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| <b>Montanez v Akourti</b>                                                                                                                                                                                                      |
| 2023 NY Slip Op 35167(U)                                                                                                                                                                                                       |
| June 20, 2023                                                                                                                                                                                                                  |
| Supreme Court, Queens County                                                                                                                                                                                                   |
| Docket Number: Index No. 704393/21                                                                                                                                                                                             |
| Judge: Timothy J. Dufficy                                                                                                                                                                                                      |
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## Short Form Order

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF QUEENSPRESENT: HON. TIMOTHY J. DUFFICY  
Justice

PART 35

FILED &amp; RECORDED

6/21/2023, 11:35:42 AM

COUNTY CLERK  
QUEENS COUNTY-----X  
PAUL MONTANEZ,

Plaintiffs,

—against—

Index No.: 704393/21

Motion Date: 4/25/23

Mot. Seq.: 2

EL AKOURTI and STACEY CAB CORP.,

Defendants,  
-----X

The following papers were read on the motion by defendants for an order granting summary judgment, pursuant to CPLR 3212, on the grounds that plaintiff has not sustained a “serious injury” as defined in Insurance Law 5102(d); and, plaintiff’s cross-motion for summary judgment, on the grounds that he has sustained a “serious injury” and for costs and sanctions, pursuant to CPLR 8106 and 8202.

PAPERS  
NUMBERED

|                                                 |              |
|-------------------------------------------------|--------------|
| Notice of Motion-Affidavits-Exhibits.....       | EF 33-39     |
| Notice of Cross-Motion-Affidavits-Exhibits..... | EF 42-55     |
| Answering Affidavit (to Cross-Motion).....      | EF 57        |
| Replying Affidavits.....                        | EF 59; EF 61 |

Upon the foregoing papers, the defendants’ motion for summary judgment is denied. Plaintiff’s cross-motion for summary judgment and for sanctions is denied.

This action arises from a motor vehicle accident, that occurred on September 10, 2019, at the intersection of 37<sup>th</sup> Avenue and 22<sup>nd</sup> Street. in Queens, New York. Plaintiff alleges that as he was traveling on 37<sup>th</sup> Street, his vehicle was struck by a vehicle operated by defendant El Akourtim and owned by defendant Stacey Cab Corp.

Pursuant to this Court’s Order, dated March 30, 2023, and filed on March 30, 2023 (*see* NYSCEF Doc. No. 32), plaintiff was granted summary judgment on the issue of liability. Defendants now move for summary judgment dismissing the plaintiff’s complaint on the grounds that the plaintiff has not sustained a “serious injury”. Plaintiff

cross-moves for summary judgment in his favor on the issue of “serious injury” and for costs and sanctions.

A movant for summary judgment must make prima facie showing of entitlement to summary judgment as a matter of law through the submission of sufficient evidence to demonstrate the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 322 [1986]). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Id*; *see also Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]). Once the movant has made the prima facie showing, the burden shifts to the opposing party to come forward with sufficient proof in admissible form to establish the existence of triable issue of fact (*Id*; *see also Zuckerman v City of New York*, 49 NY2d 557 [1980]).

On a motion for summary judgment of the issue of “serious injury”, the defendants’ motion papers must demonstrate, that the plaintiff did not sustain either a permanent consequential limitation of use of a body organ or member, a significant limitation of use of body function or system, or a medically determined injury or impairment of a non-permanent nature that prevented the plaintiff from performing substantially all of the material acts which constituted his or her usual customary daily activities for not less than 90 days during the 180 days immediately following the subject accident. (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955 [1992]; *Choi v Guerrero*, 82 AD3d 1080 [2d Dept. 2011]; *Jilani v Palmer*, 83 AD3d 786 [2d Dept 2011]).

The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. (*see Reed v Righton Limo, Inc.*, 82 AD3d 1070 [2d Dept. 2011]; *Joris v UMF Car & Limo Service*, 82 AD3d 1050 [2d Dept. 2011]; *Keenum v Atkins*, 82 AD3d 843 [2d Dept. 2011]; *Pero v Transservice Logistics*, 83 AD3d 681[2d Dept. 2011]).

Here, in his Verified Bill of Particulars, the plaintiff alleges that he sustained, *inter alia*, injuries to the left shoulder requiring arthroscopic surgery and injuries to the left wrist requiring arthroscopic surgery, as well as injuries to his cervical spine and lumbar spine. He also alleges that he was incapacitated from employment as a custodian for seven months following the accident.

In support of their motion, defendants submit, *inter alia*, the affirmed report of Dr. Thomas P. Nipper, who conducted an orthopedic examination of the plaintiff, on January

15, 2022. Dr. Nipper did find full range of motion in plaintiff's cervical spine, lumbar spine, left shoulder and left wrist. According to Dr. Nipper, his examination indicated that the plaintiff's injuries have fully resolved. There were no indications for further orthopedic treatment or physical therapy. He opined that the plaintiff did not sustain any significant or permanent injury as a result of the motor vehicle accident. However, in his report, Dr Nipper noted: Mr. Montanez was working in maintenance at the time of the accident. **He has not returned to work**" [emphasis added].

Accordingly, the defendants' papers fail to address the plaintiff's claim in his Verified Bill of Particulars that he sustained a serious injury under the ninety/one hundred and eighty-day category of Insurance Law § 5102(d) (*see Lara v Nelson*, 148 AD3d 1128 [2d Dept 2017]; *Che Hong Kim v Kossof*, 90 AD3d 969 [2d Dept 2011]; *Anjour v Singh*, 90AD3d 686 [2d Dept 2011]; *Rouach v Betts*, 71 AD3d 977 [2d Dept 2010]).

Under these circumstances, the Count need not consider whether the plaintiff's opposition papers are sufficient to raise a triable issue of fact (*see Held v Heideman*, 63 AD3d 1105 [2d Dept 2009]).

Plaintiff's cross-motion on the issue of "serious injury" is also denied. There are conflicting medical opinions between the physicians who treated and examined the plaintiff, and the opinion of Dr. Nipper, who examined the plaintiff on behalf of the defendants. These conflicting findings are sufficient to raise a triable issue of fact. (*see Novembre v Punnoose*, 211 AD3d 961 [2d Dept. 2022]; *Wilcoxon v Palladino*, 122 AD3d 727 [2d Dept. 2014]; *Perl v Meher*, 18 NY3d 208 [2011]).

The branch of plaintiff's cross-motion seeking costs and sanctions is also denied. In the Notice of Motion, the plaintiff refers only to CPLR 8106 and CPLR 8202, which deal with costs, not sanctions. Plaintiff does not request relief, under 22 NYCRR §130-1.1 e, which does pertain to sanctions nor is the notice of motion in proper form in it in proper form. In any event, the Court in its discretion, declines to award costs or sanctions.

Accordingly, it is

**ORDERED** that defendants' motion for summary judgment dismissing the complaint, on the grounds that the plaintiff has sustained a "serious injury" is denied; and it is further

**ORDERED** that plaintiff's cross-motion for summary judgment, on the issue of 'serious injury', and, for costs and sanctions, is denied.

The foregoing constitutes the decision and order and judgment of the Court.

**Dated: June 20, 2023**

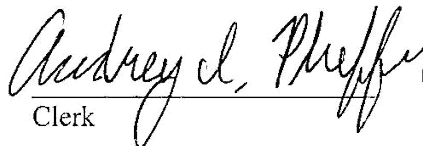


**TIMOTHY J. DUFFICY, J.S.C.**

**FILED & RECORDED**

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QUEENS COUNTY

  
Clerk