summary judgment motion for liability are denied as moot.

This is the decision and order of the court.

Date:

5/8/20



Hon. Leslie J. Purificacion, J.S.C.

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