

Ahmad v Gurung

2020 NY Slip Op 35408(U)

December 14, 2020

Supreme Court, Kings County

Docket Number: Index No. 505630/2016

Judge: Reginald A. Boddie

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This opinion is uncorrected and not selected for official publication.

At an I.A.S. Part 95 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York on the 14th day of December 2020.

PRESENT:
Honorable Reginald A. Boddie
Justice, Supreme Court

-----X
WAQAS AHMAD and JAVEERYA
ASHFAQ AHMAD,

Plaintiffs,

Index No. 505630/2016
Cal. No. 1 MS 1

-against-

DECISION AND ORDER

KARMA GURUNG,

Defendant.
-----X

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KINGS COUNTY CLERK
FILED

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

<u>Papers</u>	<u>Numbered</u>
MS 1	Docs. # 14-27, 38-48

Upon the foregoing cited papers, defendant's motion for summary judgment, pursuant to CPLR 3212, is decided as follows:

Plaintiffs commenced this action against defendant to recover for personal injuries allegedly sustained on March 23, 2016, at 2:45 PM, as a result of a motor vehicle accident on the northbound Bruckner Expressway under the sign for exit 9 approximately a half mile from its intersection with Willis Avenue, Bronx, New York.

At the time of the accident, plaintiffs alleged that a motor vehicle owned and operated by defendant struck the motor vehicle operated by plaintiff Waqas Ahmad, husband of plaintiff Javeerya Ashfaq Ahmad, and caused him to sustain serious and permanent injuries to the neck,

back, left elbow and both knees. Specifically, plaintiff alleged soft tissue injuries to his cervical and lumbar spine and contusions in the left elbow and both knees.

Defendant moved for summary judgment, pursuant to CPLR 3212, to dismiss the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d). Plaintiffs opposed.

Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). A party moving for summary judgment must make a prima facie showing of entitlement as a matter of law sufficient to demonstrate the absence of any material issues of fact, but once a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require trial of the action (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman*, 49 NY2d at 562).

Defendant sought summary judgment on the ground that plaintiff did not suffer a serious injury. In a “serious injury threshold” motion for summary judgment, as here, defendant must initially submit competent medical evidence establishing that plaintiff did not suffer a “serious injury” and the injuries are not causally related to the accident (*see* Insurance Law § 5102 [d]; *see Kelly v Ghee*, 87 Ad3d 1054, 1055 [2d Dept 2011]; *see Winegrad*, 64 NY2d at 853). “Serious injury” means a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or 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 ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment (Insurance Law § 5102 [d]). The issue is not whether plaintiff can ultimately establish a "serious injury," but whether there exists an issue of fact in the case on such issue (*Zuckerman*, 49 NY2d at 562).

Here, defendant proffered the report of Audrey Eisenstadt, M.D., a board certified radiologist, who on November 1, 2019, reviewed an MRI of plaintiff's cervical spine performed on May 3, 2016. Dr. Eisenstadt's review revealed degeneration of the C5-6 intervertebral disc level; bulging at the C3-4 intervertebral disc level with a right paracentral disc herniation as well as right uncinat/facet joint hypertrophy with foraminal narrowing; bulging of disc material with a right paracentral disc herniation and right uncinat/facet joint hypertrophy with right foraminal stenosis at the C5-6 intervertebral disc level; and right C3-4 and C5-6 uncinat/facet hypertrophy. Dr. Eisenstadt concluded plaintiff had degenerative disc disease involving the osseous, ligamentous and intervertebral disc structure as well as disc herniations, which predated this accident by six months.

On November 1, 2019, Dr. Eisenstadt also reviewed an MRI of plaintiff's lumbar spine performed on May 6, 2016. She found degeneration of the L3-4 intervertebral disc level; and bulging of disc material at the L3-4 and L5-S1 intervertebral disc levels. Dr. Eisenstadt concluded that her findings "are typical in appearance for lumbar degenerative disc disease." She further concluded "at no level is there an osseous contusion, disc herniation or annular tear seen to indicate any posttraumatic abnormalities causally related to the 03/23/16 incident."

Defendant also proffered the report of J. Serge Parisien, M.D., a board certified orthopedic surgeon, who evaluated plaintiff on November 14, 2019. Dr. Parisien found normal

ranges of motion of the cervical spine; no tenderness to palpation of the cervical paraspinal musculature; and negative Foraminal Compression, Shoulder Depression, Soto Hall, Cervical Distraction and Spurling tests. His examination of the right shoulder revealed normal ranges of motion; no winging of the scapula; and no deltoid atrophy nor tenderness on palpation of the acromioclavicular joints. Dr. Parisien further noted no sensory loss to light touch or pinprick as well as no gross atrophy.

