

Portorreal v Ali

2022 NY Slip Op 33920(U)

November 14, 2022

Supreme Court, Kings County

Docket Number: Index No. 500454/2018

Judge: Carl J. Landicino

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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 14th day of November 2022.

PRESENT:

CARL J. LANDICINO, J.S.C.

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GERSON PORTORREAL,

Index No.: 500454/2018

Plaintiff,

DECISION AND ORDER

- against -

Motion Sequence #4

ADNAN ALI, WILCOX B. ALEXANDER

Defendants.

-----X

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers Numbered (NYSCEF)

Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed.....	58-68,
Opposing Affidavits (Affirmations).....	70-80,
Reply Affidavits (Affirmations).....	82

After a review of the papers and oral argument the Court finds as follows:

The Defendant Wilcox B. Alexander (the “Defendant Alexander”) now moves (motion sequence #3) to dismiss the complaint on the grounds that the Plaintiff fails to meet the serious injury threshold as defined by New York State Insurance Law 5102(d). The purported injuries were allegedly a consequence of a motor vehicle accident on January 15, 2015, at the intersection of Washington Avenue and Lincoln Place in Brooklyn, New York. Pursuant to the Plaintiff’s Bill of Particulars, the Plaintiff sustained injuries to, *inter alia*, his right knee and lumbar spine. The Plaintiff opposes the motion, arguing that Defendant Alexander has failed to meet his *prima facie* burden and that in any event the Plaintiff has raised material issues of fact as to the severity of Plaintiff’s injuries.

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it “should only be employed when there is no doubt as to the absence of triable issues of material fact.” *Kolivas v. Kirchoff*, 14 AD3d 493, 787 N.Y.S.2d 392 [2d Dept 2005], citing *Andre v. Pomeroy*, 35 NY2d 361, 364, 362 N.Y.S.2d 1341 [1974]. The proponent for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74, 778 N.Y.S.2d 98 [2d Dept 2004], citing *Alvarez v. Prospect Hospital*, 68 NY2d 320, 324, 508 N.Y.S.2d 923 [1986], *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 N.Y.S.2d 316 [1985]. “In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inference must be resolved in favor of the nonmoving party.” *Adams v. Bruno*, 124 AD3d 566, 1 N.Y.S.3d 280, 281 [2d Dept 2015] citing *Valentin v. Parisio*, 119 AD3d 854, 989 N.Y.S.2d 621 [2d Dept 2014]; *Escobar v. Velez*, 116 AD3d 735, 983 N.Y.S.2d 612 [2d Dept 2014].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493, 538 N.Y.S.2d 837 [2d Dept 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; *see Menzel v. Plotnick*, 202 AD2d 558, 610 N.Y.S.2d 50 [2d Dept 1994].

In support of Defendant Alexander’s motion the Defendant proffers affirmed medical reports from Howard Katz, M.D. (Orthopedist) and Lourdes P. Esteban, M.D. (Neurologist). Dr.

Katz purportedly examined the Plaintiff on February 2, 2021, more than six years after the accident. Dr. Katz conducted range of motion testing, with the use of a goniometer, in relation to the Plaintiff's lumbar spine and right knee. Dr. Katz found right knee limitation of motion and mild quad atrophy. However, Dr. Katz does not opine on causation and did not review Plaintiff's MRIs. (Defendant's Motion, Exhibit G, Report of Dr. Katz). Dr. Esteban also purportedly examined the Plaintiff on February 2, 2021, more than six years after the accident. Dr. Esteban conducted range of motion testing and a neurological examination. However, Dr. Esteban does not discuss the purported injury to Plaintiff's right knee. Dr. Esteban also did not review Plaintiff's MRIs.

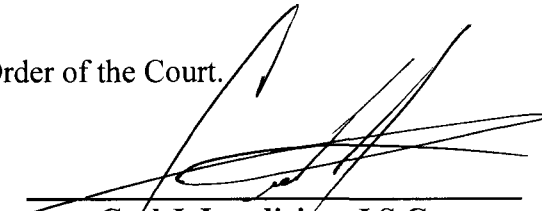
Defendant Alexander has failed to establish his *prima face* burden. Additionally, the Plaintiff, in his Bill of Particulars, claims that he sustained a medically determined injury or impairment of a nonpermanent nature which prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident. The verified Bill of Particulars states that "[t]he plaintiff has been confined primarily to home and spent inordinate periods of time in bed and home for five months from the date of the occurrence, and will be further confined in the future." Defendant Alexander also fails to address the Plaintiff's 90/180 claim. In light of this determination, "it is not necessary to consider whether the plaintiff's papers submitted in opposition to the defendants' motion were sufficient to raise a triable issue of fact" *Faun Thai v. Butt*, 34 AD3d 447, 924 N.Y.S.2d 131 [2d Dept 2006]; see *DeVille v. Barry*, 41 AD3d 763, 839 N.Y.S.2d 216 [2d Dept 2007]; *Perl v. Meher*, 18 NY3d 208, 936 N.Y.S.2d 655 [2011]. Accordingly, the Defendant Alexander has failed to establish that the Plaintiff did not suffer a serious injury, as such term is defined by Insurance Law 5102(d), as a result of the accident.

Based on the foregoing, it is hereby ORDERED as follows:

The motion by Defendant Alexander (motion sequence #4) is denied.

This constitutes the Decision and Order of the Court.

ENTER:



Carl J. Landicino, J.S.C.

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