Segal v Uddin
2020 NY Slip Op 35473(U)
November 13, 2020
Supreme Court, Queens County
Docket Number: Index No. 703119/2019
Judge: Lourdes M. Ventura
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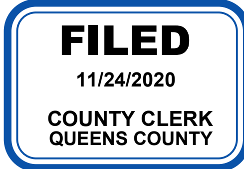
SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK - QUEENS COUNTY



Present: HONORABLE LOURDES M. VENTURA, J.S.C. IAS Part 37

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JEREMY SEGAL,

Plaintiff,

Index Number: 703119/2019

-against-

Motion Date: August 17, 2020

MD ZUMIR UDDIN and ABU HAYDER,

Defendants.

Motion Seq. No.: 1

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The following electronically filed (EF) papers read on this Motion by defendants Md Zumir Uddin and Abu Hayder for an Order: granting defendants' summary judgment and dismissing the complaint on the ground that there are no triable issues of fact and that plaintiff cannot meet the serious injury threshold requirement as mandated by Insurance Law §§ 5104(a) and 5102(d) and granting such other further relief as the court deems just and proper.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits	EF 10-17
Opposition to Motion - Affirmation - Exhibits	EF 31-42
Affirmation in Reply - Exhibits	EF 43

Upon the foregoing papers, it is Ordered that defendants' Motion is determined as follows:

The plaintiff commenced the above entitled action seeking damages for personal injuries arising out of a collision where plaintiff was operating a motor scooter and was allegedly struck by defendants' vehicle on or about December 17, 2018 at or near Northern Blvd at 39th Avenue County of Queens. Plaintiff alleges that as a result of the collision, he sustained serious injuries and that these injuries constitute "serious injuries" under the applicable categories of the New York State Insurance Law § 5102.

Defendants filed the instant motion seeking summary judgment in their favor and dismissing the complaint. Defendants aver that plaintiff did not sustain a serious injury as defined under Insurance Law § 5102(d).

Plaintiff opposes defendants' motion and avers *inter alia* that defendants failed to show their prima facie entitlement to judgment as a matter of law and plaintiff has, at the very least, raised an issue of fact with regard to whether he sustained a serious injury pursuant to the Insurance Law.

Pursuant to New York Insurance Law § 5102(d), " '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."

"It is well settled that 'the proponent of a summary judgment motions must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact' "(see *Pullman v. Silverman*, 28 NY3d 1060 [2016]) quoting (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]). Failure to make such prima facie "showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to judgment as a matter of law (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Winegrad v. New York Univ. Medical Center*, 64 NY2d 851[1985]). The burden rests on defendant to establish, by the submission of evidentiary proof in admissible form, that plaintiff has not suffered a "serious injury" (*Lowe v. Bennett*, 122 AD2d 728 [1st Dept 1986], *affd*, 69 NY2d 701, 512 NYS2d 364 [1986]). When a defendant's motion is sufficient to raise the issue of whether a "serious injury" has been sustained, the burden shifts and it is then incumbent upon the plaintiff to produce prima facie evidence in admissible form to support the claim of serious injury (*Lopez v. Senatore*, 65 NY2d 1017 [1985]). In support of a claim that plaintiff has not sustained a serious injury, a defendant may rely either on the sworn statements of the defendant's examining physician or the unsworn reports of plaintiff's examining physician (*Pagano v. Kingsbury*, 182 AD2d 268 [2d Dept 1992]).

Once the burden shifts, it is incumbent upon plaintiff, in opposition to defendant's motion, to submit proof of serious injury in "admissible form". (*Licari v. Elliott,* 57 NY2d 230 [1982]). A medical affirmation or affidavit which is based on a physician's personal examination and observations of plaintiff, is an acceptable method to provide a doctor's opinion regarding the existence and extent of a plaintiff's serious injury is deemed competent medical evidence (see *Yunatanov v Stein*, 69 AD3d 708 [2d Dept 2010]. Thus, in the absence of objective medical evidence in admissible form of serious injury, plaintiff's self-serving affidavit is insufficient to raise a triable issue of fact (*Fisher v. Williams*, 289 AD2d 288 [2d Dept 2001]).

