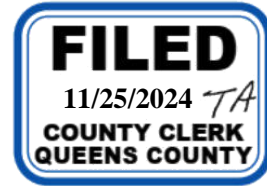


Guang Tong Zhuo v Neel
2024 NY Slip Op 35032(U)
November 14, 2024
Supreme Court, Queens County
Docket Number: Index No. 703988/2021
Judge: Mojgan C. Lancman
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HONORABLE MOJGAN C. LANCMAN



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GUANG TONG ZHUO,

IAS Part 20

Plaintiff,

Index No.: 703988/2021

-against-

Motion Seq. No.: 2

MD MOZAMMEL NEEL, 4P82 & 4P85 ACQUISITION, LLC
and TION, LLC

Motion Date: 6.5.2024

Motion Cal. No.: 54

Defendants.
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Presently before the Court is the motion filed by the defendants MD Mozammel Neel (“Neel”) and 4P82 & 4P85 Acquisition, LLC (“Acquisition”) (collectively, the “Defendants”) for summary judgment (*see* NYSCEF Doc. Nos. 33-52)

The plaintiff, Guang Tong Zhuo (the “Plaintiff”), commenced this cause seeking to recover damages for personal injuries allegedly sustained in a motor vehicle accident (the “Accident”). Presently before the Court is the Defendants’ motion for summary judgment dismissing the complaint. The application is grounded on the assertion that the Plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 [d]. For the following reasons, the motion is granted in part and denied in part.

I. Factual Background

The Accident took place on February 1, 2020 on Greenwich Street at or near its intersection with Rector Street in Manhattan. The Plaintiff’s bill of particulars alleges injuries to the cervical spine, the lumbar spine, left knee and a “head injury.”

The bill of particulars asserts the following categories of serious injury: permanent loss of use of a body organ, member, function or system; significant limitation of use of a body function or system; permanent consequential limitation of use of a body function or system; 90/180-day; and loss in excess of basic economic loss.

II. Discussion

The claim under the permanent loss of use of a body organ, member, function or system category is dismissed because there is no evidence that the Plaintiff sustained a permanent and total loss of use of a body organ, member, function or system (*see Oberly v Bangs Ambulance Inc.*, 96 NY2d 295 [2001]).

The claim under the 90/180-day category is dismissed because the Plaintiff testified that he missed ten days of work following the Accident (*see Kabir v Vanderhost*, 105 AD3d 811 [2d Dept 2013]).

The claim for economic loss greater than basic economic loss is dismissed since the Plaintiff “fail[s] to produce any evidence in admissible form which supports such a claim” (*Watford v Boolukos*, 5 AD3d 475, 476 [2d Dept 2004]).

The Court now turns to the serious injury claims under the permanent consequential limitation and the significant limitation of use categories. The Court’s function on a summary judgment motion “is not to resolve issues of fact or determine matters of credibility, but merely to determine if such issues exist” (*114 Woodbury Realty, LLC v 10 Bethpage Rd., LCC*, 178 AD3d 757 [2d Dept 2019] [citations omitted]). The facts must be viewed in the light most favorable to the non-moving party (*see Sosa v 46th Street Development LLC*, 101 AD3d 490 [1st Dept 2012]). If there is any doubt as to the existence of a triable issue of fact, the motion must be denied (*see Rotuba Extruders v Ceppos*, 46 NY2d 223 [1978]).

In support of their motion, the Defendants rely, *inter alia*, on the finding of two medical experts, which are summarized below.

Dr. Thomas P. Nipper, an orthopedist, found that ranges of motion relative to the Plaintiff’s cervical spine, lumbar spine and left knee were normal; that there was no evidence of significant or permanent injury or disability; that the Plaintiff is able to perform all activities of daily living; and that the Plaintiff’s alleged sprains to the cervical spine, the lumbar spine and the left knee had “resolved.”

Dr. Joseph Mazzie, a radiologist, reviewed the Plaintiff’s MRI studies relative to the cervical spine, the lumbar spine and the left knee. The physician concluded, *inter alia*, the subject studies did not reveal any injuries or abnormalities that are causally related to the Accident.

