

**Peters v Town Limo Inc.**

2020 NY Slip Op 35401(U)

January 7, 2020

Supreme Court, Kings County

Docket Number: Index No. 516163/2017

Judge: Carl J. Landicino

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This opinion is uncorrected and not selected for official publication.

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 7th day of January, 2020.

P R E S E N T:

HON. CARL J. LANDICINO,

Justice.

-----X  
LENNOX PETERS

*Plaintiff,*

Index No.: 516163/2017

- against -

DECISION AND ORDER

TOWN LIMO INC., and JAMES COUSINS,

Motion Sequence #1

*Defendants.*

-----X  
**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. _____

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

Defendants, Town Limo, Inc. and James Cousins, (the "Defendants") move for summary judgment and dismissal of the complaint on the basis that the Plaintiff, Lennox Peters, has failed to meet the serious injury threshold required pursuant to Insurance Law §5102(d). This action concerns a motor vehicle accident that allegedly occurred on February 16, 2017 in Brooklyn, N.Y. Plaintiff opposes the motion.

Plaintiff alleges in his complaint that as a consequence of the accident he sustained injuries, including injury to his left knee requiring surgery and injuries to his lumbar spine. He also alleges that he was confined to his home for approximately ten (10) days following the accident and approximately three (3) months following the left knee surgery that occurred on August 10, 2017. Finally, Plaintiff states that he was not employed at the time of the accident.

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 [2<sup>nd</sup> 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 [2<sup>nd</sup> 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 [2<sup>nd</sup> 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 [2<sup>nd</sup> Dept, 2006]; see *Menzel v. Plotnick*, 202 A.D.2d 558, 558–559, 610 N.Y.S.2d 50 [2<sup>nd</sup> Dept, 1994].

In support of their motion the Defendants proffer affirmed medical reports from Jeffrey Guttman, M.D. (orthopedist) and Darren Fitzpatrick M.D. (radiologist). Dr. Guttman examined the Plaintiff on November 8, 2018 and conducted range of motion testing of the Plaintiff’s lumbar spine and left knee, with the use of a goniometer. Dr. Guttman found normal range of motion of both Plaintiff’s lumbar spine and left knee. He opined that the alleged injuries to the lumbar spine and left knee were resolved, there was no permanency and no evidence that the Plaintiff suffered traumatic injury as a result of the accident. (Defendants’ Motion, Exhibit D)

Dr. Fitzpatrick reviewed the MRI of the Plaintiff's lumbar spine on April 24, 2017, and found "moderate lower lumbar spine degenerative disc disease." and "[n]o traumatic injury." (Defendant's Motion Exhibit "E"). While the Plaintiff sets forth in the subject verified Bill of Particulars that he sustained a medically determined injury or impairment of a nonpermanent nature which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident, 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 [2<sup>nd</sup> Dept, 2014]; *Kuperberg v. Montalbano*, 72 A.D.3d 903, 904, 899 N.Y.S.2d 344, 345 [2<sup>nd</sup> Dept, 2010]; *Camacho v. Dwelle*, 54 A.D.3d 706, 863 N.Y.S.2d 754 [2<sup>nd</sup> Dept, 2008].

Accordingly, the Court is of the opinion that based upon the foregoing submissions, the Defendants have met their initial burden of proof. This is because Drs. Guttman and Fitzpatrick reports provided a range of motion and did "compare those findings to the normal range of motion..." *Manceri v. Bowe*, 19 A.D.3d 462, 463, 798 N.Y.S.2d 441, 442 [2<sup>nd</sup> Dept, 2005]. As the Defendants have met their initial *prima facie* burden, the Plaintiff must prove that there are triable issues of fact as to whether the Plaintiff suffered serious injuries, as defined by Insurance Law §5102 in order to prevent the dismissal of the action. *See Jackson v United Parcel Serv.*, 204 AD2d 605 [2<sup>nd</sup> Dept, 1994]; *Bryan v Brancato*, 213 AD2d 577 [2<sup>nd</sup> Dept, 1995]. In this regard, Plaintiff Peters must submit quantitative objective findings, as well as opinions relative to the significance of the Plaintiff's injuries, as defined by statute. *See Shamsodeen v. Kibong*, 41 A.D.3d 577, 578, 839 N.Y.S.2d 765, 766 [2<sup>nd</sup> Dept, 2007]; *Grossman v Wright*, 268 AD2d 79 [2<sup>nd</sup> Dept, 2000].

Plaintiff in opposition proffers purported medical records, but many of the medical records are not otherwise affirmed. As such these records are not admissible and therefore have no probative value. (See Plaintiff's Opposition as Exhibits "A", "C", "D") However, the Plaintiff also proffers the affirmed report of Dr. Elizier Offenbacher, PLLC, who reviewed an MRI of the Plaintiff's left knee. (Plaintiff's Affirmation in Opposition, Exhibit "B") Plaintiff also proffers the affirmed medical report of Dr. Stanislav Avshalumov, an orthopedist. Dr. Avshalumov provides what he describes as a final narrative report dated June 10, 2019. The doctor represents that he first examined the Plaintiff on July 27, 2017, one day after the accident. The doctor indicated that based upon MRI findings and his objective physical examination of the Plaintiff's left knee "he was indicated for surgical intervention" which occurred on August 10, 2017. Dr. Avshalumov also causally related the Plaintiff's injuries to the subject accident. He further indicates that additional physical therapy from 2017 "would only have been palliative in nature" and that the Plaintiff "may require a total knee replacement in the future."


The Plaintiff has addressed any gap in treatment and although the Plaintiff did not address Defendants' doctor's claim of disc degeneration, Dr. Avshalumov raises an issue of fact with respect to serious injury based upon his narrative report in relation to the Plaintiff's left knee. "An expert's qualitative assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system." *Toure v Avis Rent A Car Systems Inc.*, 98 N.Y.2d 345, 774 N.E.2d 1197 [2002]; see *Dufel v. Green*, 84 N.Y.2d at 798, 622 N.Y.S.2d 900, 647 N.E.2d 105 [1995].

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

The motion by the Defendants (motion sequence #3) is denied.

This constitutes the Decision and Order of the Court.

ENTER:

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**Carl J. Landicino**  
**J.S.C.**

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