

Jimenez v Nunez
2023 NY Slip Op 35261(U)
August 1, 2023
Supreme Court, Westchester County
Docket Number: Index No. 55720/2020
Judge: Joan B. Lefkowitz
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SUPREME COURT: STATE OF NEW YORK
 IAS PART WESTCHESTER COUNTY
 PRESENT: HON. JOAN B. LEFKOWITZ, J.S.C.

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

-----X
 CHARLIE JIMENEZ JR.,

DECISION & ORDER

Plaintiff,

Index No: 55720/2020

-against-

Motion Sequence No. 1

AQUILINO NUNEZ,

Defendant.
 -----X

The following electronically filed papers (NYSCEF Doc Nos. 25-45; 48-53) were read on the motion by the plaintiff for an order, pursuant to CPLR 3212, granting summary judgment on the claim that plaintiff sustained a serious injury under the 90/180-day category of Insurance Law § 5102 (d) and for a further order dismissing the defendant's second and third affirmative defenses.

Motion Sequence No. 1

Notice of Motion-Statement of Facts-Affirmation in Support-Exhibits (1-18)

Response to Statement of Facts-Affirmation in Opposition-Exhibits (A-C)

Reply Affirmation

Upon reading the foregoing papers, the motion is determined as follows:

Plaintiff sues to recover monetary damages for personal injuries allegedly sustained in a motor vehicle accident that occurred on December 6, 2019, on Saw Mill River Road at the intersection of Palmer Road in the City of Yonkers, New York. The accident purportedly occurred when the motor vehicle operated by the plaintiff, which was traveling southbound on Saw Mill River Road and attempting to make a left turn onto Palmer Road, was struck head on by the motor vehicle owned and operated by the defendant, which was traveling northbound on Saw Mill River Road (*see* Verified Bill of Particulars at ¶¶ 1-4, 6, NYSCEF Doc No. 29).

Plaintiff alleges that, as a result of the accident, he sustained injuries to the cervical, thoracic and lumbar regions of his spine as well as to his left foot, left knee, left hip, left shoulder as well as a cerebral concussion (*see* Verified Bill of Particulars at ¶ 9, NYSCEF Doc No. 29). Plaintiff further alleges that the injuries he sustained qualify as serious

injuries under the permanent loss, permanent consequential limitation of use, significant limitation of use, and 90/180-day categories of Insurance Law § 5102 (d) (*see id.* at ¶ 9a.).

Following the completion of discovery, plaintiff now moves for, among other things, an order granting him summary judgment on the claim that he sustained a serious injury under the 90/180-day category of Insurance Law § 5102 (d). Defendant opposes the motion.

In support of the motion, plaintiff proffers, among other things, the pleadings, a certified copy of the police accident report, plaintiff's deposition testimony, plaintiff's medical records, and the affirmation of Stanley B. Holstein, M.D., plaintiff's treating neurologist. Based thereon, plaintiff argues, among other things, that the competent evidence demonstrates that he sustained medically determined injuries including, a cerebral concussion and injuries to the lumbar and cervical regions of his spine, which prevented him from performing substantially all of his usual and customary daily activities for at least 90 of the first 180 days following the accident such as, working as well as difficulties with sleeping, walking, sitting and standing. Plaintiff asserts that the evidence submitted document his disability as a result of the accident and his inability to work for the 90/180-day time period immediately following the accident. Plaintiff also points to his deposition testimony wherein, *inter alia*, he testified that he was homebound for three-four months following the accident and that he only ventured outside the home during that time period to attend physician appointments (*see* plaintiff deposition tr at pp. 115-117, NYSCEF Doc No. 44). Accordingly, plaintiff submits that his motion should be granted.

