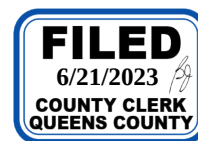


Rodriguez-Juarez v Raymours Furniture Co., Inc.
2023 NY Slip Op 35170(U)
June 21, 2023
Supreme Court, Queens County
Docket Number: Index No. 710321/20
Judge: Timothy J. Dufficy
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Short Form Order**NEW YORK SUPREME COURT - QUEENS COUNTY****PRESENT: HON. TIMOTHY J. DUFFICY**
Justice**PART 35****-----X**
EDUARDO RODRIGUEZ-JUAREZ,**Plaintiff,****Index No.: 710321/20****Mot. Date: 4/11/23****-against-****Mot. Seq. 4****RAYMOURS FURNITURE COMPANY, INC.,
DBA RAYMOUR & FLANIGAN, RAYMOUR &
FLANIGAN PROPERTIES, LLC D/B/A
RAYMOUR & FLANIGAN, AND JOHN DOE,****Defendants.**
-----X

The following papers were read on this motion by defendants for an order granting summary judgment, pursuant to CPLR 3212, and dismissing the complaint on the grounds that plaintiff has not sustained a "serious injury" as defined in Insurance Law 5102(d).

PAPERS
NUMBERED

Notice of Motion-Memo of Law-Affidavits-Exhibits	EF 83-99
Answering-Affidavits-Memo of Law-Exhibits.....	EF 100-108

Upon the foregoing papers, it is ordered that the motion by defendants is denied.

Plaintiff commenced the instant action to recover from the defendants for personal injuries he allegedly sustained, on July 17, 2017, on 108th Street, at or near its intersection with 68th Avenue, in Queens County, New York. On the date of the accident, a collision occurred between the bicycle operated by the plaintiff and the vehicle owned by defendants Raymours Furniture Company, Inc. and Flanigan Properties LLC and operated by defendant John Doe.

In his Verified Bill of Particulars, the plaintiff alleges , *inter alia*, injuries to his left knee requiring arthroscopic surgery, injuries to his right shoulder requiring arthroscopic surgery, injuries to his lumbar spine, injuries to his left wrist including a post traumatic non-displaced fracture of the trapezium, injuries to the left shoulder, as well as injuries to his cervical spine and right knee.

As a general proposition, the proponent of a summary judgment motion of this type must make a *prima facie* showing of entitlement to summary judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. (see *Licari v Elliot*, 57 NY 2d 230 [1982]; *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY 2d 557 [1980]). Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (see *Alvarez v Prospect Hospital*, supra, 68 NY2d at 322, *Winegrad v N.Y. Univ. Med. Ctr*, 64 NY2d 851, 853 [1985]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (see *Alvarez v Prospect Hospital*, supra).

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. (*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]).

Defendants' moving papers include the affirmed report of examining neurologist, Dr. Paul Lerner. Therein, Dr. Lerner noted restricted range of motion in the cervical spine. Defendants also submit the affirmed report of an orthopedist, Dr. Jeffery Dermaskian, who noted restricted range of motion in both shoulders, although he states that these are due to pre-existing degenerative conditions. Although Dr. Dermaskian opines that range of motion testing is subjective, he never opines as to what extent the positive findings were self-imposed or limited by other variables (*see Davis v Warner Insurance Company*, 2020 N.Y. Misc. LEXIS [Sup. Ct. Queens County 2020]).

In opposition, the plaintiff submits, *inter alia*, three affirmed medical reports of Dr. Albert Ciancimino, M.D., dated August 4, 2017, September 29, 2017 and November 10, 2021. Therein, Dr. Ciancimino affirms that on those occasions, he observed limited range of motion in plaintiff's cervical spine, lumbar spine and both shoulders as well as his left knee. He opines that based on MRI studies and his examinations, the plaintiff's injuries were causally related to the accident.

Plaintiff also submits the affirmation of Dr. Maxim Tyorkin, who examined the plaintiff, on December 13, 2017, and noted functional deficits in his left knee and right shoulder on that date. Dr. Tyorkin affirms that he performed surgery on plaintiff's left knee, on January 16, 2018, to repair a left knee chondral injury, and a left knee meniscal tear. Dr. Tyorkin described how, in his medical opinion, based on the MRI of the left knee, on September 12, 2017, the injuries to the plaintiff's left knee were traumatic in origin and related to the accident of July 21, 2017 and not pre-existing or degenerative.

In regards to the right shoulder, Dr. Tyorkin affirmed that he reviewed the MRI films, from 2017 and 2020, and that a tear was observed on both the 2017 and 2020 films. He states that he performed surgery, in February, 2021, to repair a tear in the plaintiff's right supraspinatus tendon, and he affirms that this tear was caused by the accident of July 21, 2017.

Finally, Dr. Tyorkin affirms that he examined the plaintiff, on January 11, 2023, and noted that the plaintiff still had restricted range of motion in the right shoulder.

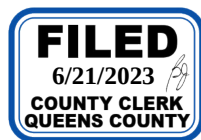
Therefore, assuming *arguendo* that the defendants met their initial burden of proof, plaintiff's opposing proof, consisting of the affirmed medical reports of Dr. Ciancimino and the affirmation of Dr. Tyorkin are sufficient to raise an issue of fact. Where there are conflicting medical opinions between the physicians who treated and

examined the plaintiff, and the opinions of the physicians, 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]).

Accordingly, it is

ORDERED that defendants' motion for summary judgment dismissing the complaint, on the grounds that plaintiff has not sustained a "serious injury", as defined in Insurance Law 5102(d) is denied.

Dated: June 21, 2023



A handwritten signature in black ink, appearing to read "T. Dufficy".

TIMOTHY J. DUFFICY, J.S.C.