

Taylor v Enterprise FM Trust
2021 NY Slip Op 31013(U)
April 1, 2021
Supreme Court, New York County
Docket Number: 156990/2016
Judge: Lisa S. Headley
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LISA S. HEADLEY PART IAS MOTION 22

Justice

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DEQUAN TAYLOR,

Plaintiff,

- v -

ENTERPRISE FM TRUST, TRUE WORLD FOODS NEW YORK LLC, DOUGLAS NUNEZ-LUZON

Defendant.

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INDEX NO. 156990/2016
MOTION DATE 10/07/2020
MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 133

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, it is ORDERED that co-defendants True World Foods New York LLC and Douglas Nunez-Luzon's motion for summary judgment to dismiss the complaint on the grounds that the plaintiff's claimed injuries do not satisfy the "serious injury" threshold under New York Insurance Law § 5102(d) is denied. Defendants filed the instant motion for summary judgment pursuant to CPLR §3212 to dismiss the complaint under Insurance Law §5102(d) and claims that the plaintiff failed to demonstrate that he suffered a serious injury as defined under the Insurance Law. Plaintiff submitted opposition papers.

Plaintiff commenced this action to recover damages for personal injuries sustained as a result of a motor vehicle accident that occurred on December 4, 2015. Plaintiff alleges that he sustained serious injuries as delineated under Insurance Law §5102(d).

"In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility." Garcia v. J.C. Duggan, Inc., 180 A.D.2d 579, 580 (1st Dep't 1992), citing, Dauman Displays, Inc. v. Masturzo, 168 A.D.2d 204 (1st Dep't 1990). As such, summary judgment is rarely granted in negligence actions unless there is no conflict at all in the evidence. See, Ugarriza v. Schmieder, 46 N.Y.2d 471, 475-476 (1979).

Defendants' motion is denied because there are issues of fact precluding summary judgment. In support of their motion, defendant argues that it is likely that all of plaintiff's alleged injuries in this case stem from his prior bicycle accident, an additional contributory factor that interrupts the chain of causation between the alleged accident and plaintiff's injuries. Defendant further argues that the plaintiff did not suffer a significant limitation or a permanent consequential limitation, and plaintiff did not meet the 90/180 threshold. Defendants proffer several independent medical doctors' and experts' opinions that conclude that the accident was low-impact, and that plaintiff did not sustain serious injuries as a result of the subject accident.

In their summary of facts, defendants submit that Dr. Lattuga, who performed anterior cervical discectomy and fusion to plaintiff's C5-C6 on August 16, 2016, determined that plaintiff's neck was healing well. Defendants also submit the report of Dr. Robert Zimmerman, board certified in radiology and neuroradiology, who concluded that X-rays and MRIs of the plaintiff's cervical and lumbar spine that was performed post-accident revealed no evidence of a traumatic spine. Dr. Zimmerman's report indicated that the plaintiff's alleged spine injuries must have been caused by "some other event" since a low impact collision cannot cause acute traumatic injuries as plaintiff claims. Dr. Robert Zimmerman's examination revealed no evidence of a traumatic spine injury. Specifically, Dr. Zimmerman concluded that the X-rays of plaintiff's cervical and lumbar spine taken on December 18, 2015 were normal with no evidence of fracture or a soft tissue injury, and that the MRI of plaintiff's cervical spine taken on January 28, 2016 revealed normal intervertebral discs, no canal stenosis and no evidence of fracture of soft tissue injury. Further, Dr. Zimmerman concluded that the MRI of plaintiff's lumbar spine taken on January 28, 2016 revealed no canal or foraminal stenosis, and no evidence of disc degeneration or fracture or soft tissue injury.

In addition, defendants submit the report of Dr. Jeffrey D. Klein, board certified in spinal surgery, who concluded that plaintiff's spinal neurological examination revealed normal motor functions and adequate range of motion in his neck and back. Dr. Klein opined, *inter alia*, that it is not possible to state, with reasonable medical certainty, that any one of these radiographic findings was caused by the accident that occurred on December 4, 2015. Dr. Klein also opined that the plaintiff should return to work.

