Wiggan v Islam
2024 NY Slip Op 31806(U)
May 20, 2024
Supreme Court, Kings County
Docket Number: Index No. 508481/2022
Judge: Ingrid Joseph

At an IAS Part 83 of the Supreme Court of the State of New York held in and for the County of Kings at 360 Adams Street, Brooklyn, New York, on the 20th day of May 2024.

PRESENT: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF
NEW YORK COUNTY OF KINGS

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DARYLL WIGGAN,

Plaintiff(s)

-against-

SIRAJUL ISLAM MD and WIMA TAXI CORP.,

Defendant(s)

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Index No: 508481/2022

ORDER

The following e-filed papers read herein:	NYSCEF Nos.:
Notice of Motion/Affirmation in Support/Affidavits Annexed Exhibits Annexed/Reply.....	6-18; 41
Affirmation in Opposition/Affidavits Annexed/Exhibits Annexed.....	33-40

In this matter, Daryll Wiggan ("Plaintiff") moves (Motion Seq. 1) pursuant to CPLR 3212 for summary judgment on the issue of Sirajul Islan MD ("Sirajul") and Wima Taxi Corp. ("Wima") (Collectively "Defendants") liability for the subject motor vehicle accident pursuant to CPLR 3212, as well as for summary judgment on the issue of "serious injury" as defined in New York Insurance Law 5102(d). Additionally, Plaintiff seeks immediate judgment in the amount of $28,063.76 for loss earnings grater than those proscribed in Insurance Law 5102(a)(2) pursuant to CPLR 3212. Defendants have opposed the motion.

This action arises out of a motor vehicle collision that occurred on or about January 3, 2022, wherein Plaintiff asserts that he was rear-ended by Defendants while employed as a mail carrier for the United States Postal Service. Plaintiff states that he was taken by ambulance to Bellevue Hospital and was diagnosed in part with a fractured vertebra at C2 and cervical disk injuries, for which Plaintiff is still receiving medical treatment. As a result of the accident, Plaintiff claims that he was disabled and unable to perform substantially all of the material acts which constituted his usual and customary daily activities and that he was out of work for over eight and a half months. Plaintiff asserts that he has met the requirements of the "serious injury" threshold defined in Insurance Law 5102(d) fracture category as well as the 90/180 category. Additionally, Plaintiff argues that he is entitled to immediate judgment because Insurance Law 5102(a)2) limits basic economic loss to $2,000.00 a month, but at the time of the accident, Plaintiff's average monthly income was $5,240.62, incurring a total loss of earnings of $28,063.76. In support of his motion Plaintiff submits in part his own affidavit, an affirmation of his treating physician Mohan Tripathi, M.D., ("Tripathi') and payroll records from the United States Post Office.

In opposition, Defendants argue that Plaintiff has failed to meet his burden for entitlement to summary judgment on the issue of liability for the subject accident. Defendants argue that Plaintiff failed

to establish that he exercised due care or that the accident was unavoidable. Defendants also assert that Plaintiff failed to proffer any actual medical records in support of their motion. Additionally, Defendants claim that Plaintiff does not meet the serious injury threshold requirements because Tripathi's examination reports were all conducted within the first 30 days following the accident, thus he is unable to comment on Plaintiff's ability to work or perform substantially all of his usual and customary daily activities for at least ninety of the first one hundred eighty days immediately following the accident. Defendants argue that Tripathi's report fails to address any prior accidents or injuries involving the Plaintiff outside of the "four-year period" prior to the subject accident, and that Plaintiff was involved in a prior motor vehicle accident on June 24, 2017 – four years and six months before the subject accident and that Plaintiff has alleged "aggravation" of a prior cervical spine injury in the subject accident as set forth in his Verified Bill of Particulars. Additionally, Defendants claim that Plaintiff's Bill of Particulars only allege that he was confirmed to his home after the accident for approximately 8 weeks. In support of their opposition, Defendants submit Plaintiff's prior medical records with respect to the 2017 accident, and a MRI report of Plaintiff's cervical spine conducted on February 8, 2022, which Defendants state shows that there was no fracture to Plaintiff's cervical spine. Moreover, Defendants argues that Plaintiff is not entitled to immediate judgment for loss earnings because the uncertified copy of a W-2 from 2021 is insufficient to establish any decrease earnings in 2022 or thereafter, or that these alleged loss of earnings were caused by the subject accident.

It is well established that "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Ayotte v. Gervasio,* 81 NY2d 1062, 1063 [1993], *citing Alvarez v. Prospect Hospital,* 68 NY2d 320, 324 [1986]; *Zapata v. Buitriago*, 107 AD3d 977 [2d Dept 2013]). Once a prima facie demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. (*Zuckerman v. City of New York,* 49 NY2d 557 [1980]).

