

Montalvo v Neo Taxi Corp.

2022 NY Slip Op 32049(U)

June 30, 2022

Supreme Court, New York County

Docket Number: Index No. 158064/2013

Judge: James G. Clynnes

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JAMES G. CLYNES PART 22M

Justice

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KIM MONTALVO, ROBERT KINSLOW, KASANDRA
PUFFER,

Plaintiff,

INDEX NO. 158064/2013

MOTION DATE 12/07/2021

MOTION SEQ. NO. 004

- v -

NEO TAXI CORP., KWAMINA F. GHAMSAH,

Defendant.

**DECISION + ORDER ON
MOTION**

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NEO TAXI CORP., KWAMINA GHAMSAH

Plaintiff,

Third-Party
Index No. 590820/2013

-against-

STEVE ASSOUS

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142

were read on this motion to/for JUDGMENT – SUMMARY

Upon the foregoing documents, defendants' Neo Taxi Corp and Kwamina F. Ghamsah motion pursuant to CPLR 3212 for summary judgment in favor of defendants and dismissal of the complaints of both plaintiffs Kim Montalvo and Robert Kinslow on the grounds that the injuries allegedly sustained by both plaintiffs as a result of a December 1, 2012, motor vehicle accident fail to satisfy the serious injury threshold requirements of Insurance Law 5102 (d) is decided as follows:

Plaintiff Kim Montalvo

The Bill of Particulars for plaintiff Montalvo alleges injuries to her cervical and lumbar spine, neck, back, headaches, anxiety, shock to her body and nervous system and exacerbation of a condition of the jaw. Montalvo also claims a loss of consortium.

Montalvo asserts that these injuries satisfy the serious injury threshold as defined in Insurance Law 5102 (d) under the categories of significant disfigurement, a fracture; permanent loss; permanent consequential limitation; significant limitation; and 90/180-day categories of serious injury as set forth under Insurance Law 5102 (d).

Defendant's Orthopedist, Dr. Arnold T. Berman, M.D, performed an independent orthopedic medical evaluation (hereinafter "IME") of Montalvo. Dr. Berman reviewed the Supplemental Verified Bill of Particulars and the information provided by Montalvo during the IME regarding the accident and treatment history, symptoms, employment and past medical history, current medical conditions, social history, medications, allergies and a physical examination of the Plaintiff. Dr. Berman states that no legally authenticated medical records were available for review.

Dr. Berman found that any alleged injury to Montalvo's cervical, thoracic, lumbar spine and left shoulder were resolved with no residuals. Dr. Berman found no atrophy of the upper or lower extremities indicating normal usage. He found no evidence of permanent injury or disability as it relates to the accident in question and that Montalvo requires no treatment or diagnostic testing as a result of the December 1, 2012, accident and that she can participate in all activities of daily living including working full time at her regular employment without restrictions. Dr. Berman found no objective findings upon examination of Montalvo that are related to the date of the accident.

Defendant's radiologist, Dr. Scott A. Springer, reviewed MRI scans of Montalvo's lumbar spine taken on November 4, 2014, and cervical spine taken on February 25, 2016. Dr. Springer found that the MRI of the lumbar spine demonstrates mild disc bulges and disc herniations with no fracture or soft tissue swelling nor traumatic basis. Dr. Springer found an acute disc herniation not related to the subject incident which was degenerative in origin and therefore no post traumatic changes were causally related to the subject incident. Similarly, Dr. Springer's review of the cervical spine found it was unremarkable with no fracture and no evidence of an acute tear of the annular ligament. The disc bulging had no traumatic basis and was not causally related to the subject incident as it is degenerative in origin.

Defendant's dentist, Isaac Seinuk, D.D.S., performed an independent dental examination of Montalvo. Dr. Seinuk reviewed the Verified Bill of Particulars, and information regarding the

accident and dental history. Dr. Seinuk states that no legally authenticated medical records were available for review.

Dr. Seinuk found that Montalvo did not need dental or temporomandibular joint (TMJ) treatments, there is no current dental condition, she is not disabled by any dental issues and that she can resume her daily functions of living.

Defendants met their prima facie burden of demonstrating that Montalvo did not sustain a serious injury to her cervical and lumbar spine through the affirmations of Dr. Berman and Dr. Springer who found the injuries to Montalvo's cervical and lumbar spine were degenerative and that there was no causality between the injuries to the spine, neck and exacerbation of the jaw and the December 1, 2012 accident (*Rabb v Mohammad*, 132 AD3d 527 [1st Dept 2015]) [holding defendants met their prima facie burden by submitting a radiologist's affirmation who opined that the MRI of the plaintiff's spine showed disc bulge of degenerative origin]; *Amaro v Am. Med. Response of NY, Inc.*, 99 AD3d 563 [1st Dept 2012] [holding, in part, defendants met their prima facie burden by submitting radiologist report who opined MRI's of Montalvo's lumbar spine were degenerative]). Additionally, Defendants met their prima facie burden of showing that Montalvo did not sustain a serious injury to her jaw through the affirmations of Dr. Seinuk who stated the Montalvo had a normal periodontal condition and that there were no accident-related injuries noted or claimed. (*Abreu v. Miller*, 60 Misc3d 1216 [A]).

Montalvo raises a triable issue of fact as to whether she sustained permanent consequential and significant limitation of use to her cervical and lumbar spine by submitting reports of Dr. Radbill, which included objective restricted range of motion testing, who found that Montalvo suffers from limitations in the rotation of her cervical and lumbar spine and that her cervical, lumbar spine and other injuries were causally connected to the accident on December 1, 2012 (*Rabb*, 132 AD3d at 528). An MRI taken on March 1, 2013, three months post-accident, indicates minimal degenerative disease and all medical documents indicate that her injuries were causally related to the December 1, 2012 accident.

Dr. Boyajian, D.O. performed an IME of Montalvo's cervical, lumbar and thoracic pain and found no preexisting condition attributing it as causally related to the December 1, 2012, accident. Similarly, Dr. Krol and Dr. Barr in subsequent IME exams, found there was a causal relationship between Montalvo's injuries and the December 1, 2012, car accident and that the physical examination showed diminished range of motion in her cervical spine respectively.

Because there is a triable issue of fact as to whether Montalvo sustained a serious injury to her cervical and/or lumbar spine that was causally related to the accident, the court need not determine whether the defendants met their burden in relation to Montalvo's claims of headaches, anxiety and shock to her body and nervous system. (*Boateng v Yiyan*, 119 AD3d 424 [1st Dept 2014]); *Caines v Diakite*, 105 Ad3d 404 [1st Dept 2013]; *Delgado v Papert Transit, Inc.*, 93 AD3d 457 [1st Dept 2012] holding "[o]nce a serious injury has been established, it is unnecessary to address additional injuries to determine whether the proof is sufficient to withstand defendants' summary judgment."); *Sin v Singh*, 74 AD3d 1320 [2nd Dept 2010] [holding "[s]ince the Supreme Court found that there were triable issues of fact regarding whether the plaintiff sustained a serious injury to her right ankle, she is entitled to seek recovery for all injuries allegedly incurred as a result of the accident."]).

Defendants also met their burden of proof as to Montalvo's 90/180-day claim through the March 2017 IME Report, which states that Montalvo only missed one week of work as a court reporter after the accident and through Montalvo's examination before trial testimony in which she testified that she only missed one week of work as a court reporter immediately after the accident and that she did not miss any performances as a singer after the accident because she performed less frequently during that time of the year. Dr. Berman and Dr. Springer both stated that Montalvo's injuries were not causally related to the accident (*Hollomon v. American United Trans* 160 AD3d 545 [1st Dept 2018] [the Court held defendants satisfied their initial burden on Plaintiff's 90/180 day claim through Plaintiff's bill of particulars and deposition testimony admitting that she was only out of work for four weeks post-accident.]). Montalvo's opposition presents no evidence of a medically determined injury that prevented [her] from performing [her] customary daily activities within 90 of the first 180 days after the accident and therefore failed to raise a triable issue of fact on the 90/180 day claim (*Id.*; *Dziuma v Jet Taxi, Inc.*, 148 AD3d 573 [1st Dept 2017]). Accordingly, Defendants' motion for summary judgment and dismissal of Montalvo's complaint based upon the grounds that Montalvo's alleged injuries do not satisfy the serious injury threshold are denied with respect to Montalvo's claims of serious injury to her cervical and lumbar spine under the serious injury categories of significant limitation of use and permanent consequential limitation and granted with respect to Montalvo's claims under the 90/180 day serious injury category.

Plaintiff Robert Kinslow

The Bill of Particulars for plaintiff Robert Kinslow (Kinslow) alleges injuries to his cervical, thoracic and lumbar spine, rotator cuff damage to right and left shoulder(s), post-traumatic/chronic headaches, post-concussion syndrome and aggravation of a pre-existing condition of his right knee, back and lumbar spine. Kinslow also raises a loss of consortium claim.

Kinslow asserts that these injuries meet the following serious injury categories under Insurance Law §5102 (d): 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.

Defendant's Orthopedist, Dr. Arnold T. Berman, M.D, performed two independent orthopedic medical evaluations of Kinslow. On April 23, 2016, Dr. Berman reviewed the Verified Bill of Particulars, the accident and treatment history, symptoms, employment, past medical history, current medical conditions, social history, medications, allergies and a physical examination of Kinslow. Dr. Berman states that no legally authenticated medical records were available for review.

Dr. Berman found that any alleged injury to Kinslow's cervical, thoracic spine and bilateral shoulders were resolved with no residuals. Dr. Berman found no atrophy of the upper or lower extremities indicating normal usage and his hand grip was strong. He found Kinslow has no functional loss and disability due to the December 1, 2021, accident and that all testing of range in motion were in normal ranges. His reflexes and muscle strength on various upper and lower regions of the body were normal. Extensive pre-existing degenerative changes were noted on the cervical spine with no aggravation by the December 1, 2012, accident. Additionally, Dr. Berman noted no aggravation of preexisting degenerative changes to the lumbar spine from previous lumbar surgery.

Kinslow can participate in all activities of daily living including working full time at his regular employment without restrictions. Dr. Berman found no objective findings upon examination of Plaintiff that are related to the date of the accident.

Dr. Berman's second evaluation of Kinslow was on November 19, 2020. He reviewed the Verified Bill of Particulars, Supplemental Verified Bill of Particulars, medical reports from treating doctors, two MRI's of the left shoulder, right knee, and right shoulder, labs, ECG, pathology, accident and treatment history, symptoms, employment and past medical history, current medical conditions, social history, medications, allergies and a physical examination..

Dr. Berman found that his cervical, thoracic and lumbar spine demonstrated normal acceptable range of motion with no tenderness, spasm or pain and that any alleged injury to the cervical, thoracic lumbar spine, bilateral shoulders and right knee were resolved with no clinical residuals. He can fully participate in all activities of daily living and can work without restrictions. He did not sustain any permanent injury and has no disability.

Defendant's Radiologist, Dr. Scott A. Springer, reviewed MRI scans of Kinslow's left shoulder and right knee taken on June 28, 2013, and thoracic spine taken on November 26, 2013. Dr. Springer found that the MRI of the left shoulder shows no fracture and no tear of the tendon with the rotator cuff intact. There is a finding of degenerative arthritis with no post-traumatic changes causally related to the December 1, 2012 incident.

Dr. Springer's review of the right knee MRI shows no fracture or dislocation, and the quadriceps and tendons are intact and the narrowing was a degenerative process with no post-traumatic changes causally related to the December 1, 2012 incident. Lastly, Dr. Springer's review of the thoracic spine MRI presented no fracture and any loss of disc substance was degenerative and unrelated to trauma. The mild disc bulges that were present were degenerative in origin.

Defendants met their prima facie burden of showing that Kinslow did not sustain a serious injury to his cervical, thoracic and lumbar spine through the affirmations of Dr. Berman and Dr. Springer who found the injuries to Kinslow's cervical, thoracic and lumbar spine were degenerative and that there was no causality between the injuries to the spine and the December 1, 2012 accident (*Rabb v Mohammad*, 132 AD3d 527 [1st Dept 2015]) [holding defendants met their prima facie burden by submitting a radiologist's affirmation who opined that the MRI of the plaintiff's spine showed disc bulge of degenerative origin]; *Amaro v Am. Med. Response of NY*,

Inc., 99 AD3d 563 [1st Dept 2012] [holding, in part, defendants met their prima facie burden by submitting radiologist report who opined MRI's of the plaintiff's lumbar spine were degenerative]).