In opposition, defendant tenders, among other things, the affirmation of Richard N. Weinstein, M.D., a board-certified orthopedic surgeon, who conducted a physical examination of the plaintiff on December 22, 2021. Dr. Weinstein opines, within a reasonable degree of medical certainty, that based upon his physical examination of the plaintiff which included range of motion testing with the use of a goniometer, as well as his review of the plaintiff's medical records, plaintiff has not sustained a disability as a result of the accident and that there exists no objective evidence establishing either disability or permanency as to any of the plaintiff's claimed injuries. Based thereon, defendant contends, among other things, that plaintiff's motion should be denied as the papers submitted raise triable issues of fact as to whether plaintiff sustained a serious injury within the meaning of Insurance Law § 5102 (d).

In reply, plaintiff asserts, among other things, that Dr. Weinstein failed to opine on the plaintiff's claimed injury under the 90/180-day category of Insurance Law § 5102 (d). Consequently, plaintiff asserts that the proof he submitted in support of this branch of the motion is un rebutted and, as such, his motion should be granted.

On a motion for summary judgment the court's function is to determine whether triable issues of fact exist or whether judgment can be granted to a party on the proof

submitted as a matter of law (*see* CPLR 3212 [b]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). In determining the motion, the court must view the evidence in a light most favorable to the nonmovant and is obliged to draw all reasonable inferences in the nonmovant's favor (*see Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]; *Stukas v Streiter*, 83 AD3d 18, 22 [2d Dept 2011]). Such a motion may be granted only if the movant tenders sufficient evidence in admissible form demonstrating, prima facie, the absence of triable issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If that burden is met, the burden of going forward shifts to the opponent of the motion to produce evidentiary proof in admissible form establishing the existence of material issues of fact requiring a trial (*see Zuckerman*, 49 NY2d at 562).

Whether a claimed injury meets the statutory definition of a serious injury is a question of law which may properly be decided by the court on a motion for summary judgment (*see Licari v Elliott*, 57 NY2d 230, 235 [1982]). "As the proponent of a motion for summary judgment, the plaintiff ha[s] the burden of making a prima facie showing that she suffered a serious injury pursuant to Insurance Law § 5102 (d) and that the injury was causally related to the accident" (*Kapeleris v Riordan*, 89 AD3d 903, 904 [2d Dept 2011]). A plaintiff may satisfy this burden through, inter alia, submission of deposition testimony and the affirmed medical report of a treating physician (*see Nicholson v Bader*, 105 AD3d 719, 719-720 [2d Dept 2013]; *Elshaarawy v U-Haul Co. of Miss.*, 72 AD3d 878, 881 [2d Dept 2010]).

A plaintiff moving for summary judgment on a claim of serious injury under the 90/180-day category of Insurance Law § 5102 (d) is required to establish, through objective medical evidence, a nonpermanent, medically-determined injury that prevents the plaintiff from performing substantially all of his usual and customary daily activities for 90 of the first 180 days following the accident (*see* Insurance Law § 5102 [d]; *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 355-356 [2002]; *Damas v Valdes*, 84 AD3d 87, 91 [2d Dept 2011]; *Solis v Silvagni*, 82 AD3d 1349, 1349 [3d Dept 2011]). This standard requires a plaintiff to demonstrate that he has been curtailed from performing his usual activities to a great extent rather than some slight curtailment (*Licari*, 57 NY2d at 236) and an inability to perform recreational and household activities is insufficient (*Omar v Goodman*, 295 AD2d 413, 414 [2d Dept 2002]).

Initially, the court addresses the timeliness of defendant's opposition papers. Although untimely served, the court has still considered the defendant's opposition papers inasmuch as plaintiff has not been prejudiced by their untimely service as evidenced by plaintiff's submission of reply papers (*see Kavakis v Total Care Sys.*, 209 AD2d 480, 480 [2d Dept 1994]). Turning to the merits, the court finds that plaintiff tendered sufficient evidence including, inter alia, the affirmation of Dr. Holstein and the plaintiff's deposition testimony, which demonstrate, prima facie, that plaintiff sustained medically determined injuries as a result of the accident including, a cerebral concussion and injuries to the lumbar and cervical regions of his spine, which prevented him from performing

