

Myrick v Rigo Limo Auto Corp.

2024 NY Slip Op 31768(U)

May 7, 2024

Supreme Court, Kings County

Docket Number: Index No. 525256/2018

Judge: Lisa S. Ottley

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS - PART 24

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WILLIAM MYRICK,

Plaintiff,

-against-

RIGO LIMO AUTO CORP., and SHAHER HUSEIN,

Defendants.

-----X

HON. LISA S. OTTLEY, J.S.C.

Motion Seq. #3

Index No. 525256/2018

DECISION/ORDER

KINGS COUNTY CLERK
FILED
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Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Notice of Motion for Summary Judgment, submitted February 1, 2024.

Papers	Numbered
Notice of Motion and Affirmation.....	1&2 [Exh. A-G]
Affirmation in Opposition.....	3
Affirmation In Reply.....	4

Plaintiff commenced this action to recover damages for personal injuries allegedly sustained from a motor vehicle accident. Defendants move pursuant to CPLR 3212 for an order granting summary judgment dismissing plaintiff's complaint in the entirety on the grounds that plaintiff's alleged injuries fail to meet the serious injury threshold requirements of New York Insurance Law 5102(d). Plaintiff opposes the motion on the ground that the plaintiff sustained serious injuries under the significant limitation of use and permanent consequential limitation categories.

Defendants argue that the plaintiff has failed to meet the serious injury threshold and the medical reports submitted in support of the motion for summary judgment, objectively demonstrate a lack of disability or impairment to establish proof of a serious injury, pursuant to CPLR Section 5102(d) of the New York State Insurance Law. Specifically, defendants argue that the plaintiff's alleged injuries are not permanent, did not result in a significant limitation of use of a body part, and did not prevent the plaintiff from performing substantially all his customary daily activities for the 90 days following the accident in question. In support of defendants' motion for summary judgment, defendants submitted the independent medical findings of Dr. Jeffrey N. Guttman, an orthopedist, who found upon examination found that plaintiff had full range of motion of the cervical spine, lumbar spine and left shoulder, and other objective orthopedic test performed yielded negative results. Dr. Guttman also opined that the plaintiff did not sustain any significant or permanent injury as a result of the motor

vehicle accident. The defendants also submitted the independent medical report of Dr. Jessica F. Berkowitz, a radiologist who reviewed the plaintiff's MRI of the lumbar spine and noted at L4-5 a small herniation, and minimal disc bulge at L5-S1 which she deemed to be chronic and degenerative in origin. In addition, she found no evidence of acute traumatic injury to the plaintiff's lumbar spine. As to the cervical spine, Dr. Berkowitz noted that the disc bulges at C4-5, C6-7 and C7-T1 were chronic and degenerative in origin and no evidence of acute traumatic injury to the cervical spine. Dr. Berkowitz further opined that there was no causal connection between the accident and the findings on the MRI examinations.

In opposition to defendants' motion for summary judgment, plaintiff submits an attorney affirmation that argues the plaintiff sustained serious injuries under the significant limitation of use and permanent consequential limitation categories. Plaintiff states that his Verified Bill of Particulars demonstrate that plaintiff claimed that all injuries were caused by, aggravated by, and/or activated by the accident and therefore plaintiff need not demonstrate that he never sustained any sort of injury or suffered any pain pre-accident. Plaintiff's attorney also states that the plaintiff still has intense pain in his neck, back (daily) and left shoulder, as testified to at plaintiff's deposition. Plaintiff also testified that he has difficulty pulling, lifting, carrying his laundry, exercising, and playing sports, and never sustained any prior injuries nor re-injured himself.

In reply to plaintiff's opposition and in support of their motion for summary judgment, the defendants argue that the plaintiff has failed to meet his burden to establish by failing to submit admissible evidence of an initial examination, as well as any admissible evidence of a recent examination. Defendants further argues that plaintiff does not meet the 90/180 category based on his own deposition testimony. In addition, defendants argue that their doctors' reports are sufficient to meet the prima facie burden establishing plaintiff's failure to meet the serious injury threshold requirements.

