

Morales-Rivera v Uddin Taxi Corp.

2023 NY Slip Op 34802(U)

January 6, 2023

Supreme Court, Kings County

Docket Number: Index No. 517192/2018

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 6th day of January 2023.

PRESENT:

CARL J. LANDICINO, J.S.C.

-----X
ALFREDO MORALES-RIVERA,

Index No.: 517192/2018

Plaintiff,

-against-

DECISION AND ORDER

UDDIN TAXI CORP. and SHAH T. ISLAM,

Motions Sequence #2

Defendant.

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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.....	26-36,
Opposing Affidavits (Affirmations).....	48-53,
Reply Affidavits (Affirmations).....	55

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

This action concerns a motor vehicle accident that occurred on April 5, 2016. The Plaintiff, Alfredo Morales-Rivera (hereinafter the "Plaintiff"), claims that he was injured when the bicycle he was operating was involved in a collision with a vehicle owned by Defendant Uddin Taxi Corp and operated by Defendant Shah T. Islam (hereinafter referred to as the "Uddin Defendants"). The Plaintiff alleges that the collision occurred on 309 West 23rd Street at or near its intersection with 8th Avenue, New York, N.Y. The Plaintiff claims, in his Verified Bill of Particulars, that he sustained a number of serious injuries including, *inter alia*, injuries to his cervical (sprain/strain) and lumbar (bulging discs) spines. The Plaintiff also alleges that he sustained a disabling injury for a period in excess of 90 out of the first 180 days following this occurrence ("90/180" claim).

The Defendants now move (motion sequence #2) for an order pursuant to CPLR 3212, granting summary judgment and dismissing the complaint on the grounds that none of the injuries allegedly sustained by the Plaintiff meets the “serious injury” threshold requirement of Insurance Law § 5102(d). In support of this application, the Defendants rely on the deposition of the Plaintiff and the reports of Dr. Pierce J. Ferriter and Dr. Scott A. Springer.

The Plaintiff opposes the motion. The Plaintiff contends that the Defendant has failed to meet his *prima facie* burden. The Plaintiff also contends that she has submitted sufficient proof to create a material issue of fact that should prevent the Court from granting summary judgment. The Plaintiff relies primarily on the report of Dr. Steven B. Losik, Dr. Hank Ross and Dr. Abraham Yvette.

It has long been established that “[s]ummary 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 [2d Dept 2005], citing *Andre v. Pomeroy*, 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The party seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. See *Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2d Dept 2004], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

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 [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, 558–559, 610 N.Y.S.2d 50 [2d Dept 1994].

In support of the Defendants’ motion, the Defendants proffer the affirmed medical reports of Dr. Pierce J. Ferriter and Dr. Scott A. Springer. Dr. Ferriter, a board certified orthopedic surgeon, examined the Plaintiff on December 28, 2020, more than four years and eight months after the date of the Plaintiff’s accident. Dr. Ferriter conducted range of motion testing of the Plaintiff’s cervical spine, lumbar spine, right wrist and right hand, with the use of a goniometer, and found no limitation in the Plaintiff’s range of motion in relation to these areas. Dr. Ferriter stated that “[t]here is no evidence of an orthopedic disability, permanency or residuals.” Dr. Ferriter also stated that “Mr. Alfredo Morales-Rivera can perform his activities of daily living as he was doing prior to the accident.” (See Defendants’ Motion, Report of Dr. Ferriter, Exhibit “E”).

Dr. Springer, a neurologist, did not examine the Plaintiff but reviewed the MRIs of the Plaintiff’s lumbar spine. The lumbar spine MRI was performed on June 7, 2016, about two months after the Plaintiff’s accident. As to the lumbar spine, Dr. Springer stated that “[t]here is no fracture, subluxation or paravertebral soft tissue swelling.” Dr. Springer also stated that “[d]isc bulging has no traumatic basis.” Dr. Springer stated that “[i]t is degenerative in origin, related to ligamentous laxity and weakening of the outer ligamentous fibers.” Dr. Springer opined that “[t]he most common cause for disc herniations is degenerative disc disease and, given the associated degenerative changes and the lack of increased signal in the annular ligament, the disc herniations seen are chronic in nature.” Dr. Springer also stated that there were “[n]o post traumatic changes causally related to the 4/5/16 incident.” (See Defendants’ Motion, Report of Dr. Springer, Exhibit F).