substantially all of his usual and customary daily activities for at least 90 of the first 180 days following the accident (*see* Insurance Law § 5102 [d]; *Nicholson*, 105 AD3d at 719-720; *Kapeleris*, 89 AD3d at 904; *Refuse v Magloire*, 83 AD3d 685, 685 [2d Dept 2011]; *cf. Menjivar v Capers*, 214 AD3d 640, 642 [2d Dept 2023]; *Cabey v Leon*, 84 AD3d 1295, 1296 [2d Dept 2011]). Accordingly, the burden of going forward shifted to the defendant to raise a triable issue of fact (*see Zuckerman*, 49 NY2d at 562).

In opposition, the defendant failed to raise a triable issue of fact (*see* CPLR 3212 [b]). The defendant's examining orthopedic surgeon, who examined the plaintiff more than two years after the subject accident, failed to relate his findings to the 90/180-day category of serious injury under Insurance Law § 5102 (d) as alleged by the plaintiff in his bill of particulars (*see Jordon v Chan*, 214 AD3d 774, 775 [2d Dept 2023]; *Dembowski v Morris*, 184 AD3d 741, 742 [2d Dept 2020]; *Che Hong Kim v Kossoff*, 90 AD3d 969, 969 [2d Dept 2011]; *Strilcic v Paroly*, 75 AD3d 542, 542-543 [2d Dept 2010]; *Greenidge v Righton Limo, Inc.*, 43 AD3d 1109, 1109-1110 [2d Dept 2007]). Accordingly, that branch of the motion seeking summary judgment on the serious injury claim under the 90/180-day category of Insurance Law § 5102 (d) is granted.

The court next addresses that branch of the motion seeking summary judgment dismissing the defendant's second and third affirmative defenses which allege that plaintiff failed to sustain a serious injury as defined by the Insurance Law (second affirmative defense) and that, consequently, plaintiff's recovery is limited to basic economic loss as provided by the no-fault provisions of the Insurance Law (third affirmative defense). To the extent that the second affirmative defense is predicated upon a claim that the plaintiff did not sustain a serious injury under the 90/180-day category of Insurance Law § 5102 (d), this affirmative defense is dismissed to this limited extent since the court has granted plaintiff summary judgment on his claim that he sustained a serious injury under this category of Insurance Law § 5102 (d). Similarly, to the extent that the third affirmative defense is predicated upon such grounds, then it is also dismissed to such limited extent.

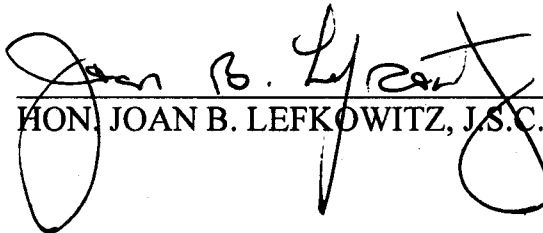
All other arguments raised on the motion and evidence submitted by the parties in connection therewith have been considered by the court, notwithstanding the specific absence of reference thereto. Based on the foregoing, it is hereby:

ORDERED the motion is granted to the extent that: (1) plaintiff is awarded summary judgment on the claim that he sustained a serious injury under the 90/180-day category of Insurance Law § 5102 (d); and (2) to the extent that the defendant's second and third affirmative defenses are predicated upon a claim that the plaintiff did not sustain a serious injury under the 90/180-day category of Insurance Law § 5102 (d) and, as such, that plaintiff's recovery is limited to basic economic loss, then these two affirmative defenses are dismissed to this limited extent; and it is further

ORDERED the parties shall appear for a settlement conference on a date and time as set by the clerk.

ENTER,

Dated: White Plains, New York
August 1, 2023


HON. JOAN B. LEFKOWITZ, J.S.C.

To:

Counsel of record via NYSCEF