Discussion

It is well settled that to grant summary judgment, it must clearly appear that no material issue of fact has been presented. *See, Grassick v. Hicksville Union Free School District*, 231 A.D.2d 604, 647 N.Y.S.2d 973 (2nd Dept., 1996), "where the moving party has demonstrated its entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring the trial of the action or tender an acceptable excuse for his failure and submission of a hearsay affirmation by counsel alone does not satisfy this requirement." *See, Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980).

A defendant can establish that a plaintiff's injuries are not serious within the meaning of Insurance Law 5102(d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim. *See, Edwards v. Ali*, 75 Misc.3d 1213(a), 168 N.Y.S.3d 676 (2nd Dept., 2022). Once established, the burden shifts to the plaintiff to come forward with evidence to negate the defendant's submissions by demonstrating a triable issue of fact that a serious injury was

sustained within the meaning of the Insurance Law. *See, Grossman v. Wright*, 268 A.D.2d 79 (2nd Dept., 2000).

Pursuant to Insurance Law CPLR 5102(d), a serious injury is defined as follows:

A personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member, significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities or not less than ninety days during the one hundred eighty days immediately following the injury or impairment.

To recover under the permanent consequential loss category, the limitation of use or function needs to be significant or consequential as it relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose, and use of a body part. *See, Como v. Tomasky*, 64 Misc.3d 1224(A), 117 N.Y.S.3d 471 (2nd Dept., 2019) *citing, (Dufel v. Green*, 84 N.Y.2d 795 [1995]). A minor, mild, or slight limitation of use cannot satisfy the meaning of serious injury as defined by 5102(d). To satisfy the definition of serious injury under the 90/180 category a plaintiff must provide competent medical evidence to support their claim that they sustained a medically determined injury of a non-permanent nature which prevented them from performing their usual and customary activities for no less than 90 out of 180 days following the subject accident. *See, Sainte-Aime v. Suwai Ho*, 274 A.D.2d 569 (2nd Dept., 2000).

The court finds that the defendants, by submitting sworn reports from their examining doctor, who conducted an independent medical exam and reviewed plaintiff's MRIs, as well as plaintiff's deposition testimony, have established a prima facie case that plaintiff did not sustain a serious injury under the categories claimed in plaintiffs' Bill of Particulars. The doctors' reports indicate that the lumbar and cervical spine, as well as plaintiff's left shoulder reveal full range of motion and the herniation and disc bulges are of chronic and degenerative origin. In addition, the plaintiff testified during his deposition, that he did not miss any days from work due to the accident.

Once the defendants established their prima facie case, the burden shifted to the plaintiffs to come forward with evidence in admissible form to raise a triable issue of fact as to a serious injury as defined by Insurance Law §5102(d). *See, Gaddy v. Eyles*, 79 N.Y.2d 955 (1992). Accordingly, it is also well established that "[a] defendant who submits admissible proof that the plaintiff has a full range of motion, and that she or he suffers from no disabilities causally related to the motor vehicle accident, has established a prima facie case that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d)" (*Kearse v. New York City Transit Authority*, 16 A.D.3d 45 [2005]).

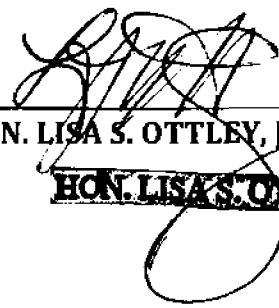
Plaintiff's opposition failed to submit evidentiary proof to raise a triable issue of fact. See, *Taylor v. Flaherty*, 65 A.D.3d 1328, 887 N.Y.S.2d 144 (2nd Dept., 2009). The plaintiff failed to submit evidentiary proof addressing the findings of defendants' experts which opined that the plaintiff's cervical and lumbar spine are attributed to chronic and degenerative changes, which renders plaintiff's complaints speculative. See, *Giraldo v. Mandanici*, 24 A.D.3d 419, 805 N.Y.S.2d 124 (2nd Dept., 2005).

Accordingly, the defendants' motion for summary judgment dismissing plaintiff's complaint is hereby granted in the entirety.

This constitutes the decision and order of this Court.

Dated: Brooklyn, New York
May 7, 2024

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HON. LISA S. OTTLEY, J.S.C.
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