Pile v Baptiste
2025 NY Slip Op 31966(U)
May 20, 2025
Supreme Court, Kings County
Docket Number: Index No. 525970/2020
Judge: Lisa S. Ottley
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS – PART 24
--x
RANDON PILE,

Plaintiff,

-against-

STANLEY JEAN BAPTISTE and WRL TRANPORT, INC,

Defendants.
--x

Mot. Seq. # 5

Index # 525970/2020

DECISION AND ORDER

HON. LISA S. OTTLEY

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Notice of Motion for Summary Judgment submitted on September 23, 2024.

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

Plaintiff commenced this action to recover for injuries allegedly sustained as a result of a motor vehicle accident on July 22, 2020, at or near the intersection of Bedford Avenue and Linden Boulevard in Brooklyn, New York. Defendants move for an order pursuant to CPLR §3212 dismissing plaintiff's complaint in its entirety on the grounds that the plaintiff has not sustained a serious injury pursuant to Section 5102(d) of the Insurance Law. Plaintiff opposes defendants' motion for summary judgment on the ground that there are issues of fact which preclude summary judgment from being granted.

Plaintiff's Bill of Particulars alleges that he sustained injuries to the left shoulder: rotator cuff tear; supraspinatus tendon tear; labrum tear; Type II SLP tear; internal derangement; synovitis; bursitis; tendinopathy and tendonitis of the supraspinatus tendon; strain/sprain; right shoulder: tendinopathy of the right supraspinatus tendon; internal derangement; tendinitis; strain/sprain; cervical spine: sprain/strain; lumbar spine: herniations at L5-S1; bulges at L2-3, L3-4, L4-5; radiculopathy; sprain/strain; sacral spine: sacroiliac joint sprain; strain/sprain; thoracic spine: strain/sprain.

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 (2nd 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].

The 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, the 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 defendants' motion for summary judgment, defendant submitted the independent medical findings of Dr. Pierce J. Ferriter, a board-certified orthopedic surgeon, who concluded upon objective tests and examination of the plaintiff that his alleged injuries had resolved and were not significant or permanent as a result of the motor vehicle accident. Dr. Ferriter found no functional disability or objective verification of the plaintiff's complaints that would negate the objective tests performed on plaintiff's cervical spine, lumbar spine, thoracic spine, right shoulder and left shoulder. The conducted tests revealed full range of motion. Defendants also argue that plaintiff's testimony as to being confined to home from work at least two weeks immediately after the accident and six weeks after his surgery fail to establish that plaintiff was confined for a significant duration of time after the accident, nor were his activities significantly curtailed.

In opposition to the defendants 'motion for summary judgment, plaintiff argues that the defendants' doctor's examination took place two years after the accident, and while Dr. Ferriter concludes that the plaintiff's injuries to his cervical spine, thoracic spine, lumbar spine, right shoulder and left shoulder are resolved, he admits that there is no evidence of any contributing pre-existing conditions or prior injuries that impact the plaintiff's stated and complained of by the plaintiff since the accident. Plaintiff further argues that Dr. Ferriter's report fails to determine whether the plaintiff was able to carry out his normal and customary activities during the 90/180-day period, which is insufficient to establish defendants' prima facie entitlement to summary judgment as a matter a law. Plaintiff further argues and submits the plaintiff's certified and/or affirmed medical records, plaintiff's examination before trial, and affirmations of Dr. Durant and Dr. Viviane Etienne raise issues of fact as to the plaintiff having sustained serious injuries pursuant to CPLR 5102(d). Mr. Pile, who at the time of the accident was 36 years of age and a passenger in the vehicle, had no past medical history to his neck, back, left shoulder and right shoulder. The plaintiff's medical treatment and affirmed reports raise an issue of fact as to whether the plaintiff suffered a serious injury and therefore, summary judgment should not be granted.

In reply, defendants argue that the plaintiff's reports are not in admissible form, to wit, the report of Dr. Viviane Etienne, which is not in compliance with CPLR 2106, and therefore plaintiff cannot establish causation because there is no evidence of an initial examination or of limitations contemporaneous with the accident. Defendants also argue that there is a 42-month gap in treatment which has not been explained by the plaintiff.

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 (2nd 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 (2nd 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 facture; 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 (2nd Dept., 2019) *citing*, (Dufel v. Green, 84 N.Y.2d 795, 622 N.Y.S.2d 900 [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, 712 N.Y.S.2d 133 (2nd Dept., 2000).

The court finds that the defendants' submissions fail to make a prima facie showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law 5102(d) because of the subject accident. The defendants' examining doctor stated in his report that there were no legally authenticated medical records available for review, and after having conducted objective range of motion tests, as well as objective orthopedic tests, Dr. Ferriter concluded that the plaintiff did not sustain any significant or permanent injury as a result of the motor vehicle accident. However, as noted in opposition to defendants' motion, Dr. Ferriter's independent examination was conducted almost two years after the subject accident and fails to offer an opinion regarding the plaintiff's physical condition contemporaneously to the accident. *See*, Washington v. Lawrence, 58 Misc.3d 1214(A), 95 N.Y.S.3d 126 (2nd Dept., 2018); Faun Thai v. Butt, 34 A.D.3d 447, 824 N.Y.S.2d 131 (2nd Dept., 2006); Volpetti v. Yoon Kap, 28 A.D.3d 750, 814 N.Y.S.2d 236 (2nd Dept., 2006) where the court held that the experts failed to relate their findings concerning this category of serious

injury for the period of time immediately following the accident, and under these circumstances, it was not necessary to consider whether the plaintiff's papers submitted in opposition to defendant's motion were sufficient to raise a trial issue of fact.

The burden to raise a triable issue of fact has not shifted to the plaintiff.

Accordingly, it is hereby ORDERED, that the defendant's 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
May 20, 2025

HON. LISA S. OTTLEY, J.S.C.

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