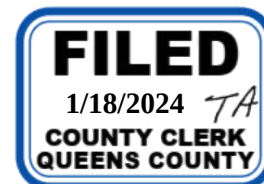


Orellana v Podushko
2024 NY Slip Op 35314(U)
January 12, 2024
Supreme Court, Queens County
Docket Number: Index No. 718552/2021
Judge: Maurice E. Muir
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Short Form Order

NEW YORK SUPREME COURT – QUEENS COUNTY

Present: HONORABLE MAURICE E. MUIR
Justice



MOISES ORELLANA,

IAS Part - 42

Index No.: 718552/2021

Plaintiff,

Motion Date: 9/28/24

-against-

Motion Cal. No. 60

ALEKSEY PODUSHKO,

Motion Seq. No. 2

Defendant.

The following electronically filed (“EF”) documents read on this motion by Aleksety Podushko (“Mr. Podushko” or “defendant”) for an order: a) pursuant to CPLR § 3212 and Article 51 of the Insurance Law of the State of New York granting summary judgment to defendant, dismissing plaintiff’s Complaint on the ground that the plaintiff, Moises Orellana, did not sustain any causally related “serious injuries” in the subject July 25, 2019 accident as defined by New York Insurance Law § 5102(d); and thus, plaintiff’s claim for non-economic loss is barred by Section 5104(a) of the statute; and b) granting such other and further relief that this Court may deem just and proper.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits-Service.....	EF 28 - 44
Affirmation in Opposition-Exhibits-Service.....	EF 47 - 51
Reply Affirmation-Exhibits-Service.....	EF 52 - 54

Upon the foregoing papers, it is ordered that this motion is determined as follows:

This is an action to recover damages for personal injuries Moises Orellana (“Mr. Orellana” or “plaintiff”) allegedly sustained in a motor vehicle collision. In particular, the plaintiff alleges that on July 15, 2021, the vehicle owned and operated by Mr. Podushko struck the rear of his vehicle while he was completely stopped in traffic on E 63rd Street and South bound FDR Drive in New York, New York. As a result of the accident, plaintiff alleges that he

sustained serious and permanent injuries to his cervical and lumbar spine, which required him to undergo a percutaneous lumbar discectomy at L5-S1 level and a percutaneous cervical discectomy at C4/5 level. Moreover, on August 17, 2021, the plaintiff commenced the instant action; and on October 18, 2021, issue was joined. Now, the defendant seeks summary judgment on the ground that Mr. Orellana did not sustain a "serious injury" as defined by § 5102(d) of the New York's Insurance Law.

It has long been established that the "legislative intent underlying the Comprehensive Motor Vehicle Insurance Reparation Act of 1974 (i.e., Insurance Law § 5101, *et seq.* – commonly known as New York's "No-Fault" Insurance Law) was to weed out frivolous claims and limit recovery to significant injuries (*Licari v. Elliot*, 57 NY2d 230 [1982]; *see also Toure v. Avis Rent A Car Sys.*, 98 NY2d 345 [2002] quoting *Duel v. Green*, 84 NY2d 795 [1995]). New York's No-Fault Insurance Law § 5102 (d) defines "serious injury" 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 for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

The Court of Appeals has held that the issue of whether a claimed injury falls within the statutory definition of a "serious injury" is a question of law for the courts in the first instance, which may properly be decided on a motion for summary judgment (*see Licari v. Elliott*, 57 NY2d 230 [1982]; *see also Charley v. Goss*, 54 AD3d 569 [1st Dept 2008] *aff'd* 12 NY3d 750 [2009]; *Porcano v. Lelzman*, 255 AD2d 430 [2d Dept 1998]; *Nolan v. Ford*, 100 AD2d 579 [2d Dept 1984] *aff'd* 64 NYS2d 681 [1984]).