Generally, where the Bill of Particulars contains conclusory allegations of a 90/180 claim, and the deposition or affidavit of the Plaintiff does not support, or reflects that there is no such claim, Defendant

movant may utilize those factors in support of its motion for summary judgment on that category (*see Master v. Boiakhtchion*, 122 AD3d 589, 590, 996 N.Y.S.2d 116, 117 [2d Dept 2014]; *Kuperberg v. Montalbano*, 72 AD3d 903, 904, 899 N.Y.S.2d 344, 345 [2d Dept 2010]; *Camacho v. Dwelle*, 54 AD3d 706, 863 N.Y.S.2d 754 [2d Dept 2008]). In this case, the Verified Bill of Particulars indicates that the Plaintiff was confined “to bed and to home for a period of approximately 1 week to date, except for necessary and essential excursion for required purpose.” (See Defendant’s Motion, Bill of Particulars, Exhibit B, Paragraph 12). At his deposition, when asked when he returned to work after this accident, the Plaintiff stated “I returned to work about a month or two months later, I went back to a new job.” (See Defendants’ Motion, Plaintiff’s Deposition, Exhibit D, 15).

Assuming the Defendants have made a *prima facie* showing, it becomes incumbent upon the Plaintiff to establish that there are triable issues of fact as to whether the Plaintiff suffered serious injuries, as defined by statute, in order to avoid the dismissal of Plaintiff’s action (*see Jackson v United Parcel Serv.*, 204 AD2d 605 [2d Dept 1994]; *Bryan v Brancato*, 213 AD2d 577 [2d Dept 1995]). In this regard, the Plaintiff must submit quantitative objective findings, in addition to opinions as to the significance of the Plaintiff’s injuries (*see Oberly v. Bangs Ambulance, Inc.*, 96 NY2d 295 [2001]; *Candia v. Omonia Cab Corp.*, 6 AD3d 641, 642, 775 N.Y.S.2d 546, 547 [2d Dept 2004]; *Burnett v Miller*, 255 AD2d 541 [2d Dept 1998]; *Beckett v Conte*, 176 AD2d 774 [2d Dept 1991]).

Dr. Stephen B. Losik did not examine the Plaintiff but reviewed the MRI of the Plaintiff’s lumbar spine. As stated, the lumbar spine MRI was performed on June 7, 2016, about two months after the Plaintiff’s accident. As to the lumbar spine, Dr. Losik stated that “[t]here are no significant paravertebral soft-tissue abnormalities.” At L2-3, L3-4 and L4-5 Dr. Losik found that “[t]here is diffuse disc bulge with impingement on the on the neural foramina.” (See Plaintiff’s Affirmation in Opposition, Exhibit “B”, Report of Dr. Losik).

Dr. Hank Ross performed a physical examination of the Plaintiff by video conference on February 8, 2022, more than five years and ten months after the Plaintiff's accident. On that date, Dr. Ross detailed his findings based upon his review of Plaintiff's medical records, his personal observations and range of motion testing. Dr. Ross found "[w]rist range of motion, dorsiflexion 60/80, volar flexion 60/80." Dr. Ross also found "[r]ing metacarpophalangeal joint, extension 0/0, flexion 80/90." As to the lumbar spine, Dr. Ross found "[r]ange of motion extension 10/30 flexion 50/80." Dr. Ross opined that the Plaintiff "suffered injuries to the soft tissues that support his lumbar spines, including the intervertebral discs, and that this is responsible for his persistent pain, weakness and loss of function." Dr. Ross also opined that "I have explained that these conditions are permanent in nature, and that he is likely to continue to suffer these symptoms, as well as suffer exacerbations of variable intensity and severity." Dr. Ross also stated that his findings were a result of the accident. As part of an addendum to the report, Dr. Ross reviewed the MRI of the Plaintiff's lumbar spine and stated "I disagree with the findings of Dr. Springer that the positive findings within Mr. Morales-Rivera's lumbar spines are due to degeneration." Dr. Ross opined that "the injuries to the lumbar spine are causally related to his motor vehicle accident of 4/5/16 and not due to a pre-existing condition or degeneration." (See Plaintiff's Affirmation in Opposition, Exhibit "C", Report of Dr. Ross).

Dr. Abraham Yvette, examined the Plaintiff on April 5, 2016, the day of the accident. Dr. Yvette conducted range of motion tests on Mr. Morales-Rivera's lumbar spine using a goniometer. Dr. Yvette found "[f]lexion - 60 (normal) 18 (average) 70% (loss), extension - 25 (normal) 13 (average) 48% (loss), left lateral - 25 (normal) 12 (average) 52% (loss), right lateral - 25 (normal) 14 (average) 44% (loss)." Dr. Yvette also stated that "[i]t is my medical opinion, to a reasonable degree of medical certainty that Mr. Morales-Rivera's injuries to his lumbar spine are causally related to his accident of April 5, 2016." (See Plaintiff's Affirmation in Opposition, Exhibit "D", Report of Dr. Yvette).

In relation to the Defendant's reply, the Plaintiff did discuss the purported gap in treatment and provided an adequate explanation for the gap in his treatment history. See *Pommells v. Perez*, 4 N.Y.3d 566, 576, 830 N.E.2d 278, 284 [2005]. An affidavit stating that a Plaintiff stopped receiving treatment because his benefits were terminated and he could not afford to continue to pay for such treatment out of pocket is an adequate explanation for the gap in his treatment history. See *Delorbe v. Perez*, 59 AD3d 491, 492, 873 N.Y.S.2d 198, 199 [2d Dept 2009]; see also *Black v. Robinson*, 305 AD2d 438, 439–40, 759 N.Y.S.2d 741, 742 [2d Dept 2003][plaintiff testified at EBT that she underwent therapy until her insurance was exhausted created sufficiently addressed gap in treatment]. Here, as part of his affidavit, the Plaintiff stated that “I stopped treating because my medical bills for the treatment I received were paid by what I have been informed are commonly referred to as “no fault” benefits.” The Plaintiff also stated that “[o]nce payment for my medical care was terminated by no-fault, I had to stop treating because I could not afford to pay for treatment out of my own pockets.” (See Plaintiff's Affirmation in Opposition, Exhibit “A”, Plaintiff's Affidavit, Paragraph 7). This is an adequate explanation for the alleged gap in treatment. See *Gutierrez v. Yonkers Contracting Co.*, 61 A.D.3d 823, 824, 877 N.Y.S.2d 226, 227 [2d Dept 2009][Plaintiff stated in affidavit that he stopped treatment because his no-fault benefits were terminated and he could not afford to pay “out of pocket”].

In addition, Dr. Ross adequately addressed the issue of degeneration raised by Dr. Springer. He referred to Dr. Springer's report, indicated the basis for his opinion and found that “the Plaintiff's injuries were caused by the subject accident, and were not caused by degenerative disease.” See also *Young Chool Yoo v. Rui Dong Wang*, 88 AD3d 991, 931 N.Y.S.2d 373 [2d Dept 2011]; *Tai Ho Kang v. Young Sun Cho*, 74 AD3d 1328, 1330, 904 N.Y.S.2d 743 [2d Dept 2010].

As a result of these examinations, particularly the examinations and reports of Dr. Losik, Dr. Ross and Dr. Yvette, the Court finds that even assuming a *prima facie* showing by Defendant, the Plaintiff has

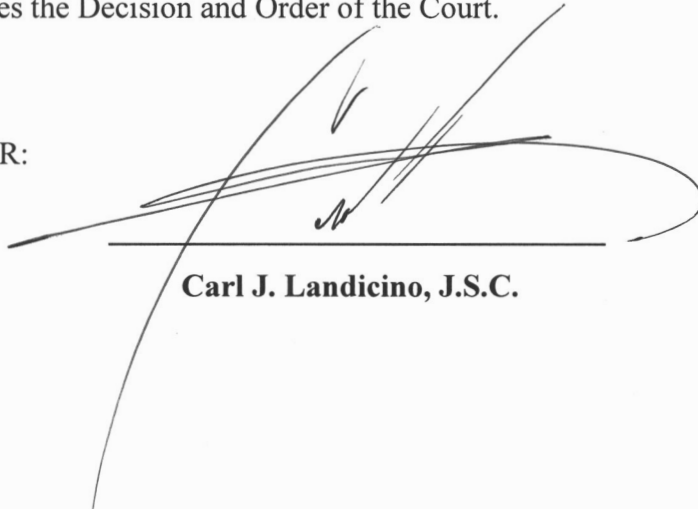
raised material issues of fact that prevent the Court from granting summary judgment to the Defendant. *See Chul Koo Jeong v. Denike*, 137 AD3d 1189, 1190, 28 N.Y.S.3d 393, 394 [2d Dept 2016]; *Casiano v. Zedan*, 66 AD3d 730, 730, 887 N.Y.S.2d 613, 614 [2d Dept 2009]. “An expert’s qualitative assessment of a plaintiff’s condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff’s limitations to the normal function, purpose and use of the affected body organ, member, function or system.” *Toure v Avis Rent A Car Systems Inc.*, 98 NY2d 345, 774 N.E.2d 1197 [2002]; *see also Mitchell v. Casa Redimix Concrete Corp.*, 83 AD3d 1015, 1015, 921 N.Y.S.2d 543 [2d Dept 2011]. As a result, the Court finds that the Plaintiff has presented sufficient evidence to raise a material issue of fact regarding whether he suffered a permanent consequential limitation of use of a body organ or member or a significant limitation of use of a body function or system as required by Insurance Law 5102.

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

The motion by the Defendants (motions sequence #2) is denied.

This constitutes the Decision and Order of the Court.

ENTER:



Carl J. Landicino, J.S.C.

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