

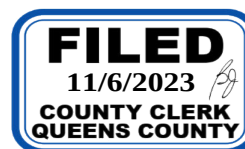
Jimenez v Jinzhong Xin
2023 NY Slip Op 35286(U)
November 2, 2023
Supreme Court, Queens County
Docket Number: Index No. 701348/20
Judge: Timothy J. Dufficy
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY
Justice

PART 35

-----X
MORFI JIMENEZ,

Plaintiff,

-against-

Index No.: 701348/20

Mot. Date: 10/24/23

Mot. Seq. 2

JINZHONG XIN and RIGO LIMO-AUTO,
CORP.Defendants.
-----X

The following papers were read on this 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).

PAPERS
NUMBERED

Notice of Motion-Affidavits-Exhibits.....	EF 37-46
Answering Affidavits-Exhibits.....	EF 49-57
Replying Affidavit.....	EF 58

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

This action arises out of a motor vehicle accident, that occurred on March 10, 2019. In his Verified Bill of Particulars, and Supplemental Verified Bill of Particulars. the plaintiff, who was 34 years old at the time of the accident, alleges, *inter alia*, bulging and herniated discs in the lumbar spine requiring a microdiscectomy procedure.

Defendants move for an order granting summary judgment, pursuant to CPLR 3212, on the grounds that the plaintiff has not sustained a "serious injury" as defined in Insurance Law § 5102(d).

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]).

The defendant's 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]). However, if the defendant meets this burden, the burden shifts to the plaintiff to come forward with evidence in admissible form to raise a material triable issue of fact as to whether she/he sustained a "serious injury" (see *Pommels v Perez*, 4 NY3d 566 [2005]; *Gaddy v Eyler, supra*).

Here, the defendants met their burden by submitting, *inter alia*, the affirmed medical report of Dr. William Walsh M.D., a board certified orthopedic surgeon, who examined plaintiff, on April 12, 2022. Dr. Walsh performed range of motion testing to the cervical and lumbar spine with the use of a goniometer, finding completely full, normal ranges of motion at all levels. The examination of the plaintiff's cervical and lumbar spine revealed no muscle spasm or tenderness to palpation. Dr. Walsh's examination of revealed no evidence of orthopedic disability or permanent injury and he found the plaintiff was able to perform activities of daily living and work without limitation.

Defendants also submit the affirmed report of Dr. Audrey Eisenstadt, a board certified radiologist, who reviewed the MRI films of the plaintiff's lumbar spine performed on September 4, 2019. She noted bulging at L4-5 and disc degeneration, disc

bulging and disc herniation at L5-S1. Dr. Eisenstadt opined that these findings are not traumatic in nature, but have a degenerative origin. Dr. Eisenstadt observed no annular tear or traumatic disc rupture and found no evidence of acute traumatic injury to the lumbar spine. She concluded that there was no causal connection between the accident and the findings on the MRI examinations.

Defendants met their burden on the “90/180” category of the Insurance Law by submitting the plaintiff’s deposition transcript where he testified no medical provider told him that he was unable to return to work after the accident.

Accordingly, the burden has now shifted to the plaintiff to come forward with evidence in admissible form to raise a material triable issue of fact. Plaintiff must submit competent objective medical evidence based on both a contemporaneous physical examination and a recent physical examination. (*See Perl v Meher*, 18 NY3d 208 [2011]; *Toure v Avis Rent-A-Car Systems, Inc.*, 98 NY2d 345 [2002]).

The opposing proof includes the affirmation of Dr. Michael Monfett, of Skyline Physical Medicine and Rehabilitation, who affirms that he examined the plaintiff, on August 5, 2019, and performed range of motion testing using a goniometer, at which time he found significant loss of range of motion in lumbar spine as well as muscle spasm. Dr. Monfett also affirms that he reviewed the lumbar MRI films and opines that the findings are traumatic in nature. Dr. Monfett examined the plaintiff on multiple occasions from August 2019 through October 2021.

Plaintiff also submits the affirmation of Dr. Dmitry Dvorskin, who affirms that he examined the plaintiff on multiple occasions: July 26, 2021, August 23, 2021, September 29, 2021, October 27, 2021, October 29, 2021 and, August 2, 2023. On that last visit, he conducted range of motion testing using a goniometer and found significant restricted range of motion in the lumbar spine as well as muscle spasm. He also affirms that he reviewed the lumbar MRI films and opines that the disc bulges and herniations shown on the MRI films were due to trauma, not degeneration.

The conflicting medical opinions between the plaintiff’s treating physicians and the defendants’ medical experts are sufficient to raise a triable issue of fact (*see Novembre v Punnoose*, 211 AD3d 961 [2d Dept. 2022]; *Perl v Meher*, 18 NY3d 208 [2011].)

Defendants have waived any argument regarding an alleged gap in treatment by waiting until their reply to raise the argument (*see Paulling v City Car & Limousine Servs., Inc.*, 155 AD3d 481 [1st Dept. 2017]; *Sylla v Brickyard Inc.*, 104 AD3d 605 [1st Dept. 2013]). In any event, since the defendants failed to establish, *prima facie*, that the alleged injuries to the lumbar spine, were not caused by the subject accident, the burden never shifted to the plaintiff to explain any gap in treatment (*see Confredo v Moore*, 210 AD3d 1050 [2d Dept. 2022]; *Cortez v Nugent*, 175 AD3d 1383, 1384 [2d Dept. 2019]; *see generally Pommells v Perez*, 4 NY3d 566, 572 [2005]). Although Dr. Eisenstadt opined that the injuries to lumbar spine of the 34 year old plaintiff were degenerative in nature, Dr. Walsh did not address the issue of causation.

Accordingly, it is

ORDERED that the defendants' motion for summary judgment on the issue of "serious injury" is denied

Dated: November 2, 2023



TIMOTHY J. DUFFICY, J.S.C.