Summary judgment is a drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable (*Elzer v. Nassau County*, 111 A.D.2d 212, [2d Dept. 1985]; *Steven v. Parker*, 99 AD2d 649, [2d Dept. 1984]; *Galeta v. New York News, Inc.*, 95 AD2d 325, [1st Dept. 1983]). When deciding a summary judgment motion, the Court must construe facts in the light most favorable to the non-moving party (*Marine Midland Bank N.A. v. Dino & Artie's Automatic Transmission Co.,* 168 AD2d 610 [2d Dept. 1990]; *Rebecchi v. Whitemore,* 172 AD2d 600 [2d Dept. 1991]).

New York Vehicle and Traffic Law § 1129(a) states that the driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of

such vehicles and the traffic upon and the condition of the highway. A rear-end collision with a stopped or stopping vehicle creates a prima facie case of liability with respect to the operator of the rearmost vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision (*Chapel v Meyers*, 306 A.D.2d 235, 237 [2d Dept. 2003]). While a non-negligent explanation for a rear-end collision may include evidence of a sudden stop of the lead vehicle, vehicle stops which are foreseeable under the prevailing traffic conditions must be anticipated by the driver who follows, since he or she is under a duty to maintain a safe distance between his or her vehicle and the vehicle ahead (*Waide v. ARI Fleet, LT*, 143 A.D.3d 512, 514 [2d. Dept. 2016]) quoting (*Theo v. Vasquez*, 136 A.D.3d 795 [2d Dept. 2016]).

The court finds that the Defendant has failed to proffer a non-negligent explanation for the rear end collision or to raise any material questions of fact as to the issues of liability or culpable conduct on the part of the Plaintiff. The Defendants have only submitted the affirmation in opposition of their counsel, which is insufficient to rebut the instant motion. As stated in *Zuckerman*, the bare affirmation of an attorney who demonstrated no personal knowledge of the manner in which the accident occurred, is without evidentiary value and is thus unavailing. (citing *Columbia Ribbon & Carbon Mfg. Co. v A-1-A Corp.*, 42 NY2d 496, 500; *Israelson v Rubin,* 20 AD2d 668, affd 14 NY2d 887; *Lambera v Long Is. R.R.*, 51 AD2d 730). Additionally, the mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process in an insufficient basis for denying the motion (*Kimyagarov v. Nixon*, 45 AD3d 736 [2d Dept 2007]).

Accordingly, Plaintiff motion for summary judgment on the issue of liability is granted.

The issue of whether a claimed injury falls within the statutory definition of "serious injury" can be a question of law for the Court which may be decided on a motion for summary judgment (*Licari v Elliot,* 57 NY2d 230 [1982]). As such, inherent in the court's consideration of a motion for summary judgment for lack of serious injury is the requisite determination that there are no issues of fact with regard to the injuries sustained by a plaintiff. The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [2016]). Once the movant has made such a showing that a party has or has not suffered a serious injury as a matter of law, the burden shifts to the opposing party to submit evidence in admissible form sufficient to create a material issue of fact warranting a trial (*Franchini v Palmieri,* 1 NY3d 536 [2003]; *Grasso v Angerami*, 79 NY2d 813 [1991]).

A plaintiff claiming permanent loss of use of a body organ, member, function or system must demonstrate that the permanent loss of use is a total loss of use (*Oberly v Bangs Ambulance, Inc.*, 96 NY2d 295 [2001]). In *Toure v. Avis Rent–a–Car Systems, Inc.,* 98 NY2d (2002), the Court of Appeals stated that resolving the question of whether plaintiff suffered a "serious injury" involves a comparative

analysis of the quantified degree and duration of an alleged injury, or its qualitative impact and duration in the claimant's normal activities. This analysis requires admissible proof of injury based on objective medical testing, which establishes a causal relation between the accident and the injury alleged, as well as between the injury and the claimed limitation and impairment. In order to prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion can be used to substantiate a claim of serious injury (*Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d 345, 350 [2002]; *Dufel v Green*, 84 NY2d 705 [1995]; *Lemieux v Horn*, 209 AD3d 1100 [3d Dept. 2022]). An expert's qualitative assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system (*Id.*; *Black v Robinson*, 305 AD2d 438 [2d Dept. 2003; *Junco v Ranzi*, 288 AD2d 440 [2d Dept. 2001]; *Papadonikolakis v First Fid. Leasing Group*, 273 AD2d 299 [2d Dept. 2001]). Establishing a lack of limitations normally would enable a defendant to successfully establish that the permanent consequential limitation of use of a body organ or member or significant limitation of use of a body function or system have not been satisfied by Plaintiff (*Toure* at 350; *Franchini* at 536).