Defendants submit a report dated September 24, 2019, affirmed by Doctor Steven A. Renzoni, M.D. (hereinafter "Dr. Renzoni") who examined the plaintiff on September 24, 2019. The report in relevant part states:

> "The examinee presents with a normal orthopedic examination on all objective testing. The orthopedic examination is objectively normal and indicates no findings which would result in orthopedic limitations in use of the body parts examined. The examinee is capable of functional use of the examined body parts for normal activities of daily living as well as usual daily activities including regular work duties."

In opposition, plaintiff submits an affirmation dated August 5, 2020, affirmed by Doctor Siddhartha Sharma, D.P.M. (hereinafter "Dr. Sharma") who examined the plaintiff on July 13, 2020. The affirmation from Dr. Sharma in relevant part states:

> "9. These injuries were personally visualized by me during surgery and it is my opinion within a reasonable degree of medical certainty that they are causally related to the underlying December 17, 2018 accident.
>
> 10. Post operatively, Mr. Segal underwent a course of physical therapy, however, on examination on July 29, 2019 his ankle was still demonstrating significant loss of range of motion as follows: 12° in dorsiflexion when 20° is normal. Likewise, plantar flexion was limited to 30° when 40° is normal. I prescribed lidocaine topical patch and a diclofenac cream. Mr. Segal was seen once during the Covid pandemic on April 2, 2020. However, due to the limitations of virtual medicine, a full physical examination was impossible.
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> 11. On July 13, 2020, I did examine Mr. Segal in my office. At that time, he continues to have pain along the lateral ankle along the incision site. He continues to have difficulty standing and walking for long periods of time and experiences flare-ups of greater pain. On my examination, Mr. Segal had limited range of motion of the ankle as follows: 13° in dorsiflexion (normal is 20°); 35° in plantar flexion (normal 40°). We discussed the possibility of future surgery to remove the anchors inserted during surgery.
>
> 12. Based on the history of Mr. Segal's ankle injury and the lack of any prior ankle injury, the objective test results, including MRI and the positive findings on my physical examinations, it is my opinion within a reasonable degree of medical certainty, that Mr. Segal suffered tears to the talofibular and calcaneofibular ligaments and other injuries discussed herein to his right ankle. These injuries necessitated the surgery I performed on March 29, 2019 including the insertion of hardware.
>
> 13. Based on Mr. Segal's continued complaints of pain approximately one and a half years post surgery, it is also my opinion within a reasonable degree of medical certainty that these injuries are permanent and I will require Mr. Segal to continue to receive medical treatment in the future."

Here, Dr. Renzoni conducted the examination of plaintiff seven months prior to Dr. Sharma's examination of the plaintiff. Notably, Dr. Renzoni concluded that the plaintiff "presents with a normal orthopedic examination on all objective testing and "[t]he orthopedic examination is objectively normal and indicates no findings which would result in orthopedic limitations in use of the body parts examined." However, Dr. Sharma concluded range of motion limitations in

plaintiff's right ankle as outlined in Dr. Sharma's affirmation cited above. Most significant, Dr. Sharma concluded, that the injuries were causally related to the collision on December 17, 2020 and that said injuries are permanent.

The Court finds that the conflicting medical reports submitted by the parties raise triable issues of fact as to whether plaintiff sustained a serious injury within the meaning of Insurance Law § 5102(d) (see *Wilcoxen v. Palladino*, 122 AD3d 727 [2d Dept 2014][finding that "in light of the conflicting expert medical opinions submitted by the parties, the Supreme Court properly denied the defendants' motion for summary judgment dismissing the complaint on the ground that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident"]).

Accordingly, defendants' motion for an Order pursuant to CPLR 3212 is hereby denied. Any other requested relief not expressly addressed herein has nonetheless been considered by this Court and is hereby denied.

This shall constitute the Decision and Order of the Court.

Dated: November 13, 2020

LOURDES M. VENTURA, J.S.C.