

Carrasco v Bah

2021 NY Slip Op 31311(U)

April 19, 2021

Supreme Court, New York County

Docket Number: 153865/2017

Judge: Lisa S. Headley

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This opinion is uncorrected and not selected for official publication.

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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JUAN CARRASCO,

Plaintiff,

- v -

MAMADOU BAH, DREAM LAND TRANSPORTATION

Defendant.

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INDEX NO. 153865/2017
MOTION DATE 01/26/2021
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 31, 32, 33, 34, 35, 36, 37

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents and after a virtual conference held on January 26, 2021 with counsel for the parties, it is ORDERED that the defendants, Mamadou Bah and Dream Land Transportation's, motion for summary judgment to dismiss the complaint on the ground that the plaintiff's claimed injuries do not satisfy the "serious injury" threshold as defined under New York Insurance Law §§ 5102(d) is denied. Plaintiff, Juan Carrasco, commenced this action to recover damages for personal injuries sustained as a result of a motor vehicle accident that occurred on June 28, 2016. On the date of the accident, the plaintiff alleged that he was injured when co-defendant-driver, Mamadou Bah, opened the door causing the plaintiff's bike to strike the car door, which caused the plaintiff to fall on his right side. The plaintiff was transported to Mount Sinai Hospital following the accident and went to physical therapy for seven months. On September 27, 2016, plaintiff underwent right ankle surgery. Plaintiff alleges that he sustained serious injuries as delineated under Insurance Law §5102(d), including headaches, anxiety, cervical and lumbar strains, and a right ankle ligament tear, which required surgery.

Defendants filed the instant motion for summary judgment pursuant to CPLR §3212 to dismiss the complaint under Insurance Law §5104(a) and claim that the plaintiff failed to demonstrate that he suffered a serious injury as defined under the Insurance Law. Plaintiff submitted opposition papers, and defendants submitted a reply affirmation.

“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 AD2d 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).

In support of their motion, defendants submit, *inter alia*, independent medical examinations performed by Dr. Barbara Freeman and Dr. Scott Springer, and plaintiff’s deposition testimony. Defendants argue that plaintiff admitted to being injured in a prior motor vehicle accident two days prior to the accident and was also injured in a subsequent accident on February 7, 2017. Defendants’ independent medical examination (IME) doctor, Dr. Springer examined the plaintiff and found no posttraumatic changes causally related to the subject accident. Dr. Springer noticed a complete tear of anterior talofibular ligament and a partial thickness tear of the posterior talofibular ligament. Dr. Springer opined that “if related to recent trauma, these tears would be associated with underlying bone marrow edema and soft tissue swelling, which is inconsistent with a significant acute right ankle ligament injury.” Dr. Barbara Freeman’s review of the x-ray of plaintiff’s right ankle taken two days after the accident determined there was no evidence of soft tissue swelling, which would be inconsistent with a significant acute ankle ligament injury. Dr. Freeman further opined that plaintiff’s examination demonstrated no evidence of a disability, and that plaintiff’s range of motion findings were within normal limits. Defendants argue that their IME doctors reported normal findings on a myriad of objective tests with full or near normal ranges of motion and no functional disability. Lastly, the defendants conclude that the plaintiff’s positive MRI findings are insufficient to establish the serious injury threshold, and that plaintiff’s injuries were either not caused by the accident or have not resulted in impairments that would qualify as a serious injury.

In opposition, plaintiff argues that there are issues of fact that exist in the medical opinions of both plaintiff’s and defendants’ doctors; that defendants fail to dispute the existence of tears of the right ankle resulting in plaintiff’s ankle surgery; and the medical reports of defendants’ doctors are incompetent, insufficient and both set forth positive findings in the plaintiff’s right ankle. Plaintiff proffers, *inter alia*, the medical opinion, from the office Jacob Lichy, MD, where MRI of the plaintiff’s right ankle and lumbar spine were taken on August 1, 2016. The affirmation of Dr.

Siddharth Prakash was submitted because Dr. Jacob Lichy, who performed the MRI study, has since passed away. The MRI performed by Dr. Jacob Lichy indicates that there is a right ankle lateral ligamentous tear and the MRI lumbar spine shows bulging discs. Dr. David R. Capiola performed plaintiff's physical examinations and performed a range of motion on plaintiff's lumbar spine and ankle. Dr. David Capiola opined, to a reasonable degree, that plaintiff's injuries to his right ankle are causally related to the subject accident, and not due to a pre-existing condition or degeneration. Dr. David Capiola affirmed that plaintiff underwent a "right ankle arthroscopy, extensive synovectomy/debridement and lateral ligamentous thermal repair" on September 27, 2016. Lastly, plaintiff submits the affirmation of Dr. Shahid Mian, an orthopedic surgeon, who performed a range of motion of the plaintiff's ankle and lumbar spine and opined that the plaintiff's injuries are causally related to the accident and the injury to his right ankle is permanent.

Plaintiff further argues that despite physical therapy and treatment, plaintiff still feels pain in his right ankle, neck and back, which causes him difficulty to sit for a long time and to stand for long periods of time. Plaintiff also argues that in his prior accident in 2016, he injured his right hand and arm, which are different body parts than the injuries sustained in the subject accident. Plaintiff also asserts that he suffered a subsequent accident in 2017, and injured his left knee, right hand and back, and has since fully recovered from those injuries after receiving treatment. Plaintiff contends that he has not reinjured his right ankle, neck and back since the subject 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 noted above, the defendants' IME doctors opined that the injuries sustained by the plaintiff were not causally related to the accident and the tears in plaintiff's ankle would be associated with underlying bone marrow edema and soft tissue swelling, which is inconsistent with a significant acute right ankle ligament injury. To the contrary, plaintiff proffers opinions from plaintiff's treating doctors that the injuries to his right ankle, neck and back directly correlate to the subject accident, and determine that the right ankle injury is permanent. Accordingly, the defendants' motion must be 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; and it is further

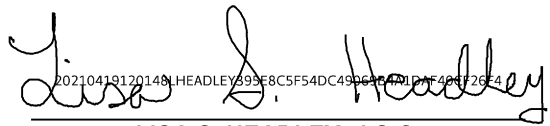
ORDERED that any relief sought not expressly addressed herein has nonetheless been considered and is denied; and it is further

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.

4/19/2021

DATE



LISA S. HEADLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE