

Anagnostopoulos v Rosenman

2021 NY Slip Op 34042(U)

December 10, 2021

Supreme Court, Nassau County

Docket Number: Index No. 604163/19

Judge: James P. McCormack

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SUPREME COURT- STATE OF NEW YORK

PRESENT: Honorable James P. McCormack
Justice
_____ **X**

MICHAEL ANAGNOSTOPOULOS,

**TRIAL/IAS PART 12
NASSAU COUNTY**

Plaintiff(s)

-against-

Index No.: 604163/19

**Motion Seq. 003
Motion Submitted: 10/15/21**

HILLEL B. ROSENMAN,

Defendant(s)
_____ **X**

The following papers read on these motions:

Notice of Motion/Supporting Exhibits.....X
Affirmation in Opposition/Supporting Exhibits.....X
Reply Affirmation.....X

Defendant, Hillel B. Rosenman (Rosenman), moves this court for an order pursuant to CPLR §3212, for summary judgment dismissing the complaint on the grounds that the injuries sustained by Plaintiff, Michael Anagnostopoulos (Anagnostopoulos), fail to satisfy the serious injury threshold requirement of Insurance Law §5102(d).

Anagnostopoulos opposes the motion.

This is an action to recover for personal injuries allegedly sustained by Anagnostopoulos in a motor vehicle accident while he was a passenger in his father’s car. Anagnostopoulos commenced this action by service of a summons and complaint dated

March 26, 2019. Issue was joined by service of an answer dated April 22, 2019. The case certified ready for trial on December 23, 2020, and a note of issue was filed on January 4, 2021.

According to the complaint, on January 24, 2019, the car driven by Rosenman made an unsafe lane change and caused an accident with the vehicle in which Anagnostopoulos was a passenger. As a result of the accident, Anagnostopoulos claims he suffered serious injuries. Rosenman now moves for summary judgment, alleging Anagnostopoulos did not sustain a serious injury as defined by the Insurance Law.

In seeking summary judgment, Rosenman relies upon; the pleadings; the bill of particulars; Anagnostopoulos' deposition transcript; Rosenman's deposition transcript, the affirmed report of Jonathan D. Glassman, M.D., an orthopedic surgeon, who examined Anagnostopoulos as part of an Independent Medical Examination (IME) on August 24, 2020; and the affirmed medical reports of Marc. J. Katzman, M.D., a radiologist who reviewed MRIs taken of Anagnostopoulos' cervical and lumbar spine are part of a radiologic IME.

“Serious injury” is defined in Insurance Law § 5102(d) as: (1) death; (2) dismemberment; (3) significant disfigurement; (4) fracture; (5) loss of fetus; (6) permanent loss of use of a body organ, member, function or system; (7) permanent consequential limitation of use of a body organ or member; (8) significant limitation of use of a body function or system; or (9) 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 90 days during the 180 days immediately following the occurrence of the injury or impairment.

The issue of whether a claimed injury falls within the statutory definition of serious injury is, in the first instance, a question of law for the court which may be decided on a summary judgment motion (*Licari v. Elliot*, 57 N.Y.2d 230, 237 [1982]; *Carter v. Adams*, 123 A.D.3d 967, 967 [2nd Dept. 2014]). A defendant seeking summary judgment based on a lack of serious injury bears the initial burden of establishing that plaintiff did not sustain a serious injury as defined in Insurance Law § 1502 (d). (*Gaddy v. Eyley*, 79 N.Y.2d 955, 956-57 [1997]; *Young Mi Hwang v. Vasconex-Vallejo*, 124 A.D.3d 769, 769 [2nd Dept. 2015]).

As a proponent of the summary judgment motion, Defendants had the initial burden of establishing that Bazin did not sustain a causally related serious injury under the permanent loss of use of a body organ, member, function or system, significant limitation of use of a body function or system and 90/180-day categories (*see Toure v. Avis Rent a Car Sys.*, 98 N.Y.2d 345, 352 [2002]). Evidence submitted in support of a motion for summary judgment must be in admissible form. (*Pagano v. Kinsbury*, 182 A.D.2d 268, 270 [2nd Dept. 1992]). A defendant can satisfy the initial burden by relying on either the sworn statements of defendant's examining physician, or plaintiff's sworn testimony or the unsworn reports of plaintiff's own examining physicians (*Id.*). A defendant can demonstrate that plaintiff's own medical evidence does not indicate that

plaintiff suffered a serious injury and that the alleged injuries were not, in any event, causally related to the accident (*Franchini v Palmieri*, 1 N.Y.3d 536, 537 [2003]).

In support of summary judgment, a defendant's medical expert must specify the objective tests upon which the stated medical opinions are based and, when rendering an opinion with respect to plaintiff's range of motion, the expert must compare any findings to those ranges of motion considered normal for the particular body part (*Browdame v. Candura*, 25 AD3d 747, 748 [2nd Dept. 2006]). Further, "[t]he mere existence of a bulging or herniated disc is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the disc injury and its duration" (*Rivera v Bushwick Ridgewood Props. Inc.*, 63 AD3d 712 [2nd Dept. 2009]; *Smeja v Fuentes*, 54 AD3d 326 [2nd Dept. 2008]). Once the defendant has made the required showing, the burden shifts to plaintiff to rebut the presumption that there is no issue of fact as to the threshold serious injury question. (*Franchini v Palmieri, supra*).

A defendant may establish through presentation of a plaintiff's own deposition testimony that a plaintiff did not sustain an injury of a non-permanent nature which prevented plaintiff from performing substantially all of the material acts which constitute plaintiff's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence (*Kuperberg v Montalbano*, 72 AD3d 903 [2d Dep't. 2010]).

Rosenman's motion will be denied. The reports of Dr. Glassman and Dr. Katzman focus solely on the alleged back, shoulder and neck injuries. The only evidence

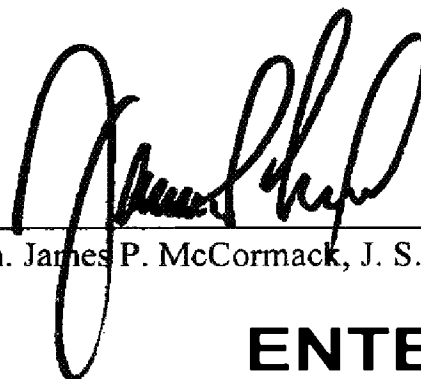
submitted in support of the dismissing the claims related to the 90/180 category is Anagnostopoulos' deposition transcript. While, in general, that is sufficient alone to prove that the 90/180 injury does not apply, in this case the testimony raises issues of fact. The bill of particulars asserts Anagnostopoulos was confined to his home from the time of the accident until at least the date the bill of particulars was served, which was beyond the 180 day time period. His deposition testimony supports that, at times, by indicating he could not attend in-person MCAT classes, along with other activities. Where one category of injury meets the no-fault threshold, it is unnecessary to determine whether the other injuries meet that threshold. (*Linton v. Nawaz*, 14 NY3d 821 [2d Dept 2010]). As a result of the deposition testimony, the court finds Rosenman has failed to establish entitlement to summary judgment as a matter of law. The motion will be denied regardless of the sufficiency of the opposition papers.

Accordingly, it is hereby

ORDERED, that Defendants' motion for summary judgment pursuant to CPLR §3212 is DENIED.

This constitutes the decision and order of this court.

Dated: December 10, 2021
Mineola, N.Y.



Hon. James P. McCormack, J. S. C.

ENTERED

Dec 14 2021

NASSAU COUNTY
COUNTY CLERK'S OFFICE