Alim v Afzal
2022 NY Slip Op 32509(U)
January 24, 2022
Supreme Court, Queens County
Docket Number: Index No. 718036/19
Judge: Janice A. Taylor

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part 15
Justice

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MD ALIM,

Plaintiff(s),

- against -

MOHAMAD AFZAL and CCC LIMOUSINE SERVICE, INC.,

Defendant(s).

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Index No.: 718036/19

Motion Date: 11/9/21

Motion Cal. No.: 6

Motion Seq. No.: 1

The following papers numbered 1 - 10 read on this motion by defendant, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

	PAPERS NUMBERED
Notice of Motion-Affirmation-Exhibits-Service.....	1 - 4
Affirmation in Opposition-Exhibits-Service.....	5 - 7

Upon the foregoing papers, it is **ORDERED** that the above-referenced motion is decided as follows:

This personal injury action arises from a December 12, 2016 automobile collision that occurred at or near the intersection of 94th Street and 23rd Avenue, County of Queens, City and State of New York. According to the bill of particulars ("BP"), plaintiff sustained injuries to, *inter alia*, his head (including a concussion), and to the lumbar region of the spine, including herniated and bulging discs. He was allegedly confined to his home for approximately three weeks, during which he was unable to continue working as a taxi driver. Plaintiff claims to have sustained the following "serious injuries," as set forth in the Insurance Law:

> "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 happening of this occurrence."

Defendants now move for summary judgment dismissing the complaint. Summary judgment is a drastic remedy that will be granted only if the movant has demonstrated, through submission of evidence in admissible form, the absence of material issues of fact (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]), and has affirmatively established the merit of their cause of action or defense (*see Zuckerman v New York*, 49 NY2d 557, 562 [1980]). Failure to make a *prima facie* showing of entitlement to judgment as a matter of law "requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Upon such a showing, the burden shifts to the non-movant to raise a material issue of fact requiring a trial (*see id*). Courts must view the evidence in the light most favorable to the non-movant (*see Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]), drawing all reasonable inferences in their favor (*see Haymon v Pettit*, 9 NY3d 324, 327, n* [2007]).

Defendants argue that plaintiff's alleged injuries do not meet the threshold for maintaining a personal injury action under the "No-Fault Law," which "bars recovery in automobile accident cases for 'non-economic loss' (e.g., pain and suffering) unless the plaintiff has a 'serious injury' as defined in the statute" (*Perl v Meher*, 18 NY3d 208, 215 [2011]; *see* Ins Law § 5104[a]), and the injury is "causally related to the accident" (*Elshaarawy v U-Haul Co. of Mississippi*, 72 AD3d 878, 881 [2d Dept 2010]). This "require[s] objective proof of a plaintiff's injury," as "subjective complaints alone are not sufficient" (*Toure v Avis Rent a Car Sys.*, 98 NY2d 345, 350 [2002]). As the proponents of summary judgment, defendants bear the "prima facie burden of showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the accident" (*Luque v Flovictov Cab Corp.*, 168 AD3d 922, 923 [2d Dept 2019]).

The court finds that defendants did not satisfy their *prima facie* burden. It is well-settled that a defendant cannot obtain summary judgment on the threshold injury issue when his or her own expert submits evidence of a plaintiff's limitations allegedly caused by the subject accident (*see e.g. Katanov v County of Nassau*, 91 AD3d 723, 724 [2d Dept 2012]; *Black v County of Dutchess*, 87 AD3d 1097, 1099 [2d Dept 2011]). In support of the motion, defendants submit, *inter alia*, the BP, plaintiff's certified deposition transcript, as well as the affirmed reports of orthopaedic surgeon Howard Katz, M.D., and neurologist Audrey Eisenstadt, M.D., DABR. Dr. Eisenstadt reviewed MRI images taken of plaintiff's lumbar spine on February 12, 2017, and largely opined that they showed evidence of disc bulging, degeneration, and

desiccation, all of which were degenerative in origin, and, thus, constituted pre-existing conditions. However, Dr. Eisenstadt also indicated that the MRI showed a left annular lateral tear superimposed over the bulging discs at the L4-5 level, stating that this "can be seen up to twelve months, so its association with the incident of 12/12/16 is uncertain." This evidence proffered by defendants' own expert raises a triable issue of fact as to whether the December 12, 2016 accident caused or contributed to this particular condition shown on the MRI taken just two months later.

Defendants also argue that plaintiff's injuries do not qualify as "serious" under the No-Fault Law because their orthopaedic expert, Dr. Katz, performed an independent medical examination ("IME") on March 31, 2021, after which he concluded, *inter alia*, that the sprain/strain of the lumbar spine had resolved, there was no evidence of permanency or a disability, and that plaintiff "is able to seek gainful employment without limitations" and "perform normal activities of daily living without limitations." However, Dr. Katz also measured the ranges of motion in plaintiff's lumbar spine, and recorded limitations with respect to extension, right lateral bending, and left lateral bending. Defendants, thus, failed to affirmatively establish that plaintiff did not sustain a permanent injury, where their own expert provided objective evidence tending to show limitations existing more than four years after the subject accident. In any event, Dr. Katz's seemingly contrary conclusion would not necessarily foreclose applicability of the significant limitation of use category, which does not require a finding of permanency (*see Estrella v GEICO Ins. Co.*, 102 AD3d 730, 731-732 [2d Dept 2013]; *Decker v Rassaert*, 131 AD2d 626, 627 [2d Dept 1987]). To this point, Dr. Katz examined plaintiff just once, and did not opine as to whether plaintiff had experienced any significant limitation of use during the several years preceding the IME. Moreover, Dr. Katz acknowledged that he did not review any of plaintiff's medical records, but only reviewed the BP.

It is well-settled that the statutory threshold categories are read in the disjunctive, and so, the failing to qualify under one category "does not necessarily preclude a recovery for the same alleged injuries under another category" (*see Damas v Valdes*, 84 AD3d 87, 92 [2d Dept 2011]). Rather, a plaintiff need only establish one qualifying injury, after which he or she is "entitled to seek recovery for all injuries [] allegedly incurred as a result of the accident" (*Swed v Pena*, 65 AD3d 1033, 1034 [2d Dept 2009]; *see also Linton v Nawaz*, 14 NY3d 821, 822 [2010]). As such, defendants' failure to affirmatively establish that plaintiff's injuries do not qualify under the "permanent consequential limitation of use" or "significant limitation of use" categories, renders their arguments regarding the other categories academic.

It is noted that plaintiff's opposing papers failed to comply

with the requirements to: 1) include word-count certifications at the end of their supporting affirmation, affidavit, and memorandum of law; and 2) submit a statement of material facts, or respond to the movants' statement (*see* 22 NYCRR § 202.8-b; 22 NYCRR § 202.8-g). However, since defendants did not make their *prima facie* showing, their motion for summary judgment must be denied, regardless of the sufficiency of plaintiff's opposition (*see Alvarez*, 68 NY2d at 324; *Penoro v Firshing*, 70 AD3d 659, 660 [2d Dept 2010]; *Powell v Prego*, 59 AD3d 417, 419 [2d Dept 2009]).

Accordingly, the above-referenced motion by defendant for summary judgment dismissing the complaint is **DENIED.**

The foregoing shall constitute the decision and order of this court.

Dated: January 24, 2022

JANICE A. TAYLOR, J.S.C.

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