In opposition, the Plaintiff submits, *inter alia*, reports from Dr. Howard I. Baum of Bay Ridge Orthopedic Associates, P.C. These reports are not considered because they are not affirmed. The records from Dr. Baum will also not be considered because they are not certified.

The MRI reports that are contained in Dr. Baum’s records are not affirmed and thus will not be considered. In any event, the reports are of no assistance to the Plaintiff because they do not address causality.

The Plaintiff also submits in opposition an affirmed report from Dr. Arden M. Kaisman, which was generated as the result of an examination conducted on April 30, 2024. In said report, Dr. Kaisman found losses in range of motion relative to the lumbar spine. He opined: that the Plaintiff had a herniated disc at L5-S1 with lumbar radiculopathy and myofascial pain syndrome; that the subject injuries are causally related to the Accident; and that the Plaintiff has a permanent disability relative to the lumbar spine.

The branch of the Defendants’ motion for summary judgment dismissing the permanent consequential limitation and the significant limitation of use categories is denied relative to the lumbar spine for two reasons.

First, the parties' competing evidence relative to causation and losses in range of motion relative to the lumbar spine "constitute[s] the classic battle of the experts" (*Sason v Dykes Lumbar Company, Inc.*, 221 AD3d 491, 492 [1st Dept 2023], which "[is] properly left to a jury for resolution" (*Thomas v Eckhert*, 229 AD3d 1237, 1239 [4th Dept 2024] [internal quotation marks and citations omitted]).

Second, and in any event, the record is clear that sharply disputed issues of fact exist with respect permanent consequential limitation and the significant limitation of use categories as to the lumbar spine (*see Oputa v New York City Transit Authority*, 216 AD3d 461 [1st Dept 2023]; *Hobbs v MTA Bus Company*, 211 AD3d 471 [1st Dept 2022]).

However, the Plaintiff fails to raise triable issues of fact with respect to his other claimed injuries. Here, Dr. Kaisman did not conduct range of motion testing with respect to the cervical spine and the left knee when he last examined the Plaintiff on April 30, 2024. Thus, the Plaintiff fails to rebut the Defendants' *prima facie* showing that he did not sustain a serious injury to the subject body parts. The "head injury" claim asserted in the bill of particulars is also dismissed since the Plaintiff's opposition does not address this issue.

Lastly, the Defendants' contention that this cause should be dismissed because of a gap in treatment is without merit. Here, the Defendants bore the burden of proof of establishing that the Plaintiff's lumbar spine injuries were not causally related to the Accident (*see Jeehyun Choi v Joel*, 181 AD3d 660 [2d Dept 2020]). Although Dr. Mazzie, the Defendants' expert radiologist, opined that the subject injuries were not causally related to the Accident based on his review of MRI studies, Dr. Nipper, the Defendants' expert orthopedist who examined the Plaintiff, failed to render an opinion on the issue of causality. Therefore, the Defendants' submissions fail to establish that the Plaintiff's lumbar injuries were not caused by the Accident, making it unnecessary for the Plaintiff to explain any gap in treatment (*see De Castillo v Reado*, 230 AD3d 565 [2d Dept 2024]).

III. Conclusion

For the reasons stated above, it is hereby:

ORDERED, that the Defendants' motion is granted in part and denied in part; and it is further,

ORDERED, that the motion is granted to the extent that the Plaintiff's permanent loss of use of a body organ, member, function or system; economic loss in excess of basic economic loss; and 90/180-day claims are dismissed; and it is further,

ORDERED, that the motion is also granted to the extent that the Plaintiff's injury claims except for those relative to the lumbar spine are dismissed; and it is further,

ORDERED, the motion is denied as to the Plaintiff's lumbar spine injury claims; and it is further,

ORDERED, that the Defendants shall serve a copy of this Order with Notice of Entry upon the Plaintiff via NYSCEF by December 18, 2024.

This constitutes the Decision and Order of the Court.

Dated: Jamaica, New York
November 14, 2024



MOJGAN C. LANCMAN, J.S.C.

