

Javed v Venture Leasing LLC

2024 NY Slip Op 34118(U)

November 8, 2024

Supreme Court, Kings County

Docket Number: Index No. 523927/2020

Judge: Ingrid Joseph

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At an IAS Term, Part 83, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 8th day of November, 2024.

P R E S E N T:

HON. INGRID JOSEPH,

Justice.

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AMJAD JAVED and SHAZIA AMJAD,

Plaintiffs,

Index No.: 523927/2020

-against-

DECISION & ORDER
(Mot. Seq. No. 4)

VENTURE LEASING LLC and
KEN E. ALLEN-GITTENS,

Defendants.

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The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Affirmation in Support/Exhibits.....	50 – 59
Affirmation in Opposition/Exhibits.....	62 – 70

Upon the foregoing papers, Defendants Venture Leasing LLC (“Venture”) and Ken E. Allen-Gittens (“Allen-Gittens”) (collectively, “Defendants”) move for an order, pursuant to CPLR 3212, granting them summary judgment on the basis that Plaintiffs Amjad Javed (“Javid”) and Shazia Amjad’s (“Amjad”) (collectively, “Plaintiffs”) alleged injuries do not meet the “serious injury” threshold under Insurance Law § 5104 (a) and 5102 (d) (Mot. Seq. No. 4). Plaintiffs oppose the motion.

This action arises out of a motor vehicle accident that occurred on December 3, 2017. At the time, Javid was operating his vehicle and Amjad was a passenger when the vehicle came in contact with a vehicle owned by Venture and operated by Allen-Gittens. In their complaint, Plaintiffs seek to recover damages for their personal injuries resulting from the accident. Specifically, Javed alleges in his Bill of Particulars that he sustained injuries to his right shoulder, left knee, lumbar spine, and cervical spine. Amjad alleges injuries to her cervical spine, right knee

and right shoulder. Plaintiffs essentially seek to recover for serious injuries as defined by Insurance Law § 5102 (d) resulting in (i) a permanent loss of use; (ii) a permanent consequential limitation of use; (iii) significant limitation of use; and (iv) the inability to perform substantially all of the material acts which constitute usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident.

Defendants now move for summary judgment, arguing that Plaintiffs did not sustain a “serious injury” as defined by Insurance Law 5102 (d). First, Defendants contend that Plaintiffs’ injuries were not caused by the subject accident. Second, Defendants’ medical experts reported no functional disability or objective verification of subjective complaints. In their papers, Defendants include reports from two medical experts. Dr. Ignatious Roger, a board-certified plastic surgeon, opined that Javed’s right shoulder exhibited no visible scarring and while there was scarring of the left knee, this did not result in any disability or prevent Javed from engaging in any activity. Dr. Hugh Selznick, an orthopedist, examined Javed and Amjad and opined that their ranges of motion were normal and all tests were negative. Dr. Selznick concluded that their injuries had resolved. Drs. Roger and Selznick noted that there were no legally authenticated medical records available for review at the time of their examinations.

In their opposition, Plaintiffs aver that Defendants’ motion must be denied because there are issues of fact. Plaintiffs assert that they treated with Dr. Timur Hanan for over seven months following the accident and that Dr. Hanan found a causal relationship between the accident and their injuries. Plaintiffs further assert that they continued to seek treatment on a regular basis until September 5, 2024. According to Plaintiffs, their medical records establish that they sustained loss of ranges of motion shortly after the accident and per Dr. Hanan’s 2024 report, have not improved. Moreover, Plaintiffs assert that their daily activities have been restricted. With respect to Amjad, Plaintiffs assert that she can no longer pray in a praying position and is unable to attend the Mosque. With respect to Javed, Plaintiffs assert that he can no longer work. In addition, Plaintiffs note that Defendants’ experts do not address causation or permanency.

Whether a claimed injury falls within the statutory definition of “serious injury” is a question of law for the Court (*Licari v Elliot*, 57 NY2d 230 [1982]). The movant bears the initial burden of establishing, by the submission of evidentiary proof in admissible form, a prima facie case that a party has not suffered a serious injury proximately resulting from the subject motor vehicle accident (*Toure v Car Sys., Inc.*, 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955

[1992]). 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]).

To establish that a plaintiff did not sustain a serious injury, a defendant must present medical evidence reflecting that the ranges of motion are all within normal range, the specific measurements taken and the methods used to perform the measurements (*Staff v Yshua*, 59 AD3d 614, 614 [2d Dept 2009]). “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), despite the existence of an MRI which shows herniated or bulging discs” (*Kearse v NY City Tr. Auth.*, 16 AD3d 45, 49-50 [2d Dept 2005]).

Where the defendant has made a showing that a party 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]). For a plaintiff’s claim to survive, he or she must proffer sufficient evidence to raise a triable issue of fact. This evidence must be “objective medical evidence, based upon a recent examination, to verify his [or her] subjective complaints of pain and limitation of motion” (*Faroze v Kamran*, 22 AD3d 458, 458 [2d Dept 2005]).