On a motion for summary judgment, the defendant has the initial burden of making a *prima facie* showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a "serious injury" within the meaning of New York's No-Fault Insurance Law § 5102(d) (*see Toure v. Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v. Eyler*, 79 NY2d 955 [1992]; *Akhtar v. Santos*, 57 AD3d 593 [2d Dept 2008]). The defendant may satisfy this burden by submitting the plaintiff's deposition testimony and the affirmed medical report of the defendant's own examining physician (*Moore v. Edison*, 25 AD3d 672 [2d Dept 2006]; *Faroze v. Kamran*, 22 AD3d 458 [2d Dept 2005]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, such as affidavits and affirmations, and

not unsworn reports" to demonstrate entitlement to judgment as a matter of law (*Pagano v. Kingsbury*, 182 AD2d 268, 270 [2d Dept 1992]). A defendant may also establish entitlement to summary judgment by using medical reports and records prepared by the plaintiff's own physicians (*see Fragale v. Geiger*, 288 AD2d 431 [2d Dept 2001]; *Grossman v. Wright*, 268 AD2d 79 [2d Dept 2000]; *Vignola v. Varrichio*, 243 AD2d 464 [2d Dept 1997]; *Torres v. Micheletti*, 208 AD2d 519 [2d Dept 1994]). The failure to make such a *prima facie* showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Xin Fang Xin v. Saft*, 177 AD3d 823 [2d Dept 2019]; *Rosenblum v. Schloss*, 175 AD3d 1339 [2d Dept 2019]; *Burns v. Stranger*, 31 AD3d 360 [2d Dept 2006]). Once defendant has met this burden, plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard for "serious injury" under New York's No-Fault Insurance Law (*see Duel v. Green*, 84 NY2d 795 [1995]; *Pagano v. Kingsbury*, 182 AD2d 268 [2d Dept 1992]). The mere parroting of language tailored to meet statutory requirements is insufficient (*see Grossman v. Wright*, 268 AD2d at 84).

Here the court finds that summary judgment is not appropriate in this action, because defendant failed to meet his *prima facie* burden of showing that Mr. Orellana did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject accident. Moreover, the complete record before the Court indicates that there are conflicting medical reports submitted by the parties, which raise triable issues of fact as to whether plaintiff sustained serious injuries within the meaning of Insurance Law § 5102(d) (*see Scully v. Stephens*, 214 AD3d 834 [2d Dept 2023]; *Pommells v. Perez*, 4 NY3d 566 [2005]; *Wilcoxon v. Palladino*, 122 AD3d 727 [2d Dept 2014]; *Garcia v. Long Island MTA*, 2 AD3d 675 [2d Dept 2013]; *Tinao v. City of New York*, 112 AD2d 363 [2d Dept 1985]; *Cassagnol v. Williamsburg Plaza Taxi*, 234 AD2d 208 [1st Dept 1996]). It is well settled that conflicting medical evidence on the issue of the permanency and significance of a plaintiff's injuries warrants denial of summary judgment. (*Pommells v. Perez*, 4 NY3d 566 [2005]; *Wilcoxon v. Palladino*, 122 AD3d 727 [2d Dept 2014]; *Garcia v. Long Island MTA*, 2 AD3d 675 [2d Dept 2013]; *Noble v. Ackerman*, 252 AD2d 392 [1st Dept 1998]). This is a matter to be resolved by a trier of fact.

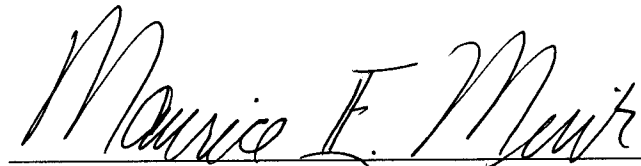
Accordingly, it is hereby

ORDERED that the defendant's motion for summary judgment, pursuant to CPLR § 3212, is denied, in its entirety; and it is further,

ORDERED that plaintiff shall serve a copy of this decision and order with notice of entry upon the defendants and the clerk of this court on or before February 15, 2024.

The foregoing constitutes the decision and order of the court.

Dated: January 12, 2024
Long Island City, NY


MAURICE E. MUIR, J.S.C.