Finally, defendants submit the reports of John C. Scott, a certified accident reconstruction expert, and Dr. Kirk L. Thibault, who is board certified in forensic engineering sciences. John

Scott concluded that the point of impact on the defendant's vehicle was the right front corner and the point of impact on plaintiff's vehicle was on the left side forward edge of the plaintiff-driver's door. Mr. Scott's simulation of the impact with defendants' vehicle traveling at or close to 0 mph, the alleged travel speed, and plaintiff's vehicle traveling at 20-25 mph, also the alleged travel speed, resulted in damage consistent with the observed damage to the subject vehicles. In addition, Dr. Kirk L. Thibault opined, *inter alia*, that "the subject incident was a low-energy sideswipe collision [and] the incident in question did not produce the injury mechanism associated with acute, traumatic failure of the spine or spinal discs."

In opposition, plaintiff argues that there is evidence to prove that plaintiff suffered serious injuries to his neck and back. Plaintiff submits his sworn affidavit and medical reports of Dr. Ornela Rehova and Dr. Dina Nelson. Specifically, plaintiff, in his affidavit, states that at the time of the prior 2008 motor vehicle accident, he did not suffer injuries to his neck and back, and that the only injury he recalled suffering was broken teeth. The report of Dr. Rehova, who examined the plaintiff on December 14, 2015, indicated limited range of motion and determined plaintiff to be moderately, partially disabled. Dr. Rehova opined that there was a causal relationship between the subject accident and the plaintiff's pathological findings and on September 6, 2016. Specifically, Dr. Rehova noted that "patient is incapacitated due to pain from his job which requires heavy lifting and carrying heavy objects. He will need spine specialist clearance." Dr. Nelson examined the plaintiff's cervical spine and lumbar spine on July 27, 2017, and determined plaintiff to be temporarily, totally disabled from working as a plumber and delivery driver since December 17, 2015.

In sum, plaintiff argues that defendant's motion must be denied because they failed to eliminate material triable issues of fact and failed to prove that the plaintiff's prior accident resulted in injuries to his neck and back. Plaintiff argued defendant's independent medical doctor, Dr. Klein, did not address the medial condition of the plaintiff during the first 180 days following the accident. Plaintiff argued that questions of fact exist as to plaintiff's claim of serious injury in the 90/180 category. Plaintiff testified at deposition that he had attempted to work but was unable to do so. Plaintiff submits that his testimony is supported by a contemporaneous medical finding of disability, which prevented plaintiff from going back to work for over 180 days following the accident.

Here, this court finds that there are conflicting medical reports pertaining to the limitations caused by plaintiff's injuries, the permanency of his alleged injuries and the causation of the alleged injuries. Specifically, as notated above, the defendants' IME doctors opined that the injuries sustained by the plaintiff were not causally related to the accident and were caused by a prior accident. Defendants also proffer expert reports that determine the accident to be low impact, and inferred the injuries allegedly sustained by plaintiff could not have been caused by the subject accident. To the contrary, plaintiff proffers opinions from plaintiff's treating doctors that the plaintiff's injuries to his neck and back directly correlates to the subject accident and determined the injuries to be permanent. Accordingly, the defendants' motion is denied because there are issues of fact precluding summary judgment.

Accordingly, it is

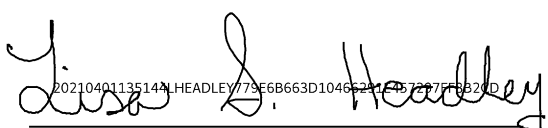
ORDERED that defendants' motion for summary judgment dismissing the complaint on the ground that the plaintiff's claimed injuries do not satisfy the "serious injury" threshold under *New York Insurance Law §§ 5102(d)* is DENIED it is further

ORDERED that any relief sought not expressly addressed herein has nonetheless been considered and is DENIED; and it is further

ORDERED that within 30 days of entry, defendants shall serve a copy of this decision/order upon plaintiff with notice of entry.

This constitutes the Decision/Order of the Court.

4/1/2021
DATE


LISA S. HEADLEY, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE