Tounkara v Mack
2020 NY Slip Op 35317(U)
May 22, 2020
Supreme Court, Bronx County
Docket Number: Index No. 34519/2018E
Judge: Mary Ann Brigantti
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART __15____

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MAKHAMBA TOUNKARA Index №. 34519/2018E

-against- **Hon. MARY ANN BRIGANTTI**

MAURICE L. MACK, et al. Justice Supreme Court

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The following papers numbered 1 to _____4____ were read on this motion (Seq. No. ____1_____) for ____**SUMMARY JUDGMENT**_____ noticed on October 3, 2019.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s).	1, 2
Answering Affidavit and Exhibits	No(s).	3, 4
Replying Affidavit and Exhibits	No(s).	

Upon the foregoing papers, the defendants Maurice L. Mack and Sajid Javed (collectively, "Defendants") move for summary judgment dismissing the complaint of the plaintiff Makhamba Tounkara ("Plaintiff") for his failure to satisfy the "serious injury" threshold as defined by New York Insurance Law § 5102 (d). Plaintiff opposes the summary judgment motion.

When a defendant seeks summary judgment alleging that a plaintiff does not meet the "serious injury" threshold required to maintain a lawsuit, the burden is on the defendant to establish through competent evidence that the plaintiff has no cause of action (*Franchini v Plameri*, 1 N.Y.3d 536 [2003]). "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 A.D.3d 589, 590 [1st Dept 2011]). A defendant may also meet his or her summary judgment burden with sufficient medical evidence demonstrating that the plaintiff's injuries are not causally related to the accident (*see Farrington v Go On Time Car Serv.*, 76 A.D.3d 818 [1st Dept 2010], citing *Pommells v Perez*, 4 N.Y.3d 566, 572 [2005]). Once this initial threshold is met, the burden shifts to the plaintiff to raise a material issue of fact using objective, admissible medical proof (*see Toure v Avis Rent A Car Sys.*, 98 N.Y.2d 345, 350 [2002]).

In this matter, Defendants carried their initial summary judgment burden of establishing that Plaintiff did not sustain a "serious injury" as a result of this accident. Defendants accomplished this by submitting the sworn IME report of radiologist Dr. Darren Fitzpatrick, who reviewed Plaintiff's lumbar spine and left shoulder MRIs. Upon review of the lumbar spine MRI, Dr. Fitzpatrick opined that it showed age-related degeneration with no signs of trauma related to the subject accident (*Pastora L. v Diallo*, 167 A.D.3d 424 [1st Dept 2018], citing *Hernandez v Marcano*, 161 A.D.3d 676 [1st Dept 2018]). Upon review of the left shoulder MRI, Dr. Fitzpatrick opined that it showed no signs of trauma related to the subject accident (*id*.).

Defendants also submitted the sworn IME report of orthopedist Dr. Pierce Ferriter, who found that Plaintiff had normal ranges of motion in his cervical and lumbar spine and left shoulder, upon a physical examination, and negative clinical results (*Ahmed v Cannon*, 129 A.D.3d 645, 646 [1st Dept 2015]). The finding of a minor ten-degree limitation in one plane of Plaintiff's left shoulder does not defeat Defendants' prima facie showing (*see Stephanie N. v Davis*, 126 A.D.3d 502 [1st Dept 2015]). Accordingly, Defendants' submissions established that Plaintiff's injuries to his cervical and lumbar spine, and left shoulder, have resolved, and do not constitute either a "permanent consequential" or "significant limitation" category of injury (*see Tejada v LKQ Hunts Point Parts*, 166 A.D.3d 436, 436-437 [1st Dept 2018]; N.Y. Ins. Law § 5102 [d]). In addition, Defendants have demonstrated that Plaintiff's alleged injuries to his lumbar spine and left shoulder are unrelated to this accident, thus, shifting the burden to Plaintiff to adequately address the issue of causation as to those body parts (*see Bianchi v Mason*, 179 A.D.3d 567 [1st Dept 2020], citing *Blake v Cadet*, 175 A.D.3d 1199, 1199-1200 [1st Dept 2019]).

In opposition to the motion, Plaintiff has raised an issue of fact as to whether he sustained a "permanent consequential" or "significant" limitation to his cervical and lumbar spine, and left shoulder, as a result of this accident. At the outset, the Court notes it will consider the unaffirmed emergency room medical records from Harlem Hospital Center, found in Exhibit D, as well as the unaffirmed reports from

Drs. Aron Rovner and David Abbatematteo, and medical records from AYM Physical Therapy, PC, and Sound Spine Chiropractic, PC, found in Exhibit H, for the purpose of contemporaneous treatment, since those reports do not constitute the sole basis for Plaintiff's opposition (*see Pantojas v Lajara Auto Corp.*, 117 A.D.3d 577 [1st Dept 2014]). Plaintiff also submitted the affirmations of Drs. B.V. Reddy and Mark Decker, who reviewed Plaintiff's cervical and lumbar spine MRIs, and left shoulder MRI, respectively. Upon review, Dr. Reddy found, among other things, bulges in Plaintiff's cervical spine and herniations and bulges in Plaintiff's lumbar spine. Dr. Decker found, among other things, supraspinatus tendinopathy in Plaintiff's left shoulder MRI.

Plaintiff additionally submitted the affirmed report of Dr. Albert Ciancimino, who first examined Plaintiff on approximately two weeks after the accident on October 24, 2018, and then on multiple occasions throughout 2018 and 2019. The most recent examination occurred on October 2, 2019, and during this examination, Dr. Ciancimino found, among other things, pain and range of motion limitations in Plaintiff's cervical and lumbar spine, and left shoulder (*see Holloman v American United Transp. Inc.*, 162 A.D.3d 423, 424 [1st Dept 2018]; *see also Windham v New York City Tr. Auth.*, 115 A.D.3d 597 [1st Dept 2014], citing *Perl v Meher*, 18 N.Y.3d 208, 218 [2011] [plaintiff "not required to present proof of contemporaneous range of motion findings as a prerequisite to establishing serious injury"]).

With respect to Plaintiff's "90/180-day" injury claim, Defendants sufficiently established their entitlement to dismissal of this claim by submitting Plaintiff's deposition transcript wherein he admitted that he was confined to home for approximately two months and missed only one month of work following this accident (Pl. EBT at 91-92, 102-103). Accordingly, Plaintiff has no viable "90/180 day" injury claim (*see Moreira v Mahabir*, 158 A.D.3d 518, 519 [1st Dept 2018]; *Gomez v Davis*, 146 A.D.3d 456, 457 [1st Dept 2017]).

Finally, there is no evidence on this record that Plaintiff sustained a "total loss of use" of any body part, and therefore, the claim that she sustained a "permanent loss of use" of any body part is dismissed (*see Swift v New York Tr. Auth.*, 115 A.D.3d 507, 509 [1st Dept 2014]).

Accordingly, it is hereby,

ORDERED, that Defendants' motion for summary judgment is granted to the extent that Plaintiff's claim that he sustained a "90/180 day" injury as a result of this accident is dismissed, and it is further,

ORDERED, that Plaintiff's claim that he sustained a "permanent loss of use" of any body part is dismissed, and it is further,

ORDERED, that the remaining branches of Defendants' motion are denied.

This constitutes the Decision and Order of this Court.

Dated: 5/22/20 **Hon.** _____ **J.S.C.**

1. CHECK ONE.....	☐ CASE DISPOSED IN ITS ENTIRETY ☐ CASE STILL ACTIVE
2. MOTION IS.....	☐ GRANTED ☐ DENIED ☑ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE.....	☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE
	☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT