

Cruz v Singh

2021 NY Slip Op 33945(U)

June 30, 2021

Supreme Court, Queens County

Docket Number: Index No. 715867/2018

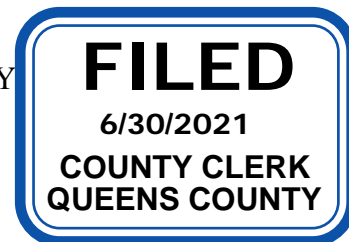
Judge: Phillip Hom

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY



Present: Hon. Phillip Hom
Justice

IAS Part 43

JOHN L. CRUZ,

Plaintiff,

Index No.: 715867/2018
Motion Date: 12/17/2020
Motion Seq.: 1

-against-

SUKHJINDER SINGH and PREET MULTANI,

Defendants.

The following numbered papers were read on this motion by Defendants Sukhjinder Singh and Preet Multani (“Defendants”) for an order dismissing the complaint of Plaintiff John L. Cruz (“Cruz”) for his alleged failure to meet the *prima facie* threshold of serious injury, under New York Insurance Law §5102 (d).

<u>Papers</u>	<u>Numbered</u>
Notice of Motion - Affidavits – Exhibits.....	E 11-20
Affirmation in Opposition.....	E 24-31
Reply Affirmation.....	E 32

Upon the foregoing papers it is ORDERED that the motion is denied.

Background

This matter involves a lawsuit for personal injuries resulting from a crash between the vehicle owned by Defendant Preet Multani and operated by Defendant Sukhjinder Singh and the vehicle operated by Plaintiff John L. Cruz on December 2, 2017 at or near 129 East 27th Street,

New York, New York. Plaintiff commenced this action by filing and service of the Summons and Complaint dated October 12, 2018 (NYSCEF Doc. No. 1). Issue was joined on November 2, 2018 (NYSCEF Doc. No. 2). The Preliminary Conference was held on April 22, 2019 (NYSCEF Doc. No. 7). The Compliance Conference was held on November 6, 2019 (NYSCEF Doc. No. 8).

Serious Injury

Insurance Law §5102(d) defines “serious injury” as “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.”

In paragraph ten of his Verified Bill of Particulars dated March 29, 2019, Cruz alleges that as a result of the car crash he suffered, among other things, the following injuries: C6/C7 focal central posterior disc herniation; C4-C6 tenderness and palpable paraspinal muscle spasms; L5/S1 central posterior disc herniation; L4/L5 posterior disc bulge, radiculopathy and restricted range of motion. In paragraph twenty, Cruz alleges that he sustained “a medically determined injury or impairment of a permanent (sic) nature which prevented his (sic) from performing substantially all of the material acts which constitute his usual customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of his injury and impairment” (NYSCEF Doc. No. 14).

It is well settled that a defendant seeking summary judgment on threshold has the initial burden of establishing, by competent evidence, that a plaintiff did not sustain a serious injury causally related to the subject accident (*Franchini v Palmieri*, 1 NY3d 536 [2003]). Once a defendant meets this initial threshold, the burden shifts to plaintiff to offer proof, in admissible form, which creates a material issue of fact requiring a trial (*id*). A defendant can establish that a plaintiff's injuries are not serious within the meaning of Insurance Law §5102(d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support a plaintiff's claim (*Grossman v Wright*, 268 AD2d 79 [2d Dept 2000]).

The papers submitted by Defendants fail to adequately address Plaintiff's claim, set forth in paragraph six of his Verified Bill of Particulars, that he sustained a serious injury under the 90/180-day category of Insurance Law §5102(d) (*see Lara v Nelson*, 148 AD3d 1128 [2d Dept 2017]; *Che Hong Kim v Kossoff*, 90 AD3d 969 [2d Dept 2011]; *Aujour v Singh*, 90 AD3d 686 [2d Dept 2011]; *Rouach v Betts*, 71 AD3d 977 [2d Dept 2010]). Plaintiff alleges that he sustained, among other things, a serious injury pursuant to Insurance Law Section §5102(8) that prevented him from performance of his usual and customary daily activities for 90 out of the 180 days immediately following the accident. Defendants submit an Independent Orthopedic Examination Report by Dr. Willie E. Thompson, a board-certified orthopedic surgeon, dated August 27, 2019 (NYSCEF Doc. No. 16; the "IME Report"). Dr. Thompson examined Plaintiff Cruz on August 27, 2019 and concluded that Plaintiff's injuries were all resolved.

Dr. Thompson however, failed to relate his findings to Plaintiff's 90/180-day category of serious injury for the period of time immediately following the subject accident in the IME Report based on his examination more than one year and eight months after the subject crash of

December 2, 2017 (*Encarnacion v Smith*, 70 AD3d 628 [2d Dept 2010]). Nevertheless, the Independent Radiology Report by Dr Darren Fitzpatrick, a Board-Certified Radiologist concludes that there is “no traumatic injury” and that Plaintiff suffers from disc degeneration (NYSCEF Doc. No. 17).

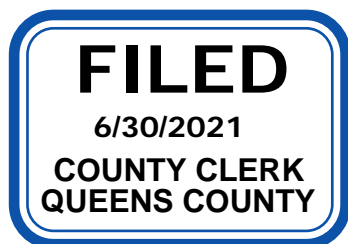
In opposition, Plaintiff submits an Affirmation from Dr. Thomas M. Kolb, a radiologist who reviewed MRI reports of the cervical and lumbar spines taken six weeks after the accident and found disc herniation at C6-C7 and at L4-L5, “. . .a central posterior disc herniation impinging upon the thecal sac” (NYSCEF Doc. No. 30). Plaintiff also submits an affirmed report dated August 19, 2020 from his treating board-certified pain management physician, Dr. Tim Canty (NYSCEF Doc. No. 29) that shows Plaintiff has reduced range of motion in his back, raising triable issues of fact (*see Perl v Meher*, 18 NY3d 208, 218-219 [2011]).

Conclusion

Accordingly, Defendants’ motion to dismiss the complaint of Plaintiff Cruz for failure to establish a “serious injury” under NY Insurance Law §5102 is denied in its entirety.

This constitutes the decision and order of the Court.

Dated: June 30, 2021




Hon. Philip Hom, JSC