Rahman v Asare
2022 NY Slip Op 35058(U)
December 20, 2022
Supreme Court, Bronx County
Docket Number: Index No. 42357/2019E
Judge: Bianka Perez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 14

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SYED AMADUR RAHMAN,

Plaintiff,

-against-

GEORGE LOVELL ASARE, FRANK BOAHEN and JOSE O. SANDOVAL,

Defendants.

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Index №. 42357/2019E

Hon. BIANKA PEREZ
Justice Supreme Court

The following papers were read on these motions (**Seq. No. #3**) for **SUMMARY JUDGMENT** submitted on June 24, 2022**.**

Notice of Motions – Affirmation in Support – Memorandum of Law-Exhibits Annexed	No(s). 69-75
Affirmation in Opposition and Exhibits	No(s). 91-97
Replying Affidavit and Exhibits	No(s). NA

Upon the foregoing papers, defendant Jose O. Sandoval (Sandoval) moves for summary judgment, dismissing plaintiff's Complaint for his alleged failure to satisfy the "serious injury" threshold as defined by New York Insurance Law §5102(d), and directing the Clerk of the Court to enter Judgment in his favor. Plaintiff opposes.

When a defendant seeks summary judgment alleging that a plaintiff does not meet the "serious injury" threshold required to maintain a lawsuit, the burden is on the defendant to establish through competent evidence that the plaintiff has no cause of action (*Franchini v. Palmeri*, 1 N.Y.3d 536 [2003]). "Such evidence includes 'affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim'" (*Spencer v. Golden Eagle, Inc.*, 82 A.D.3d 589, 590 [1st Dept. 2011] [internal quotations omitted]). A defendant may also meet his or her summary judgment burden with sufficient medical evidence demonstrating that the plaintiff's injuries are not causally related to the accident (*see Farrington v. Go On Time Car Service*, 76 A.D.3d 818 [1st Dept. 2010], citing *Pommels v.*

Perez, 4 N.Y.3d 566, 572 [2005]). Once this initial threshold is met, the burden shifts to the plaintiff to raise a material issue of fact using objective, admissible medical proof (*see Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d 345, 350 [2002]).

In this case, defendant Sandoval established that plaintiff's alleged injuries were not permanent or significant in nature, and that plaintiff's cervical and lumbar spine injuries were degenerative in nature. Defendant Sandoval accomplished this by submitting a report by Orthopedic surgeon Thomas Nipper, M.D., who found normal ranges of motion in the allegedly injured body parts, and all diagnostic testing were either normal or negative. Dr. Nipper further found the plaintiff has no disability (*Riollano v. Leavey*, 173 A.D.3d 494, 495 [1st Dept. 2019]). In addition, defendant Sandoval also submitted a report by neurologist Warren E. Cohen M.D., who found no objective clinical evidence of radiculopathy or any impairment of neurologic function and found normal ranges of motion in the allegedly injured body parts. Moreover, defendant annexed a report by radiologist Jeffrey Warhit, M.D., who found degenerative changes throughout the plaintiff's cervical and lumbar spine and opined that the alleged disc herniations at the C2-C5 and L2-L3 levels, and the disc bulging at C5-C7 and L1-L2 levels appeared to be degenerative (*Franklin v. Gareyua*, 136 A.D.3d 464 [1st Dept. 2016]).

In opposition to the motion, plaintiff raised a triable issue of fact as to whether he sustained a "permanent consequential" or "significant" limitation of use of his lumbar and cervical spine. Plaintiff submitted an affirmation by Dr. Tamer Elbaz, M.D., and by Magda Fahmy, M.D., who found significant limitations of motions in plaintiff's lumbar and cervical spine. Moreover, contrary to Dr. Warhit's findings of degeneration, Dr. Elbaz found no signs of degeneration, and opined within a reasonable degree of medical certainty, that plaintiff's C3-C4 and C4-C5 central disc herniations were traumatically and causally related to the subject accident. Thus, Dr. Elbaz' affirmation sufficiently addresses the defendant's expert's opinion as to the existence of pre-existing degenerative conditions in the plaintiff's cervical and lumbar spine. Lastly, Dr. Elbaz opined with a reasonable degree of medical certainty, that based on the MRI findings and his own clinical examinations, plaintiff suffers from partial permanent injuries to his cervical and lumbar spine, and that these injuries are causally related to subject motor vehicle accident. (See, *Linton v. Nawaz*, 62 A.D.3d 434 at 439 (holding that plaintiff raised an issue of fact regarding causation as

the doctor concluded that plaintiff's symptoms were related to the accident based on a full physical examination of plaintiff)). See also *Ramkumar v. Grand Style Trans. Enter*, 22 N.Y.3d 905, 976 N.Y.S.2d 1 (2013).

Accordingly, the above submissions are sufficient to raise factual issues as to whether plaintiff sustained a "permanent consequential" or "significant" limitation of use of his cervical and lumbar spine, (*Encarnacion v. Castillo*, 146 A.D.3d 600, 601 [1st Dept. 2017]). Since plaintiff has established a serious injury to one or more body parts, he may recover for all injuries causally related to the accident (see, e.g, *Bonilla v. Vargas-Nunez*, 147 A.D.3d 461, 462 [1st Dept. 2017]).

As to defendants' branch of the motion, arguing that the proof rules out a serious injury based on the 90/180-day claim, the Court finds that defendant Sandoval has established his entitlement to summary judgment as to the 90/180-day claim by submitting the report of his experts, which found plaintiff's injuries were all resolved and found no disability. In opposition, plaintiff failed to raise a triable issue of fact as to his entitlement to summary judgment as to the 90/180-day claim. At his deposition, plaintiff testified that he was confined to home and to bed for three months immediately following the accident, and that he did not work during those three months. However, the record does not contain objective medical evidence to substantiate these claims and, claims of inability to work alone are insufficient to demonstrate a 90/180-day injury without objective support in the record (*Abreu v. Miller*,181 A.D.3d 435 [1st Dept 2020]; *Tarjavaara v. Considine*, 188 A.D.3d 509 [1st Dept. 2020]).

Finally, there is no evidence on this record that plaintiff sustained a "permanent loss of use" of any body part - which requires a "total" loss of use (*Swift v. New York City Transit Authority*, 115 A.D.3d 507, 509 [1st Dept. 2014]).

The Court finds the parties remaining arguments unavailing.

Accordingly, it is hereby

ORDERED, that defendant Sandoval's motion for summary judgment is granted only to the extent of dismissing plaintiff's claims as to the "permanent loss of use" claim and the "90/180" claim, and it is further,

ORDERED that defendant Sandoval's motion for summary judgment is otherwise denied.

This constitutes the Decision and Order of this Court.

Dated: December 20, 2022 **Hon._____**
BIANKA PEREZ, J.S.C.

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1. CHECK ONE..... ☐ CASE DISPOSED IN ITS ENTIRETY ☐ CASE STILL ACTIVE
2. MOTION IS..... ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE..... ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE
   ☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT