

**Ojelade v Akhtar**

2024 NY Slip Op 32989(U)

August 12, 2024

Supreme Court, Kings County

Docket Number: Index No. 524142/2018

Judge: Lisa S. Ottley

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

-----X  
OLAWALE OJELADE,

Plaintiff,

Index # 524142/2018

-against-

**DECISION & ORDER**

MUHAMMAD AKHTAR,

Mot. Seq. #1

Defendant.  
-----X

**HON. LISA S. OTTLEY**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Notice of Motion and Cross-Motion for Summary Judgment submitted on March 11, 2024.

Papers	Numbered
Notice of Motion and Affirmation .....	1& 2 [Exh. A-F]
Affirmation/Affidavit in Opposition.....	3[Exh. A-E]
Reply Affirmations.....	4
Memoranda of Law.....	

Plaintiff commenced this action for personal injuries allegedly sustained as a result of a motor vehicle accident that occurred on April 30, 2018. Defendant moves for summary judgment pursuant to CPLR 3212 on the ground that plaintiff did not sustain a serious injury under Insurance Law 5102(d), as required by Insurance law 5104(a). Plaintiff opposes the motions on the grounds that the defendants failed to establish its entitlement to summary judgment as a matter of law, as well as there being issues of fact which preclude summary judgment from being granted.

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 (2<sup>nd</sup> 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.” See also, *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980).

Defendant argues 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, defendant argues 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 defendant's motion for summary judgment, defendant submitted the independent medical findings of Dr. Pierce J. Ferriter, a board-certified orthopedic surgeon, who concluded upon examination of the plaintiff that there is no objective evidence of injuries to the plaintiff's cervical spine, thoracic spine, lumbar spine, left shoulder and left elbow.

In addition, Dr. Jessica Berkowitz, a board-certified radiologist, upon examination of plaintiff's left shoulder MRI dated May 21, 2018, found slight denigrative changes in the acromioclavicular joint and noted that otherwise the examination was unremarkable, and concluded that there is no evidence of acute traumatic injury to the shoulder such as a fracture, traumatic bone marrow edema, or musculotendinous junction tear. Dr. Berkowitz also looked at the plaintiff's MRI study dated June 12, 2018, and found no evidence of acute traumatic injury to the lumbar spine such as fracture, traumatic bone marrow edema, asymmetry of the disc spaces, ligamentous rupture or epidural hematoma, and no posttraumatic changes causally related to the accident. Upon examination of the plaintiff's cervical spine MRI study dated May 29, 2018, Dr. Berkowitz found no evidence of acute traumatic injury to the cervical spine and concluded that the cervical spine MRI study revealed no posttraumatic changes causally related to the accident. Dr. Berkowitz had the same conclusions for plaintiff's thoracic spine MRI study dated June 5, 2018, and found an unremarkable MRI without any bulges or herniation, nor posttraumatic changes causally related to the accident.

In opposition to defendant's motion for summary judgment, plaintiff argues that defendant failed to make out a prima facie case of entitlement to summary judgment, as well as there being issues of fact which preclude summary judgment from being granted. Plaintiff argues that the medical findings of Dr. Ferriter are flawed in that the doctor failed to quantify the test results and did not compare the normal straight leg raise test range to the plaintiff's actual range. Plaintiff argues that Dr. Ferriter's findings were approximately three and half years after the April 30, 2018, accident; significant limitation does not require permanency, which defendant has failed to sustain the prima facie burden, nor has Dr. Ferriter examined the plaintiff during the 180-day statutory period, and only addressed plaintiff's condition as of October 28, 2022. Plaintiff also argues that Dr. Jessica Berkowitz's conclusions from examination of plaintiff's MRI studies fail to sustain the prima facie burden to demonstrate lack of causation. Specifically, plaintiff argues that the report fails to specify which rotator cuff is unremarkable in appearance, in that plaintiff's radiologist identified two rotator cuff tears.

In addition, plaintiff submits medical findings from Dr. Laxmidhar Diwan and Dr. Guenadi Amoachi, reports from EMU Surgical Center as to the left shoulder, and physical therapy records from 488 Lafayette Avenue, which address the serious injuries sustained and restrictions and limitations to the plaintiff's left shoulder, cervical spine, lumbar spine, thoracic spine, and left elbow. Dr. Diwan stated in his affirmation that the plaintiff had no history of prior injuries or conditions, and that he did not observe any signs of degeneration when the surgery was performed on the plaintiff's left shoulder on August 10, 2018. He opined with a reasonable degree of medical certainty that the cause of the plaintiff's injuries was the accident of April 30, 2018.

In reply to plaintiff's opposition, the defendant argues that the court should only consider the medical reports which are in admissible form. Defendant argues that several of the reports are not in admissible form, the plaintiff has failed to meet the 90/180 requirement, and the plaintiff has failed to address the gap in treatment and the degenerative causation challenges raised by the defendant.

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 (2<sup>nd</sup> 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 (2<sup>nd</sup> 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 (2<sup>nd</sup> 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 (2<sup>nd</sup> Dept., 2000).

The court finds that the defendant, by submitting sworn reports from their examining doctors and using the plaintiffs' deposition testimony, has established a *prima facie* case that plaintiff did not sustain a serious injury under the categories claimed in plaintiffs' Bill of Particulars. Once the defendants established their *prima facie* case, the burden shifted to the plaintiff 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. Eyler, 79 N.Y.2d 955 (1992).

The court finds that the reports relied upon in opposition to defendant's motion for summary judgment, to wit, Dr. Laxmidhar Diwan's reports, as affirmed by the doctor, is in admissible form for consideration by this court. (See, Exh. A to opposition papers, NYSCEF Doc. No. 30). In addition, the court finds the following reports to be in admissible form, Exh. C to opposition papers, NYSCEF Doc. No. 32.

Considering the conflicting expert opinions, the court finds that triable issues of fact have been raised which preclude summary judgment from being granted.

Accordingly, it is hereby ORDERED, that the defendants' motion for summary judgment dismissing plaintiff's complaint is denied in its entirety.

This constitutes the decision and order of this Court.

Dated: Brooklyn, New York  
August 12, 2024

  
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HON. LISA S. OTTLEY, U.S.C.  
HON. LISA S. OTTLEY

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