To establish that the plaintiff has suffered a permanent or consequential limitation of use of a body organ or member and/or a significant limitation of use of a body function or system, the plaintiff must demonstrate more than a mild, minor or slight limitation of use and is required to provide objective medical evidence of the extent or degree of limitation and its duration (*Burnett v. Miller,* 255 A.D.2d 541 [2d Dept. 1998]; *Booker v. Miller,* 258 AD2d 783 [3d Dept. 1999]; *Jones v Marshall*, 147 AD3d 1279 [3d Dept 2017]).

Here, Tripathi's report avers in part that as a result of the subject accident, Plaintiff sustained in part a fracture in his cervical spine at C2 which constitutes a serious injury within the meaning of Insurance Law 5102(d). Additionally, Tripathi's affirmation states that Plaintiff was examined on several occasions after the subject accident, including February 10, 2022, February 17, 2022, June 2, 2022, and May 11, 2023. During these examinations, Tripathi states that range of motion tests were not performed because of the cervical vertebrae fracture at C2 but that Plaintiff's Lumbar spine continued to show a tenderness to palpation and spasms and his ranges of motion were limited. Additionally, based upon Tripathi's examinations and review of the diagnostic testing including x-rays taken on January 20, 2022, February 17, 2022, June 2, 2022, and May 11, 2023, Tripathi found that Plaintiff sustained a fractured cervical vertebra at C2, Lumbar and cervical disc injuries, shoulder impingement syndrome, and carpal tunnel syndrome. Tripathi states that Plaintiff's injuries are all causally related to the January 3, 2022, car accident, and that the injuries disabled Plaintiff from performing substantially all the material acts which

constituted his usual and customary daily activities including disabling him from working as a letter carrier from the date of the accident, January 3, 2022, until September 22, 2022.

Furthermore, Tripathi states that Plaintiff was examined on February 21, 2022, March 9, 2022, and April 13, 2022, by Dr. Nisheeth Pandey ("Pandey") who found that Plaintiff had continued neck and back pain. Pandey performed a physical examination which revealed that his cervical spine showed tenderness to palpation and spasms. Pandey did not test cervical ranges of motion tests because of the cervical vertebrae fracture at C2 but reports that Plaintiff's Lumbar spine showed tenderness to palpation and spasms and that Plaintiff's ranges of motion continued to be limited. Pandey did test Plaintiff's lumbar spine range of motion and found that Plaintiff's Lumbar spine showed tenderness to palpation and spasms and limitations. Pandey also reviewed the Cervical MRI which indicated a disc bulge at C4-5 and found that the Lumbar MRI indicated disc bulge at L5-S1 with diffuse facet hypertrophy. Pandey assessed Plaintiff to have a cervical fracture at C2, lumbar disc herniation with radiculopathy, cervical radiculopathy, shoulder impingement syndrome, carpal tunnel syndrome on the left. Plaintiff received an epidural steroid injection, 40 mg of Kenalog and .5% Bupivcaine 2 cc, at L5/S1 with fluoroscopic guidance from Pandey on February 21, 2022. Pandey also performed follow-up examinations of Plaintiff on March 9, 2022, and April 13, 2022.

Tripathi states that Plaintiff was examined by Roman Vallarino, M.S. ("Vallarino") On September 7, 2022, November 16, 2022, and December 28, 2022, wherein Vallarino reports that cervical range of motion tests were not performed because of the cervical vertebrae fracture at C2 but that Plaintiff's Lumbar spine on inspection continued to show tenderness to palpation and spasms and that ranges of motion were significantly limited.

In opposition, the papers submitted by the defendant include prior medical records of Plaintiff dated July of 2017, November of 2017, and December 2018. Defendants also submit an MRI report of Plaintiff performed on February 8, 2022, by Narayan B. Paruchuri M.D. ("Paruchuri"), which reports no fracture to the cervical spine nor is there evidence of any bulge or herniation at C2-C3, C3-C4, C4-C5, C5-C6, C6-C7, C7-T1. The report does state that there is a disc bulge with anterior thecal sac impingement at C4-C5.

Here, the court finds that Plaintiff has sufficiently submitted a physician affirmation stating that based upon a reasonable degree of medical certainty that Plaintiff's injuries and limitations are permanent in nature and states in addition an opinion as to how Plaintiff's alleged injuries affects his daily and customary activities and that that the alleged injuries are causally related to the subject accident. Additionally, the physician's opinion is supported by the doctor's own examination of the patient and the report references objective diagnostic tests that were conducted (see *Addison v NYC Trans. Auth.*, 208 AD2d 368 [1st Dept. 1994]). However, the submitted physician affirmation does not demonstrate an

awareness of Plaintiff's potentially pre-existing injuries from a prior car accident or distinguish them from his relied-upon injuries for this lawsuit. Similarly, the findings of Pandey and Vallarino do not state that their findings are based upon a reasonable degree of medical certainty, whether Plaintiff's injuries and limitations are permanent in nature, how the alleged injuries affect his daily and customary activities, nor do they state that the alleged injuries are causally related to the subject accident.

Moreover, Defendants in opposition have submitted an MRI Exam report to contradict the existence of any fracture, the report is not affirmed, nor does it state that its findings are based upon a reasonable degree of medical certainty. Additionally, the report does not give any explanation or medically based opinion regarding its findings, and generally, while a conclusory statement that a Plaintiff did not sustain a serious injury is insufficient to rebut Plaintiff's entitlement to summary judgment, the issue of whether Plaintiff sustained a fracture or if his alleged injuries were causally related to the subject accident are questions of fact for the jury to resolve (see *Mahler v Lewis*, 210 AD3d 673 [2d Dept. 2022]; *Flores v Leslie*, 27 AD3d 220 [2d Dept. 2006]; *Kallicharian v Sooknanan,* 282 AD2d 537 [2d Dept. 2000]; *Rubin v Sms Taxi Corp.*, 71 AD3d 548 [1st Dept. 2010]; *Williams v Laura Livery Corporation*, 176 AD3d 557 [1st Dept. 2019]; *Faraone v Dicocco,* 259 AD2d 854 [3d Dept. 1999]).

Accordingly, Plaintiff's motion for summary judgment on the issue of serious injury as defined by Insurance Law 5102(d) is denied.

With respect to the 90/180-day category, a "serious injury" is defined as a plaintiff's inability to perform substantially all of the material acts which constitute his or her usual and customary activities for not less than 90 of the 180 days immediately following the date of the accident (Insurance Law 5102[d]). A claim under the 90/180-day category by its terms does not have a durational element beyond the 180–day period set forth by the statute, making a plaintiff's current condition irrelevant as to whether he or she was unable to carry out her normal and customary activities during the statutory period (see Insurance Law 5102; *Peplowv Murat*, 304 AD2d 633 [2d Dept. 2003]). To prevail under this category, a plaintiff must demonstrate through competent, objective proof, a medically determined injury or impairment of a nonpermanent nature which would have caused limitations on the plaintiff's daily activities (*Ryan v Xuda*, 243 AD2d 457 [2d Dept. 1997]; *Olivare v Tomlin*, 187 AD3d 642 [1st Dept. 2020]; *Fernandez v Fernandez*, 151 AD3d 581 [1st Dept. 2017]). This limitation must be to a great extent rather than some slight curtailment (*Licari v Elliot*, 57 NY2d 230 [1982]). Additionally, a gap or cessation of treatment is immaterial as to whether the plaintiff sustained a medically determined injury or impairment of a nonpermanent nature which prevents him or her from performing substantially all the material acts which constitute his or her usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment (Insurance Law 5102 [d]). Plaintiff,

however, must offer some reasonable explanation for the gap in treatment or cessation of treatment (*Pommells v Perez*, 4 NY3d 566 [2005]; *Neugebauer v Gill*, 19 AD3d 567 [2d Dept. 2005]).

Here, while Defendants argue in part that Plaintiff has not suffered a serious injury under the 90/180 category, Defendants have failed to proffer any competing medical reports or admissible evidence to support their claim. Thus, Defendants have failed to rebut Plaintiff's contentions that he did suffer a serious injury under the 90/180 category of the Insurance Law.

With respect to Plaintiff's request for immediate judgment in the amount of $28,063.76 for loss earnings greater than basic economic loss as defined in Insurance Law 5102(a)(2), Plaintiff's submitted evidence is for pay periods before the subject accident. Thus, Plaintiff has not established his income at the time of the subject accident or any decrease in earnings in following.

Accordingly, it is hereby,

ORDERED, that Plaintiff's motion for summary judgment on the issue of liability is granted, and it is further,

ORDERED, that Plaintiff's motion for summary judgment on the issue of serious injury as defined by Insurance Law 5102(d) under the category of permanent or consequential limitation of use of a body organ or member and/or a significant limitation of use of a body function or system, or fracture is denied. Plaintiff's motion for summary judgment on the issue of serious injury as defined by Insurance Law 5102(d) under the 90/180 category is granted, and it is further,

ORDERED, that Plaintiff's motion for summary judgment in the amount of $28,063.76 for loss earnings greater than those proscribed in Insurance Law 5102(a)(2), is denied.

This constitutes the decision and order of the court.

Hon. Ingrid Joseph J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice