

<b>Ngom v New York City Tr. Auth.</b>
2018 NY Slip Op 33406(U)
December 18, 2018
Supreme Court, New York County
Docket Number: 153013/2016
Judge: Lisa A. Sokoloff
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

MAMADOU NGOM

*Plaintiff,*

-against-

NEW YORK CITY TRANSIT AUTHORITY,  
MANHATTAN AND BRONX SURFACE  
TRANSIT OPERATING AUTHORITY, AND  
JULIUS E. PUGH

*Defendants.*

X

Index No. 153013/2016

Motion Seq. 001

**DECISION AND ORDER**

X

*Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:*

Papers	Numbered	NYCEF #
Defendant's Summary Judgment Motion/Affirmation	<u>1</u>	14-29
Plaintiff's Opposition to Motion/Exhibits	<u>2</u>	31-41
Defendant's Reply Affirmation	<u>3</u>	43-44

LISA A. SOKOLOFF, J.

Defendants New York City Transit Authority, Manhattan and Bronx Surface Transit Operating Authority and Julius E. Pugh move for an order pursuant to CPLR § 3212 granting summary judgment and dismissing the complaint on the ground that Plaintiff Mamadou Ngom did not sustain a "serious injury" within the meaning of New York State Insurance Law §5102(d).

This is an action to recover for personal injuries allegedly sustained by Plaintiff as a result of a motor vehicle accident that occurred on May 15, 2015. In his Notice of Claim, Plaintiff alleges that his vehicle was negligently struck by a bus owned and/or operated by Defendants on East 128<sup>th</sup> Street near Third Avenue in Manhattan.

According to his Bill of Particulars, as a result of the accident, Plaintiff suffered multiple disc bulges/derangement, sprains/strains of his cervical and lumbar spine, cervical and lumbar radiculopathy, loss of range of motion, and left shoulder derangement with impingement and radiating back pain. He claims that his injuries fall within the following categories of § 5102(d): significant disfigurement, a fracture, permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents Plaintiff from performing substantially all of the material acts which constitute his usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment.

Under New York's "No Fault" statute, a party alleging negligence in a motor vehicle accident may only recover damages for pain and suffering if they have suffered a "serious injury" pursuant to Insurance Law § 5102(d) (Ins. Law § 5104[a]; *Pommells v Perez*, 4 NY3d 566 [2005]). 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 for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

Ins. Law § 5102[d].

The threshold question of whether the evidence would warrant a jury finding that a plaintiff has suffered a "serious injury" is one for the court (*Licari v Elliott*, 57 NY2d 230 [1982]). To prevail on a motion for summary judgment, where the issue is whether the plaintiff has sustained a serious injury under the No-Fault Law, a defendant must establish

by competent evidence, that plaintiff did not suffer a serious injury causally related to the accident (*Wadford v Gruz*, 35 AD3d 258 [1st Dept 2006]). Defendants can do so by submitting affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim (*Shinn v Catanzaro*, 1 AD3d 195 [1st Dept 2003] citing *Grossman v Wright*, 268 AD2d 79, 83-84 (2d Dept 2000)).

Once a defendant makes the requisite *prima facie* showing, the burden shifts to the plaintiff to demonstrate a triable issue of fact that a serious injury was sustained (*Shinn v Catanzaro*, at 197). A plaintiff's expert may provide a qualitative assessment that has an objective basis and compares the plaintiff's limitations with normal function in the context of the limb or body system's use and purpose, or a quantitative assessment that assigns a numeric percentage to the plaintiff's loss of range of motion (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350-351 [2002]). The evidence a plaintiff presents must be objective and based on a recent examination of the plaintiff (*Townes v Harlem Group, Inc.*, 82 AD3d 583 [1st Dept 2011]). In addition to proving that issues of fact exist, a plaintiff must also demonstrate that the injury was causally related to the accident (*Valentin v Pomilla*, 59 AD3d 184 [1st Dept 2009]). If a defendant fails to make the *prima facie* showing, summary judgment may be denied without considering the sufficiency of plaintiff's evidence to raise a triable issue of fact (*Vishevnik v Bouna*, 147 AD3d 657 [1st Dept 2017]).

In the matter before us, Defendants submit that Plaintiff did not suffer a serious injury. Defendants submit the affirmed report of orthopedic surgeon, Dr. Frank Oliveto, who examined Plaintiff on August 25, 2015. Dr. Oliveto observed subjective limitation of range of motion in plaintiff's cervical and lumbar spine with flexion, extension and rotation

between 10-20 degrees. While there were subjective complaints of discomfort with motion, there were no tenderness or spasm noted in the paracervical spinal musculature or in the paralumbar area and that straight leg raising in both lower extremities was normal to 70 degrees. Dr. Oliveto diagnosed that both cervical and lumbar sprain/strain objectively resolved and healed, found no evidence of a causally-related disability and that Plaintiff is capable of performing his usual activities of daily living without restrictions.

Defendants also submit the affirmed report of chiropractor, Dr. Michael A. Maiorino, who examined Plaintiff on August 25, 2015. Upon examination of the cervical spine and lumbar spine, Dr. Maiorino measured full range of motion. Discomfort in the neck bilaterally and subjective tenderness over the bilateral paraspinal muscles were noted. Dr. Maiorino diagnosed that objectively cervical spine and thoracic spine were resolved and that the Plaintiff has made a full recovery with no restrictions.

Defendants also submit the affirmed report of an independent orthopedic Dr. Gregory Galano, who examined the Plaintiff on March 11, 2017. Dr. Galano diagnosed that cervical spine strain, thoracic spine strain, lumbar spine strain and left shoulder sprain were resolved and that bilateral leg examinations were normal with no spasms or tenderness.

Defendants also submit the affirmed report of an independent neurologist Dr. Naunihal Sachdev Singh who examined Plaintiff on March 13, 2017. Dr. Singh diagnosed that the cervical, thoracic and lumbar spine sprain and strain were resolved, that Plaintiff had a normal neurological examination and that there is no permanency to the cervical, thoracic and lumbar spine sprain and strain.

Based on the findings of Drs. Oliveto, Maiorino, Galano and Singh, Defendants have established *prima facie* that Plaintiff did not suffer a serious injury within the meaning of Insurance Law §5102(d), as he has no significant limitation (*Toure v Avis Rent-A-Car*, 98 NY2d 345 [2002]; *Ramos v Rodriguez*, 93 AD3d 473 [1st Dept 2012]).

Defendants also note that in his Bill of Particulars, Plaintiff claimed he was confined to his bed and house following the accident. Yet Plaintiff testified that during his visit to Harlem Hospital on the day of the accident he did not require assistance walking and was discharged the same day. Plaintiff further testified that he was able to visit his primary doctor at Montefiore Medical three days later and to attend physical therapy three to four times a week for over a year following the accident and has not provided any testimony that the injuries suffered were permanent. The Plaintiff therefore cannot utilize the 90/180-day qualifier of Insurance Law § 5102 to meet the serious injury threshold.

As such, the burden shifts to Plaintiff to establish that he sustained a serious injury. A plaintiff's subjective claims of pain and limitation of motion must be supported by verifiable objective medical findings (*Munoz v Hollingsworth*, 18 AD3d 278 [1st Dept 2005]) and based on a recent examination (*Grossman v Wright*, 268 AD2d 79 [2nd Dept 2000]). In order to prove the extent or degree of physical limitation, an expert may designate a numeric percentage of a plaintiff's loss of range of motion or may make a qualitative assessment of plaintiff's condition, provided that the latter evaluation has an objective basis and compares the plaintiff's limitations to the normal use of the affected body system or function (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 350-351 [2002]; *Shinn v Catanzaro*).

Plaintiff has provided the sworn report of Dr. James R. McGee, a chiropractic orthopedist who had treated Plaintiff following the accident. Dr. McGee's sworn affidavit states that Plaintiff was last examined on June 21, 2018 and notes that Plaintiff had sustained bulging discs with resultant central canal and foraminal stenosis. Plaintiff also sustained internal derangement of the left shoulder, which remains symptomatic and, in Dr. McGee's opinion with a reasonable degree of scientific certainty, the consequential limitation in motion and function are permanent. The injuries suffered by Plaintiff in the accident are permanent and there is a permanent partial disability of the cervical and lumbosacral spinal regions, both of a significant level. Bulging disc indicates partial tearing of the annular fibers surrounding the inner gelatinous material. There is resultant central canal and foraminal stenosis. This is a permanent and significant finding and will predispose him ultimately to further progression of degenerative processes involving the disc. He will continue to suffer pain and restriction in various activities of daily living.

While Dr. McGee's affidavit gives no indication or explanation as to whether injuries were objectively measured and why the injuries are "significant," Dr. McGee's sworn affidavit refers to his report and the reports given by Physical Medicine and Rehabilitation physician Robert Marini, M.D and incorporates the reports as part of the affidavit.