Kinslow raises a triable issue of fact as to whether he sustained permanent consequential and significant limitation of use to his cervical, thoracic and lumbar spine by submitting reports of Dr. Rabbill which showed a significant reduction in his range of motion below the normal range(s) on the cervical, thoracic and lumbar spine. This finding included objective range of motion testing and he found that plaintiff suffers from limitations in the rotation of his cervical spine and that plaintiff's cervical spine and other injuries were causally connected to the accident if December 1, 2012 (*Rabb*, 132 AD3d at 528). Because there is a triable issue of fact as to whether Plaintiff sustained a serious injury to his cervical spine that was causally related to the accident, it is unnecessary to address the alleged injuries to his lumbar, thoracic spine or any of the above-mentioned ailments. (*Boateng v Yiyan*, 119 AD3d 424 [1st Dept 2014]); *Caines v Diakite*, 105 Ad3d 404 [1st Dept 2013]; *Delgado v Papert Transit, Inc.*, 93 AD3d 457 [1st Dept 2012] holding “[o]nce a serious injury has been established, it is unnecessary to address additional injuries to determine whether the proof is sufficient to withstand defendants’ summary judgment.”]; *Sin v Singh*, 74 AD3d 1320 [2nd Dept 2010] [holding “[s]ince the Supreme Court found that there were triable issues of fact regarding whether the plaintiff sustained a serious injury to her right ankle, she is entitled to seek recovery for all injuries allegedly incurred as a result of the accident.”]).

Because there is a triable issue of fact as to whether Kinslow sustained a serious injury to his cervical, thoracic or lumbar spine that was causally related to the accident, the court need not determine whether the Defendants met their burden in relation to Kinslow's claims of fracture, post-concussive syndrome, post traumatic headaches, and post traumatic dizziness.

Defendants also met their burden of proof as to Kinslow's 90/180-day claim by relying on Kinslow examination before trial testimony that he returned to work as a title clerk four days after the accident and only missed two weeks after his surgery in 2017 and seven to ten days after his surgery in 2019 (*Fathi v Sodhi*, 146 AD3d 445 [1st Dept Jan. 5, 2017]). “In opposition, plaintiff presented no evidence of a medically determined injury that prevented him from performing his customary daily activities within the relevant time period” (*Id.*).

Kinslow’s opposition presents no evidence of a medically determined injury that prevented him from performing his customary daily activities within 90 of the first 180 days after the accident and therefore failed to raise a triable issue of fact on the 90/180 day serious injury claim (*Id.*; *Dziuma v Jet Taxi, Inc.*, 148 AD3d 573 [1st Dept 2017]). Defendants’ motion for summary judgment and dismissal of Kinslow’s complaint based upon the grounds that Kinslow’s alleged injuries do not satisfy the serious injury threshold is denied with respect to Kinslow’s claims of serious injury under the serious injury categories of permanent loss; permanent consequential limitation; and significant limitation and is granted with respect to Kinslow’s claim under the 90/180 day serious injury category.

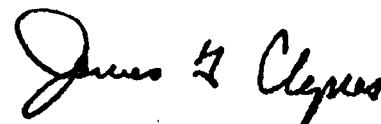
Accordingly, for the foregoing reasons, it is hereby

ORDERED that defendants’ motion for summary judgment and dismissal of plaintiff Montalvo’s claims for failure to satisfy the serious injury threshold is denied with respect to her claims under the serious injury categories of permanent loss; permanent consequential limitation; and significant limitation and is granted with respect to her claim of serious injury under the 90/180 day category; and it is further

ORDERED that defendants’ motion for summary judgment and dismissal of plaintiff Kinslow’s complaint for failure to satisfy the serious injury threshold is denied with respect to the serious injury categories of permanent loss, significant limitation and permanent consequential limitation categories of Insurance Law § 5102 (d); and it is further

ORDERED that Defendants’ summary judgment motion is GRANTED as to Plaintiff’s claim of serious injury under the 90/180-day category of Insurance Law § 5102 (d).

This constitutes the Decision and Order of the Court.



JAMES G. CLYNES, J.S.C.

6/30/2022

DATE

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