Dodaj v Lofti
2021 NY Slip Op 30613(U)
January 13, 2021
Supreme Court, Bronx County
Docket Number: 20240/2019E
Judge: Veronica G. Hummel

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IAS PART 31

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NIKOLIN DODAJ,

Plaintiff,

-against -

MAHAMED ABDUL HALIM LOFTI,

Defendant.

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Index No. 20240/2019E
DECISION/ORDER
Motion Seq. 1

VERONICA G. HUMMEL, A.S.C.J.

In accordance with CPLR 2219 (a), the decision herein is made upon consideration of all papers filed by the parties in NYSCEF in support of and in opposition to the motion of defendant MAHAMED ABDUL HALIM LOTFI (defendant) [Mot. Seq. 1], made pursuant to CPLR 3212, for an order dismissing the complaint on the ground that plaintiff NIKOLIN DODAJ (plaintiff) has not sustained a "serious injury" as defined by Insurance Law 5102(d).

Plaintiff commenced this action to recover damages for personal injuries he allegedly sustained as a result of a December 24, 2017, motor vehicle accident ("the Accident"). Prior to the Accident, plaintiff was a driver and a part-time freelance photographer. Plaintiff was driving east on Astor Avenue, a two-way street, when he slowed his car to allow another vehicle to pull out from a parking spot on his right. As he slowed down, defendant allegedly tried to improperly pass plaintiff's vehicle, and struck the driver's side of the plaintiff's car.

Plaintiff alleges that as the result of the Accident he suffered injuries to the cervical and lumbar spine. Plaintiff argues that these injuries satisfy the following Insurance Law 5102(d)

threshold categories: permanent loss of use of a body part; permanent consequential limitation; significant limitation; and 90/180 days.

Defendant seeks summary judgment dismissing the complaint on the ground that plaintiff did not sustain a “serious injury” under Insurance Law 5102(d) as a result of the Accident. Defendant argues that plaintiff's claimed injuries are not “serious,” and that any injuries or conditions from which plaintiff suffers are not causally related to the Accident. The underlying motion is supported by the pleadings, the bill of particulars, plaintiff’s deposition transcript, and the affirmed medical reports of Dr. Wersterband (orthopedic surgeon), and Dr. Fitzpatrick (radiologist).

In his report, Dr. Fitzpatrick reviews a cervical spine MRI dated January 13, 2018, taken less than one-month post-Accident. Dr. Fitzpatrick’s review of the cervical MRI finds no traumatic injury and finds disc degeneration based on age-related factors. He opines that the MRI findings are within the spectrum of degenerative disc disease and are not causally related to acute traumatic cervical spine injury. The expert does not review a lumbar MRI.

Dr. Wersterband bases his opinion on the details of a physical examination, and plaintiff’s bill of particulars. He avers that there were no legally authenticated medical records available for his review. Dr. Wersterband examined plaintiff on February 25, 2020, approximately two years post-Accident. In terms of the cervical spine, the doctor finds that plaintiff has decreased extension, right lateral flexion, left lateral flexion, right rotation, and left rotations at various levels from 10-20 degrees. The results of all of the objective tests were negative.

In terms of the lumbar spine, the expert finds a complaint of tenderness and pain on the right side. The range of motion examine reveals a decrease in flexion, extension, right lateral flexion, and left lateral flexion of 10-15 degrees. The bilateral straight leg raise is “negative at 60 degrees (80 degrees normal)” and the neurological examination of the bilateral lower

extremities are negative. As an impression, the expert finds that: the cervical spine-sprain/strained-resolved and the lumbar spine-sprain/strain-resolved. There was no evidence of orthopedic disability and the decreased ranges of motion and tenderness of the cervical and lumbar spine "carry no medical significance and are functional". He opines that the plaintiff is capable of carrying out his occupational duties with no restrictions or limitations and plaintiff can perform all activities of daily living as he was doing prior to the Accident without restrictions.

Plaintiff opposes the motion, submitting an attorney affirmation, the affidavits and medical records of Dr. Wayne Fleischhacker, D.O. (pain management) and Dr. Racek (chiropractor), the records of Jacobi Medical Center, a MRI report by Dr. Gary Tubman (lumbar spine dated January 4, 2018), a MRI report by Dr. Steven Brownstein (cervical spine dated January 13, 2018), and a photograph. Of note, defendant elects to not submit a reply to plaintiff's opposition.

In total, plaintiff's evidence raises triable issues of fact as to his claims of "serious injury" as to the cervical spine and lumbar spine under the threshold categories of permanent consequential limitation and significant limitation (*Morales v Cabral*, 177 AD3d 556 [1st Dept 2019]). Plaintiff's evidence demonstrates that he received medical treatment for his claimed injuries to his neck and back shortly after the Accident, and that he had substantial limitations in motion at the relevant body parts at a recent examination in February 2020 (*see Perl v Meher*, 18 NY3d 208 [2011]). The MRIs taken soon after the Accident diagnose plaintiff with cervical disc herniation, and lumbar diffuse bulge with superimposed central disc herniation. Both of plaintiff's experts opine that the plaintiff suffers from a decrease in range of motion of the cervical and lumbar spine that is significant, and that plaintiff suffered partial permanent injuries with a poor prognosis for recovery. The doctors reviewed the MRIs and found that the injuries were caused by the Accident, were not degenerative and were permanent, causing a significant loss of use and function in the cervical spine and lumbar spine(*see Morales v Cabral, supra*; *see Aquino v Alvarez*, 162 AD3d 451, 452 [1st Dept 2018]).

It is obvious, however, that plaintiff did not sustain a permanent loss of use (*see Riollano v Leavey,* 173 AD3d 494 [1st Dept 2019]). Such loss must be total (*Swift v N.Y. Transit Auth.,* 115 AD3d 507 [1st Dept 2014]; *see Oberly v Bangs Ambulance Inc.,* 96 NY2d 295 [2001]), and evidence of mere limitations of use is insufficient (*see Melo v Grullon*, 101 AD3d 452 [1st Dept 2012]; *Byong Yol Yi v Canela*, 70 AD3d 584 [1st Dept 2010]).

Furthermore, in light of plaintiff's testimony that he returned to work two weeks post-Accident, plaintiff fails to generate an issue of fact as to the category of 90/180 days (*Morales v Cabral, supra*; *Nunez v Motor Vehicle Accident Indemnification Corp.,* 96 AD3d 917 [2d Dept 2012]). Of course, if a jury determines that plaintiff has met the threshold for serious injury, it may award damages for any injuries causally related to the accident, including those that do not meet the threshold (*Morales v Cabral, supra*; *Rubin v SMS Taxi Corp*., 71 AD3d 548 [1st Dept 2010]).

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the court, it is hereby denied. Accordingly, it is hereby

ORDERED that the motion of defendant MAHAMED ABDUL HALIM LOTFI [Mot. Seq. 1], made pursuant to CPLR 3212, for an order dismissing the complaint on the ground that plaintiff NIKOLIN DODAJ has not sustained a "serious injury" as defined by Insurance Law 5102(d) is denied with respect to the claims under the threshold categories of permanent consequential limitation and significant limitation as relates to the cervical spine and lumbar spine, but granted with respect to the claims under the threshold category of permanent loss of use and the category of 90/180 days .

The parties are reminded that a compliance conference is scheduled in this matter on March 24, 2021. The attorneys are expected to review the revised Part 31 rules for compliance conferences (available on the homepage of the 12th J.D.), well ahead of that date and to follow

the guidelines for using NYSCEF, rather than appearing in court, to meet their compliance conference obligations.

The foregoing constitutes the decision and order of the court.

Dated: January 13, 2021

E N T E R,

s/Hon. Veronica G. Hummel/signed 1/13/2021
Hon. Veronica G. Hummel