Reynoso v Rahman
2022 NY Slip Op 32390(U)
January 10, 2022
Supreme Court, Queens County
Docket Number: Index No. 703166/2019
Judge: Maurice E. Muir
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Short Form Order

NEW YORK SUPREME COURT – QUEENS COUNTY

Present: HONORABLE MAURICE E. MUIR
Justice

NESTOR REYNOSO,

Plaintiff,

-against-

ATIQUR RAHMAN,

Defendant.

IAS Part - 42

Index No.: 703166/2019

Motion Date: 10/7/21

Motion Cal. No.: 28

Motion Seq. No.: 3

The following electronically filed ("EF") documents read on this motion by Atiqur Rahman ("Mr. Rahman" or "defendant") for an order pursuant to CPLR § 3212 granting summary judgment in his favor and dismissing the complaint of Nestor Reynoso ("Mr. Reynoso" or "plaintiff") for failure to meet the no-fault statute's threshold for tort recovery pursuant to sections 5104(a) and 5102(d) of the Insurance Law of the State of New York, together with such other and further relief as this court deems just and proper.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits.....	EF 33 - 43
Affirmation in Opposition-Exhibits.....	EF 53 - 59
Reply Affirmation-Exhibits.....	EF 60 - 61

Upon the foregoing papers, it is ordered that this motion is determined as follows:

BACKGROUND

This is an action to recover damages for personal injuries allegedly sustained by Mr. Reynoso in a motor vehicle collision. The plaintiff alleges that on May 18, 2018, the vehicle operated by Mr. Rahman struck his vehicle, on the driver's side, while on 3rd Avenue at or near its intersection with East 60th Street, County, City and State of New York ("subject accident"). The plaintiff also avers that due to the impact to his vehicle, the driver's side airbags deployed

striking him on the left side of his body. As a result, the plaintiff alleges that he sustained serious injuries to his lumbar spine, left shoulder, left elbow, cervical spine and left hip (thigh). The plaintiff also claims exacerbation of any pre-existing injuries. The plaintiff also avers that he underwent physical therapy, acupuncture and chiropractic treatment about three times per week for about five months at Queens Wellness Medical, P.C. ("QWM"), at which time his benefits were denied. QWM also referred him to have the Computed Tomography ("CT") images done of his neck, back and left shoulder. On February 21, 2019, the plaintiff commenced the instant action against the defendant. On September 21, 2019, issue was joined, wherein the latter interposed an answer. Now the defendant seeks summary judgment, pursuant to CPLR § 3212, on the ground that Mr. Reynoso did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident.

APPLICABLE LAW

It has long been established that the "legislative intent underlying the Comprehensive Motor Vehicle Insurance Reparation Act of 1974 (now Insurance Law § 5101, *et seq* – commonly known as the "No-Fault" statute) was to weed out frivolous claims and limit recovery to significant injuries (*Duel v. Green*, 84 NY2d 795 [1995]; *see also Toure v. Avis Rent A Car Sys.*, 98 NY2d 345 [2002]). New York's No-Fault 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." The Court of Appeals has held that the issue of whether a claimed injury falls within the statutory definition of a "serious injury" is a question of law for the courts in the first instance, which may properly be decided on a motion for summary judgment (*see Licari v. Elliott*, 57 NY2d 230 [1982]; *see also Charley v. Goss*, 54 AD3d 569 [1st Dept 2008] *aff'd* 12 NY3d 750, 876 NYS2d 700 [2009]; *Porcano v. Lelzman*, 255 AD2d 430 [2d Dept 1998]; *Nolan v. Ford*, 100 AD2d 579 [2d Dept 1984], *aff'd* 64 NYS2d 681 [1984]).

On a motion for summary judgment, the defendant has the initial burden of making a *prima facie* showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a "serious injury" within the meaning of New York's No-Fault Insurance Law § 5102(d) (*see Gaddy v. Eyler*, 79 NY2d 955 [1992]; *Akhtar v. Santos*, 57 AD3d 593 [2d Dept 2008]). The defendant may satisfy this burden by submitting the plaintiff's deposition testimony and the affirmed medical report of the defendant's own examining physician (*Moore v. Edison*, 25 AD3d 672 [2d Dept 2006]; *Farozes v. Kamran*, 22 AD3d 458 [2d Dept 2005]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, such as, affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (*Pagano v. Kingsbury*, 182 AD2d 268, 270 [2d Dept 1992]). A defendant may also establish entitlement to summary judgment by using medical reports and records prepared by the plaintiff's own physicians (*see Fragale v. Geiger*, 288 AD2d 431 [2d Dept 2001]; *Grossman v. Wright*, 268 AD2d 79 [2d Dept 2000]; *Vignola v. Varrichio*, 243 AD2d 464 [2d Dept 1997]; *Torres v. Micheletti*, 208 AD2d 519 [2d Dept 1994]). The failure to make such a *prima facie* showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*Xin Fang Xin v. Saft,* 177 AD3d 823 [2d Dept 2019]; *Rosenblum v. Schloss*, 175 AD3d 1339 [2d Dept 2019]; *Burns v. Stranger*, 31 AD3d 360 [2d Dept 2006]; *Rich-Wing v. Baboolal*, 18 AD3d 726 [2d Dept 2005]; *see generally, Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Once defendant has met this burden, plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard for "serious injury" under New York's No-Fault Insurance Law (*see Duel v. Green*, 84 NY2d 795 [1995]; *Pagano v. Kingsbury*,182 AD2d 268 [2d Dept 1992]). However, if a defendant does not establish a *prima facie* case that the plaintiff's injuries do not meet the serious injury threshold, the court need not consider the sufficiency of the plaintiff's opposition papers (*Xin Fang Xin v. Saft,* 177 AD3d 823 [2d Dept 2019]; *Rosenblum v. Schloss*, 175 AD3d 1339 [2d Dept 2019]; *Burns v. Stranger*, 31 AD3d 360 [2d Dept 2006]; *Rich-Wing v. Baboolal*, 18 AD3d 726 [2d Dept 2005]; *see generally, Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

DISCUSSION

In support of the instant motion, the defendant provides the affirmed medical report of Salvatore Corso, M.D. ("Dr. Corso"), who is Board Certified Orthopedic Surgeon. On January 19, 2021, Dr. Corso performed an independent orthopedic examination, wherein he found normal ranges of motion in the plaintiff's thoracolumbar spine, left shoulder, cervical spine and left hip. The range of motion were measured with the use of a goniometer; and he compared the plaintiff's range of motion to it to the normal range of motion as stated in the A.M.A Guideline to the Evaluation of Permanent Impairment, fifth edition. Dr. Corso further found that the objective tests (e.g., compression test, straight leg tests, Ely's test, etc.) were negative. In conclusion, Dr. Corso noted "[t]oday's examination indicates that the injured body parts alleged in the Bill of Particulars have resolved. The claimant did not sustain any significant or permanent injury as a result of the motor vehicle accident. There are no objective clinical findings indicative of a present disability, or functional impairment, which prevents the examinee from engaging in ADLs, including work, school, and hobbies." In further support of the instant motion, the defendant provides the affirmed medical report of Dr. Berkowitz, who is a Board-Certified Radiologist. Dr. Berkowitz only reviewed the X-rays performed on the plaintiff's cervical and lumbar spine, which were performed on July 5, 2018 at All County, LLC. In connection with the plaintiff's cervical spine, Dr. Berkowitz found the following:

> 'Straightening of the normal cervical lordosis'. . . . a nonspecific finding but may be related to the findings described below. Minimal grade I spondylolisthesis and spondylosis C4-5. The spondylolisthesis is likely due to degenerative changes at the disc space and facet joints. Disc space narrowing and spondylosis, CS-6. The findings at CS-6 are chronic and degenerative. There is no evidence of acute traumatic injury to the cervical spine. CAUSAL RELATIONSHIP: Evaluation of this x-ray examination reveals no causal relationship between the claimant's alleged accident and the findings on the x-ray examination

Furthermore, in connection with the plaintiff's lumbar spine, Dr. Berkowitz found "[m]inimal spondylotic changes. These are degenerative. There is no evidence of acute traumatic injury to the lumbar spine. . . . Evaluation of this x-ray examination reveals no causal relationship between the claimant's alleged accident and the findings on the x-ray examination.

In opposition, plaintiff provides the affirmed medical report of Madhu Babu Boppana, M.D. ("Dr. Boppana"), who is plaintiff's Treating Physicians. On May 18, 2018, Dr. Boppana performed an Initial Comprehensive Patient Evaluation, wherein he found pain, restrictions and

limitation of motion in plaintiffs cervical and lumbar spine, among other related injuries. Moreover, Dr. Boppana opined that "[a]ccording to [his] best judgment, if the history given by the patient is accurate, the above-mentioned accident seems to be the causative factor of the patient's symptomatology." Additionally, the plaintiff provides the affirmed report of Brian Haftel, M.D. ("Dr. Haftel"). On April 22, 2021, Dr. Haftel examined the plaintiff, wherein he found that the plaintiff had markedly restricted ranges of motion in his cervical and lumbar spine: In particular, Dr. Haftel found that ". . . Mr. Reynoso's cervical spine revealed bilateral paracervical and trapezius tenderness and spasms noted. There are multiple trigger points palpated with referred pain. There is tenderness over the lesser and greater occipital nerves. Cervical spine range of motion (measured with a goniometer) revealed cervical flexion was limited to 30 degrees (normal 60 degrees) representing a 50% deficit; extension was limited to 20 degrees (normal 50 degrees) representing a 60% deficit; and rotation was limited to 50 degrees (normal 80 degrees) representing a 37% deficit." Moreover, Dr. Haftel found that the plaintiff's ". . . lumbar spine revealed tenderness over the sacroiliac joints. Straight leg raise was positive at 50 degrees/60 degrees. There was midline tenderness at L4 and L5 and bilateral paralumbar tenderness and spasm. Lumbar range of motion, measured by goniometer revealed flexion was limited to 50 degrees (normal 90 degrees) representing a 44% deficit and extension was limited to 20 degrees (normal 30 degrees) representing a 33% deficit. Furthermore, Dr. Haftel opined that "[b]ased on the history of Mr. Reynoso's immediate complaints of neck pain and back pain, as noted, the fact that he was asymptomatic in his neck and back prior to the date of the accident, that he has suffered no subsequent injuries to his neck and back, that he continues to suffer pain, restriction and limitation of motion in his neck and back for three years following his accident, [his] clinical observations and examination, the objective medical tests such as the CT's and range of motion testing, based on a reasonable degree of medical certainty Mr. Reynoso's cervical spine injury and lumbar spine injury are directly related to the accident of May 18, 2018." Dr. Haftel further opined that "[b]ased on the above findings, which continue to cause pain, restrictions, limitation of motion and a significant limitation of use of the above body parts for three years following the subject motor vehicle accident, with a reasonable degree of medical certainty, the above injuries are permanent and the motor vehicle accident of May 18, 2018 is the competent producing cause of the injuries sustained."

In further opposition, the plaintiff provides the affirmed medical report of David R. Payne, M.D. ("Dr. Payne"), who is a Board Certified a Radiologist. Dr. Payne read and interpreted the Computed Tomography ("CT") images of plaintiff's cervical spine, lumbosacral spine and left shoulder. With respect to the plaintiff's cervical spine Dr. Payne's impressions were: 1) bulging disc at C2-3 with thecal sac indentation; 2) bulging disc at C3-4 with thecal sac indentation; and 3) bulging disc at C4-5 with thecal sac Impingement. With respect to the plaintiff's lumbosacral spine, Dr. Payne's impressions were: 1) right foraminal herniation at L1-2 impinging upon the exiting L1 root. Multifocal ligamentum flavum calcification; 2) bulging disc at L2-3 with thecal sac impingement; 3) bulging disc at L3-4 without stenosis; 4) bulging disc at L4-5 with thecal sac impingement. Mild bilateral foraminal stenosis. Facet joint hypertrophy. Left foraminal herniation component impinging upon the exiting L4 root; 5) mild right sacrolliac joint osteoarthritis. 6) incidental note is made of aortoiliac calcification. Additionally, with respect to the plaintiff's left shoulder Dr. Payne's impressions were: 1) Acromioclavicular joint osteoarthritis; and 2) patent bony supraspinatus outlet.

CONCLUSION

Here the court finds that the defendant failed to meet his prima facie burden of establishing that the plaintiff did not sustained a serious injury within the meaning of Insurance Law § 5102(d). (*see Toure v. Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v. Eyler*, 79 NY2d 955 [1992]; *Sook Houng v. Beers*, 151 AD3d 995 [2d Dept 2017]; *Nash v. MRC Recovery, Inc.*, 172 AD3d 1213 [2d Dept 2019]). The plaintiff correctly argues that neither Dr. Corso nor Dr. Berkowitz address the CT scan findings. Dr. Corso admittedly only reviewed the plaintiff's bill of particulars and the police report. (*see Che Hong Kim v. Kossoff,* 90 AD3d 969 (2d Dept 2011]; *Rouach v. Betts*, 71 AD3d 977 [2d Dept 2010]). In light of the fact that the defendant failed to establish his prima facie entitlement to judgment as a matter of law in the first instance, it is unnecessary to reach the question of whether the plaintiff's papers in opposition were sufficient to raise a triable issue of fact (*see Winegrad v. New York University Medical Center,* 64 NY2d 851 [1985]; *Che Hong Kim v. Kossoff,* 90 AD3d 969 [2d Dept 2011]). Additionally, with respect to the alleged gap in treatment, the court finds that plaintiff provided an adequate explanation by averring that the no-fault insurance ceased paying for his treatment; and he could not afford to pay out of his own funds. (*see Pommells v. Perez*, 4 NY3d 566 [2005]; *Foy v.*

Pieters, 190 AD3d 700 [2d Dept 2021]; *Encarnacion v. Castillo*, 146 AD3d 600 [1st Dept. 2017]; *Jenkins v. Livo Car Inc.*, 176 AD3d 568, 569-570 [1st Dept. 2019]).

Notwithstanding the same, the court has competent, admissible, but conflicting medical evidence and/or affirmations on the issue of serious injury, which warrant denial of the instant motion for summary judgment. (*Tinao v. City of New York*, 112 AD2d 363 [2d Dept 1985]; *Cassagnol v. Williamsburg Plaza Taxi*, 234 AD2d 208 [1st Dept 1996]). It is well settled that conflicting medical evidence on the issue of the permanency and significance of a plaintiff's injuries warrants denial of summary judgment. (*Pommells v. Perez*, 4 NY3d 566 [2005]; *Wilcoxen v. Palladino*, 122 AD3d 727 [2d Dept 2014]; *Garcia v. Long Island MTA*, 2 AD3d 675 [2d Dept 2013]; *Noble v. Mathew*, 252 AD2d 392 [1st Dept 1998]).

Accordingly, it is hereby

ORDERED that the defendant's motion for summary judgment, pursuant to CPLR § 3212, is denied in its entirety; and it is further,

ORDERED that plaintiff shall serve a copy of this decision and order with notice of entry upon the defendant and the clerk of this court on or before February 15, 2022.

The foregoing constitutes the decision and order of the court.

Dated: January 10, 2022
Long Island City, New York

FILED
1/14/2022
COUNTY CLERK
QUEENS COUNTY

Maurice E. Muir

MAURICE E. MUIR, J.S.C.