His examination of the left elbow revealed normal ranges of motion as well as no swelling, effusion, instability, false motion nor crepitus. Dr. Parisien's examination of the plaintiff's lumbosacral spine revealed normal ranges of motion, no spasm or tenderness over the paraspinal musculature on palpation, no sensory deficits, radiation of pain, numbness nor tingling, normal Achilles deep tendon reflexes and muscle strength. His examination of the plaintiff's bilateral knees revealed normal ranges of motion, no redness, swelling, atrophy, instability to varus or valgus stress, nor joint effusion.

Dr. Parisien concluded that plaintiff's alleged injury to the cervical and lumber spine, right shoulder, left elbow and bilateral knees were resolved. He further concluded "[t]here is no evidence of a disability or permanency. The claimant can continue to work and perform daily living activities without restrictions stemming from the accident." Therefore, defendant met its prima facie burden by submitting competent medical evidence establishing plaintiff did not suffer a "serious injury" and the injuries are not causally related to the accident (*see* Insurance Law § 5102 [d]; *see Kelly*, 87 AD3d at 1055).

In opposition, plaintiff proffered the affirmation of Siddharth Prakash, M.D., a board certified diagnostic radiologist, who on November 9, 2020, reviewed the MRI of plaintiff's cervical spine conducted on May 3, 2016. Dr. Prakash found spinenoid sinus and mucosal

thickening; loss of disc hydration at C2-C3 through C5-C6; right paracentral broad-based disc herniation at C5-C6 abutting the ventral aspect of the spinal cord, narrowing the right foramina, abutting the exiting right C6 nerve root; and right foraminal disc herniation measuring 10mm sagittal by 3 mm wide narrowing the right foramina at C3-C4.

On November 9, 2020, Dr. Prakash also reviewed the MRI of plaintiff's lumbar spine conducted on May 3, 2016. He found a right paracentral broad-based disc herniation extending 2mm posteriorly indenting upon the ventral thecal sac, right lateral recess and right foramina, with facet arthropathy at L3-L4 and a broad-based central posterior disc herniation extending 2mm posteriorly indenting upon the ventral thecal sac with facet arthropathy at L5-S1. Dr. Prakash concluded plaintiff had "broad-based central posterior disc herniation at L5-S1 indenting upon the ventral thecal sac" and "right paracentral disc herniation at L3-L4 indenting upon the ventral thecal sac, right lateral recess and right foramina."

Plaintiff also proffered the report of Denny A. Julewicz, M.D., a chiropractic specialist who evaluated plaintiff on March 6, 2020. With respect to the cervical spine, Dr. Julewicz found:

Cervical Spine: Ranges of motion were reduced in all ranges with pain. Cervical Flexion is 25/50. Cervical Extension is 20/50. Cervical Lateral Right is 10/45. Cervical Lateral Left is 15/45. Cervical Rotation Right is 30/80. Cervical Rotation Left is 25/80. Patient states pain on lateral bending, bilaterally, extension, flexion and rotation bilaterally.

Dr. Julewicz's evaluation of the lumbar spine revealed:

Lumbar Spine: Ranges of motion were reduced in all ranges. Lumbar Flexion is 35/60. Lumbar Extension is 10/25. Lumbar Lateral Right is 15/25. Lumbar Lateral Left is 10/25. Lumbar Rotation Right is 25/45. Lumbar Rotation Left is 20/45. Patient states pain on lateral bending bilaterally, extension, flexion, and rotation on the left.

Dr. Julewicz diagnosed plaintiff with Cervical Intersegmental Dysfunction, herniated disc at C3-C4 and C5-C6 and Lumbar Intersegmental Dysfunction, herniated disc at L3-L4 and L5-S1. He concluded "within a reasonable degree of medical certainty, based on the patient's history

and examination findings, that Mr. Ahmad’s injuries are a direct result of the accident of March 23, 2016, and he has sustained permanent partial disability.” Therefore, plaintiff has raised a triable issue of fact as to whether he sustained a serious injury (*see Perez v Schreier*, 102 AD3d 938, 939 [2d Dept 2013]).

Accordingly, defendants’ motion for summary judgment is denied.

ENTER:

RAB
HON. REGINALD A. BODDIE
J.S.C.

Hon. Reginald A. Boddie
Justice, Supreme Court

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