The chiropractor's sworn affidavit, which incorporates by reference two prior unsworn reports, is sufficient to raise a triable issue of fact as to whether plaintiff sustained a serious physical injury as defined by Insurance Law § 5102(d) (*Lazu v Integral Truck Leasing*, 292 AD2d 306 [1st Dept 2002]). Accordingly, Dr. McGee's report can be

incorporated in his affidavit to determine if the Plaintiff's subjective claims of pain and limitation of motion must be supported by verifiable objective medical findings.

Dr. McGee's report notes that Plaintiff was initially examined on May 26, 2015 and ranges of motion of the thoracolumbar spine were limited in flexion/extension 40/5 degrees (normal 90/20 degrees); cervical spine were limited in right/left rotation 35/30 degrees (normal 80/80 degrees), right/left lateral bending 10/10 degrees (normal 45/45 degrees), and left shoulder were limited in abduction, internal and external rotation, 120/40/30 degrees (normal 180/60/40 degrees). Manual motor test revealed weakness of the left shoulder abductors, (5-/5). Sensory evaluation revealed paresthesia into the left upper extremity. Deep tendon reflexes were graded +2, equal. Orthopedic tests for the cervical and lumbosacral spine were positive for joint and muscle derangement. Straight leg raise was positive 15 degrees on the left and 30 degrees on the right. Cervical compression test was positive. Impingement signs of the left shoulder were positive in abduction and external rotation.

Moreover, Dr. McGee examined Plaintiff on June 21, 2018 and found limited ranges of motion of the thoracolumbar, cervical spine, and left shoulder, objectively measured using a goniometer. Manual motor testing revealed weakness of the left shoulder abductors, (5-/5). Sensory evaluation revealed paresthesia into the right lower extremity. Deep tendon reflexes were graded +2, normal. Orthopedic tests for the cervical and lumbosacral spine were positive for joint and muscle derangement. Straight leg raise was positive 30 degrees on the right, left 45 degrees. Cervical compression test was positive. Impingement signs of the left shoulder were positive. Plaintiff sustained a bulging disc,



which indicates partial tearing of annular fibers surrounding the inner gelatinous material with resultant central canal and foraminal stenosis.

The report also notes that the resultant soft tissue disruption and ligamentous instability sustained in the accident will result in permanent degenerative changes to the spine, including scar tissue formation and altered biomechanics secondary to muscular and ligamentous instability.

Plaintiff's complaints that he continues to experience pain in his neck, back and left shoulder, cannot lift any heavy objects such as grocery bags and that it is painful and difficult to get out of bed are insufficient to establish "serious injury are insufficient to defeat Defendant's summary judgment motion (*Rivera v Benaroti*, 29 AD3d 340 [1st Dept 2006]). Further, Plaintiff testified that he was able to visit his primary doctor at Montefiore Medical three days after the accident and attend physical therapy three to four times a week for over a year following the accident. Therefore, Plaintiff has failed to raise an inference that a medically determined injury or impairment prevented him from performing substantially all his usual and customary daily activities for at least 90 of the first 180 days following the accident (*Farrington v Go On Time Car Service*, 76 AD3d 818 [1st Dept 2010]).

However, as a final diagnosis, Dr. McGee reports a limited range of motion, bulging discs with resultant central canal and foraminal stenosis, attributes the injuries to the accident and deems them to be permanent. The affidavit of Plaintiff's treating physician, stating that he found a 20% restriction of both the cervical and lumbosacral spine after a recent examination and testing, sufficed to show, prima facie, that the injuries

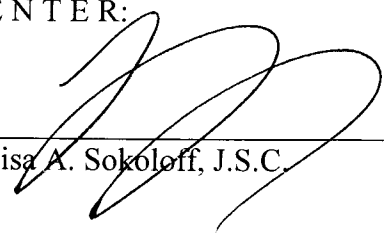
were objectively measured and "significant" (*Pagan v Gondola Cab Corp.* 235 AD2d 251 [1<sup>st</sup> Dept 1997]).

Accordingly, it is

ORDERED, that Defendants' motion for summary judgment on the ground that Plaintiff has not met the "serious injury" threshold within the meaning of Insurance Law § 5102(d) is denied.

Any other requested relief not expressly granted is denied.

Dated: December 18, 2018  
New York, New York

ENTER:  
  
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Lisa A. Sokoloff, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
		<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: