

Mangasaryan v Palomino

2023 NY Slip Op 30727(U)

March 10, 2023

Supreme Court, New York County

Docket Number: Index No. 153314/2020

Judge: James G. Clynes

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. JAMES G. CLYNES PART 22M

Justice

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ARTUR MANGASARYAN,

Plaintiff,

- v -

DONALD PALOMINO, NAVJOT SINGH, UPPER LEFT
GLOBAL INC.

Defendant.

-----X

INDEX NO. 153314/2020

MOTION DATE 08/03/2022

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 81, 82, 83

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, the motion by Defendants Navjot Singh and Upper Left Global, Inc. to dismiss Plaintiff's complaint in its entirety on the grounds that the injuries claimed by Plaintiff Arthur Mangasaryan fail to satisfy the serious injury threshold under Insurance Law 5102 (d) and the cross-motion by Plaintiff for summary judgment on the issue that the injuries asserted meet the serious injury threshold requirement are decided as follows:

Plaintiff seeks recovery for injuries allegedly sustained as a result of a June 12, 2017 motor vehicle accident between a vehicle operated by Palomino, within which Plaintiff was a passenger, and a vehicle operated by Singh and owned by Upper Left. Plaintiff's Bill of Particulars alleges injuries to his cervical spine, which resulted in six injections on December 1, 2017, April 4, 2018, September 13, 2018, December 5, 2018, March 21, 2018, and April 4, 2019; lumbar spine, which resulted in two injections on August 1, 2018 and May 1, 2019; left and right TMJ; and left shoulder exacerbation of a tear that resulted in an injection and an arthroscopic surgical repair.

Movant bears the initial burden to establish that the plaintiff has not sustained a serious injury (*Lowe v Bennett*, 122 AD2d 728 [1st Dept 1986]). When the movant has made such a showing, the burden shifts to the plaintiff to produce prima facie evidence to support the claim of serious injury (*see Lopez v Senatore*, 65 NY2d 1017 [1985]). In instances where a defendant asserts that the evidence reveals a preexisting injury or a degenerative condition, the plaintiff must present evidence to the contrary (*Brewster v FTM Servo, Corp.*, 44 AD3d 351 [1st Dept 2007]).

Defendants have established prima facie entitlement to summary judgment. Defendants rely on the affirmed report of Dr. Arnold Berman, orthopedist, and Plaintiff's examination before trial (EBT) testimony.

Dr. Berman examined Plaintiff on April 21, 2022 and reviewed relevant medical records and reports including MRIs of the cervical spine, lumbar spine, left and right Temporomandibular Joint, and left shoulder. Dr. Berman measured Plaintiff's range of motion with a goniometer pursuant to AMA Guidelines and found normal range of motion as to Plaintiff's cervical spine, lumbar spine, and right and left shoulders, with negative and normal objective tests. Dr. Berman concluded that the alleged lumbar/thoracic spine strain/sprain was resolved with no residuals, the alleged cervical spine strain/sprain was resolved with no residuals, the left shoulder strain/sprain was resolved with no residuals, and the temporomandibular joint right and left subluxation was resolved clinically with no residuals. Dr. Berman noted that the left shoulder MRI shows a SLAP lesion and tendinitis that were preexisting and caused by degenerative subacromial spur, and his examination showed full strength of the left shoulder with no residuals. As to the cervical and lumbar spine MRIs, Dr. Berman determined that the spinal injections were administered for the degenerative findings of age-related, multilevel, preexisting degenerative disc disease, osteoarthritis, discogenic disease, disc herniation, bulging discs, and annular tear, and not any

injury. Dr. Berman does not directly dispute the findings in the MRI reports reviewed, but he concludes that there is no clinical correlation with the normal physical exam with no objective findings, no reflex changes, no atrophy indicating normal function, no sensory or motor loss, no radiculopathy of the cervical and lumbar spine, and no loss of bodily function.

Defendants have also met their burden as to the 90/180 category of Insurance Law 5102 (d). Defendants submit Plaintiff's deposition, in which he testified that as a result of the subject accident he missed time from work as a driver for Uber and Lyft but could not remember exactly how many days. He further testified that he is left-handed and is unable to complete daily activities without pain. Plaintiff's subjective complaints of pain and limitation, without more, do not rise to the level of a "serious injury" within this category of Insurance Law 5102 (d).

Defendants have met their initial burden of establishing that Plaintiff did not sustain serious injuries as a result of the accident under Insurance Law 5102 (d) (*Perez v Rodriguez*, 25 AD3d 506 [1st Dept 2006]).

In opposition to Defendants' motion and in support of his cross-motion, Plaintiff relies on the notarized affidavit of his treating chiropractor, Dr. Karl Nixdorf, pursuant to CPLR 2106, pages from unaffirmed hospital records, MRIs and MRI reports from Affinity Radiology and Paramus MRI, the chiropractic treatment records of Dr. Karl W. Nixdorf, the unaffirmed treatment records and surgical notes of Dr. Nasar Shahid from Surgery Center of Oradell, the certified treatment records from Allied Neurology & Intervention Pain Practice, PC¹, and Plaintiff's affidavit.

It is well-settled that unaffirmed reports and uncertified medical records are without probative value in opposing a summary judgment motion, the New York Court of Appeals found that a sworn medical opinion that relies on unsworn MRI reports constitutes competent evidence

¹ The Court notes that the certification for the reports and records from Allied Neurology was attached to NYSCEF Doc No 76 – the chiropractic treatment records from Dr. Karl W. Nixdorf.

(*Grasso v Angerami*, 79 NY2d 813 [1991]; *Pommells v Perez*, 4 NY3d 566 [2005]). Accordingly, the Court will not consider the unsworn treatment records. As the MRI reports were relied upon by Defendant's Dr. Berman, the Court will consider them in its determination. However, with regard to the affidavit of Dr. Karl Nixdorf and the certified records from Allied Neurology, although they were each submitted in proper form, they were both substantively deficient in that they fail to specify range of motion measurements, or objective tests used to determine that the subject accident caused an exacerbation of Plaintiff's injuries (*Perl v Meher*, 18 NY3d 208 [2011]). Dr. Nixdorf relies only on Plaintiff's MRIs to conclude that there is a new disc injury as a result of the subject accident and that the subject accident exacerbated Plaintiff's old injuries. And the Allied Neurology records indicate decreased range of motion without noting how the doctors measured Plaintiff's range of motion and without providing a baseline norm to compare the ranges, eroding the reliability of the assessments, "leaving the court to speculate" as to their ultimate meaning (*Bray v Rosas*, 29 AD3d 422 [1st Dept 2006]).

The MRI reports fail to raise a triable issue of fact. While the MRI report found disc bulges and herniations, it did not address causation (*Paduani v Rodriguez*, 101 AD3d 470 [1st Dept 2012]). The existence of a tear in a shoulder ligament, bulging, or herniated discs taken alone are not evidence of serious injury without object proof as to the extent of the alleged physical limitation (*Williams v Horman*, 95 AD3d 650 [1st Dept 2012]). Plaintiff fails to offer objective medical proof showing a significant impairment of a body function caused by his injuries, or that the alleged tear, bulges, and herniations were objectively caused or exacerbated by the subject accident.

Plaintiff's submission with respect to his restrictions do not raise a triable issue of fact regarding the 90/180 category since they are based on Plaintiff's subjective complaints of pain

absent medical proof (*Arenas v Guaman*, 98 AD3d 461 [1st Dept 2012]). Therefore, Defendants' motion is granted. Accordingly, it is

ORDERED that the motion by Defendants Navjot Singh and Upper Left Global, Inc. for summary judgment and dismissal of the Complaint on the grounds Plaintiff's alleged injuries fail to satisfy the serious injury threshold under Insurance Law 5102 (d) is GRANTED and the Complaint is dismissed and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the Complaint is dismissed in its entirety; and it is further

ORDERED that Plaintiff's cross-motion for summary judgment on the grounds that the injuries asserted meet the serious injury threshold requirement thus allowing for Plaintiff's claim for non-economic loss under Insurance Law 5101 (a) is DENIED;

ORDERED that any requested relief not specifically addressed herein has nonetheless been considered; and it is further

ORDERED that within 30 days of entry, Defendants shall serve a copy of this Decision and Order with Notice of Entry upon Plaintiff.

This constitutes the Decision and Order of the Court.

3/10/2023
DATE


JAMES G. CLYNES, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
				<input type="checkbox"/> REFERENCE