Here, Dr. Selznick’s reports indicate that all ranges of motion were determined by a goniometer and Plaintiffs exhibited normal ranges of motion, pursuant to AMA Guidelines (NYSCEF Doc No. 56-57). Moreover, Dr. Selznick opined that Plaintiffs’ injuries had resolved and concluded that there was no objective evidence of permanency or disability (*id.*). Therefore, the Court finds that Defendants have established, through competent medical evidence, that Plaintiffs’ alleged injuries do not constitute a serious injury.

In support of their opposition, Plaintiffs rely on medical records and reports from Dr. Hanan and radiological reports from Precision Radiology. The Court must first address the admissibility of certain medical records and radiological reports, which are neither affirmed nor certified. While unaffirmed or uncertified medical records and reports are generally inadmissible, they may be admissible if they are the records of plaintiffs’ treating physicians (*Uribe v Jimenez*, 133 AD3d 844, 844 [2d Dept 2015]) or where they were properly referenced by defendants’ medical experts (*Kearse v NY City Tr. Auth.*, 16 AD3d 45, 47, n 1 [2d Dept 2005]). Here, the Court finds that the medical records from Dr. Hanan, Plaintiffs’ treating physician, are admissible.

However, Plaintiffs' radiological reports are inadmissible since they were not referenced by Defendants' experts. Dr. Hanan first examined Plaintiffs on December 14, 2017, and found limited ranges of motion and causally related their injuries to the subject accident. Dr. Hanan documented Plaintiffs' limited ranges of motion during follow-up visits on February 1, 2018, March 15, 2018, March 27, 2018, May 28, 2018, August 16, 2018, and July 18, 2023. Dr. Hanan again examined Plaintiffs on August 27, 2024, and found limited ranges of motion. With respect to Javed, Dr. Hanan opined that he had "sustained a permanent, consequential limitation of use and a significant limitation of function of his cervical spine, right shoulder, left knee and lumbosacral spine" (NYSCEF Doc No. 67). Dr. Hanan further opined that Amjad had "a permanent, consequential limitation of use and a significant limitation of function of his [*sic*] cervical spine, right shoulder, right knee and lumbosacral spine" (NYSCEF Doc No. 68).

Based upon the foregoing, the Court finds that Plaintiffs have proffered evidence that they sustained range of motion limitations contemporaneous with the subject accident and in a more recent follow-up, thus raising an issue of fact as to whether their injuries constitute a serious injury (*cf. Rodriguez v Cesar*, 40 AD3d 731, 733 [2d Dept 2007]).

The Court will next address the 90/180 category of Plaintiffs' claim. Under this 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 daily activities for not less than ninety days during the one hundred eighty days immediately following the date of the [accident]" (Insurance Law 5102 [d]). Therefore, a plaintiff's current condition has no bearing on whether he or she was unable to carry out his or her normal and customary activities during the statutory period. Moreover, a plaintiff's self-serving statement or testimony claiming an inability to engage in customary daily activities will not suffice (*Ryan v Xuda*, 243 AD2d 457, 457-458 [2d Dept 1997]). Instead, there must be objective evidence of a medically imposed limitation (*id.*; *Jones v Marshall*, 147 AD3d 1279, 1280-1281 [3d Dept 2017]). This limitation must have "curtailed [plaintiff] from performing his [or her] usual activities to a great extent rather than some slight curtailment" (*Licari*, 57 NY2d at 236).

At his deposition, Javed testified that "It was a long time when I was confined to the home. I couldn't go anywhere" (Javed tr at 81, lines 14-16). Defendants failed to inquire as to the specific date Javed was no longer confined to his home. In addition, Javed testified that he could not work after the accident until 2020 (*id.* at 18, line 25; at 19, lines 2-5; at 22, lines 8-12). Assuming this is

true, then Javed did not go to work for approximately two years or more. Defendants have not proffered any medical evidence addressing the 90/180-day category.

During her deposition, Amjad testified that she is a housewife and stay-at-home mother and has never held any outside job (Amjad tr at 14, lines 13-24). When asked how long she was confined to her home, Amjad answered that she is “still confined to [her] home” and “can’t go anywhere” (Amjad tr at 32, lines 11-12). Again, Defendants failed to inquire any further. Amjad’s unemployment is not fatal to her 90/180-day claim and Defendants cite to no evidence to disprove the length of her alleged confinement (*Seepersaud v L&M Bus Corp.*, 140 AD3d 579, 579 [1st Dept 2016]; *see also* Rincon v Brancato, 2021 NY Misc LEXIS 4056, *7 [Sup Ct, Bronx County Apr. 29, 2021, index No. 306286/2014E]).

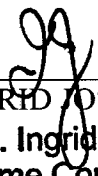
Based on the foregoing, the Court finds that Defendants have not established prima facie entitlement to summary judgment under the 90/180-day category and the burden does not shift to Plaintiffs.

Accordingly, it is hereby

ORDERED, that Defendants’ motion for summary judgment (Mot. Seq. No. ~~4~~) is denied.

All other issues not addressed herein are either without merit or moot.

This constitutes the decision and order of the Court.



HON. INGRID JOSEPH, J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice