SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 22

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MARIO ARGIRO,

Plaintiff,

Index No.:152675/15
DECISION/ORDER

-against-

ANDREW'S TAXI EXPRESS CORP. and
MOHAMMAD O. FAROQUE,

Defendants.

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HON. PAUL A. GOETZ, J.S.C.:

In this personal injury/automobile accident action, defendants Andrew's Taxi Express Corp. (Andrew's) and Mohammad O. Faroque (Faroque; together, defendants) move for summary judgment pursuant to CPLR 3212 to dismiss the complaint (motion sequence number 001) on the grounds that the injuries allegedly sustained by plaintiff Mario Argiro (Argiro), fail to establish serious injury thresholds as defined by Insurance Law 5102 (d). Plaintiff's bill of particulars alleges injuries to his right lower extremity. Plaintiff brings this action, claiming that his injuries are serious within the meaning of Insurance Law 5102 (d) in that he sustained a fracture; and that the accident resulted in permanent consequential limitation of use of a body organ or member, a significant limitation of use of a body function or system, and prevented him from performing substantially all of the material acts which constitute his usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the accident.

BACKGROUND

The accident occurred on November 29, 2013, when Argiro was attempting to enter a

taxicab that was owned by Andrew's and operated by Faroque. Argiro states that the accident took place at approximately 2 p.m., at the intersection of West 4th Street and 6th Avenue in the County, City and State of New York. Argiro specifically asserts that, after his other family members had entered the car, and he was in the process of getting in, Faroque began to accelerate away with the rear passenger door still open, and Argiro's right foot still standing on the street pavement. *See* notice of motion, exhibit C, at 23-34. Argiro further asserts that the car's right rear tire rolled over his right foot, pulling him out of the car, twisting him around and throwing him to the ground, where he sustained multiple injuries. *Id.*

Argiro avers that he is a resident of the state of Florida, and that he and his wife were in New York to visit their children for Thanksgiving. *See* Argiro aff in opposition, ¶ 3. Argiro notes that their return flight departed on the evening of November 29, 2013, and states that he and his wife opted to take that flight rather than seek emergency room care in New York. *Id.*, ¶ 4. Argiro also notes that he saw his primary care physician, Robert Reeder, MD (Dr. Reeder), on the following Monday, December 3, 2013, at which time he was X-rayed and referred to an orthopedist. *Id.*, ¶ 5. Argiro states that the orthopedist refused to see him at that time, however, because he required a defendant's insurance information in any automobile accident case for billing purposes. *Id.* Argiro states that he eventually obtained that information, and thereafter scheduled an examination with orthopedist Dominic Kleinhenz, MD (Dr. Kleinhenz) on February 7, 2014. *Id.*, ¶ 6. Argiro avers that he was treated by Dr. Kleinhenz on numerous occasions between 2014 and 2016. *Id.*, ¶¶ 7-8. Argiro further avers that, at Dr. Kleinhenz's recommendation, he also undertook treatment with neurologist Richard Kishner MD (Dr. Kishner), whom he saw on two occasions in 2014. *Id.*, ¶ 8. Argiro has presented copies of three

medical examination reports by Dr. Kleinhenz. *Id.*, Kleinhenz aff in opposition, exhibits 1, 2, 3. The first, dated February 7, 2014, notes that Argiro exhibited a full range of motion in his right foot and ankle, but a "markedly positive sciatic stretch" on his right side. *Id.*, exhibit 1. That report notes that a lumbar spine X ray "demonstrates mild narrowing of the L5-S1 disc space," and set forths assessments of "ankle joint pain" and "lumbar radiculopathy." *Id.* In the second report, dated November 11, 2014, Dr. Kleinhenz noted that he had reviewed several MRIs and Dr. Kishner's neurological report, and made the following conclusions: 1) that, as a result of the accident, Argiro had suffered "a microscopic fracture in the tarsal navicular bone along with injuries to his posterior and peroneal tendons;" 2) that he agreed with Dr. Kishner's finding that Argiro had a "permanent impairment rating to the quadriceps muscle of 10% to the whole body;" 3) that Argiro had "an additional 6% whole body impairment as a result of the injury to his foot and ankle;" and 4) that Argiro "has a 14% whole body impairment as a result of the right quadriceps injury along with the right foot and ankle injury." *Id.*, exhibit 2. In the final report, dated November 29, 2016, Dr. Kleinhenz made the following findings: 1) Argiro "has a 12% whole body impairment as a result of his lumbar radiculopathy and multiple disc injuries in the lumbar spine;" 2) Argiro "has an additional 3% whole body impairment as a result of the peroneal tendinitis and posterior tibial tendinitis;" 3) Argiro has an additional 2% whole body impairment as a result of the microscopic foot fracture; and 4) that these aggregate impairments "add up to a 17% whole body impairment." *Id.*, exhibit 3. Dr. Kleinhenz concluded that Argiro will continue to be limited in his ability to work full time or to engage in his normal activities, will need special footwear and will never recover the strength in his right lower extremity. *Id.* Finally, Argiro himself states that he remains in continuous pain, that he was unable to work or

perform any of his usual activities at all for a period of five months after his accident, and that he has only been able to work part time since September 2015. *Id.*, Argiro aff in opposition, ¶¶ 10-11.

For their part, defendants note that reports on the X ray and the MRI performed on Argiro after his first visit with Dr. Kleinhenz both contain the conclusion there was no fracture in his right foot, and that the MRI report also sets forth the impression that there was mild edema rather than tendon damage. See notice of motion, exhibits D, E. Defendants have also presented copies of medical examination reports from their experts, orthopedist Lisa Nason, MD (Dr. Nason) and radiologist Audrey Eisenstadt, MD (Dr. Eisenstadt). *Id.*, exhibits G, H. Dr. Nason's report, dated December 28, 2015, found no instability and a normal range of motion in Argiro's right foot and ankle, and concluded that his alleged injuries thereto were "resolved." *Id.*, exhibit G. Dr. Eisenstadt's report, dated August 20, 2016, recited that she had reviewed Argiro's MRIs and performed a physical examination, and reached the following conclusions: 1) there was "evidence of extensive degenerative joint disease involving the bony structures" of Argiro's right foot; 2) that "these degenerative changes could not have occurred in less than six months' time and have no traumatic etiology;" and 3) that, while "mild tenosynovitis of the peroneus tendons" is observed, there is "no osseous injury, ligamentous injury, tendinous disruption or subcutaneous changes seen." *Id.*, exhibit H.

DISCUSSION

The "damages" component of Argiro's negligence claims is prdicated on the allegation that he suffered a "serious injury," as that term is defined by the statute. Insurance Law § 5102 (d) specifically provides as follows:

> "'Serious injury' means 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."

"To prevail on a [threshold] motion for summary judgment, the defendant has the initial burden to present competent evidence showing that the plaintiff has not suffered a serious injury" (*Spencer v Golden Eagle, Inc.*, 82 AD3d 589, 590 [1st Dept 2011] [internal quotation marks and citations omitted]). Once defendant meets its initial burden, plaintiff must then demonstrate a triable issue of fact as to whether s/he sustained a serious injury within the meaning of Insurance Law § 5102 [d] (*Shinn v Catanzaro*, 1 AD3d 195, 197 [1st Dept 2003]).

In *Toure v Avis Rent A Car Sys.* (98 NY2d 345 [2002]), the Court of Appeals held that the:

> "plaintiff's proffered evidence raises issues of material fact as to whether he sustained a 'permanent consequential limitation of use of a body organ or member' or a 'significant limitation of use of a body function or system.'
>
> "For these two statutory categories, we have held that '[w]hether a limitation of use or function is "significant" or "consequential" (i.e., important ...) 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 the body part.' While [plaintiff's doctor's] affirmation does not ascribe a specific percentage to the loss of range of motion in plaintiff's spine, he sufficiently describes the 'qualitative nature' of plaintiff's limitations 'based on the normal function, purpose and use of the body part.' [Plaintiff's doctor] further attributes the limitations in plaintiff's physical activities to the nature of the injuries sustained by opining that plaintiff's 'difficulty in sitting, standing or walking for any extended period of time and his inability to lift heavy boxes at work are a natural and expected medical consequence of his injuries.'

> "We cannot say that the alleged limitations of plaintiff's back and neck are so 'minor, mild or slight' as to be considered insignificant within the meaning of Insurance Law § 5102 (d). As our case law further requires, [plaintiff's doctor's] opinion is supported by objective medical evidence, including MRI and CT scan tests and reports, paired with his observations of muscle spasms during his physical examination of plaintiff. Considered in the light most favorable to plaintiff, this evidence was sufficient to defeat defendants' motion for summary judgment."

98 NY2d at 352-353 (internal citations omitted).

Defendants argue that Argiro's injuries do not meet the definition of "serious injury" under several of the categories of such injuries that the statute recognizes. First, defendants argue that "where a successful surgery resolved the injury allegation, with no permanent residual loss of use or limitation, there was no basis for a claim of 'permanent' serious injury under the statute." *See* notice of motion, Kane affirmation, ¶ 22. Defendants cite a number of cases to support their argument, however they are all inapposite. Nothing before the court establishes that Argiro ever underwent surgery to treat his injuries. Therefore, defendants' first dismissal argument is without merit.

Next, defendants argue that "since the medical proofs plainly establish that plaintiff did not sustain a complete loss of the use of a body organ or member, he . . . cannot satisfy that category of the statute." *See* notice of motion Kane affirmation, ¶ 23. However, Argiro's bill of particulars does not allege that he suffered a serious injury under this category of Insurance Law 5102 (d), consequently this category in not in contention.

Next, defendants argue that "by finding no causally related limitations, and also normal results on a variety of objective clinical tests, defendants' doctors ruled out any basis for a permanent consequential limitation." *See* notice of motion, Kane affirmation, ¶ 24. Defendants

specifically rely on Drs. Nason's and Eisenstadt's medical examination reports as evidence of their prima facie claim that Argiro suffered no such "serious injury." *Id.* Argiro responds that Dr. Kleinhenz's medical examination reports and diagnoses constitute sufficient proof to raise a triable issue of fact with respect to the "permanent consequential limitation" category of Insurance Law § 5102 injuries. *See* Stern affirmation in opposition, ¶ 9. After reviewing the evidence and the governing case law, the court agrees. In *Birch v 31 N. Blvd., Inc.* (139 AD3d 580 [1st Dept 2016]), the Appellate Division, First Department, affirmed that medical evidence which includes calculations showing below normal range of motion and/or percentage of loss of use of a body part or function is generally sufficient to raise a triable issue of fact as to whether a plaintiff has sustained an injury that amounts to a "permanent consequential limitation"of such body part or function. The Court acknowledged that it is not necessary to include these types of calculations or percentages in an accident victim's initial medical treatment reports, as long as the treating physician includes them in the final expert's report. Here, Dr. Kleinhenz's report of Argiro's first visit did not contain such figures, but both his November 11, 2014 and November 29, 2016 examination reports do. Those reports also recite that Dr. Kleinhenz reviewed "objective medical evidence" consisting of X ray and MRI results, as well as his own physical examination of Argiro, in formulating these calculations. Finally, the two reports both also recite that, in Dr. Kleinhenz's professional opinion, Argiro's injuries are causally related to the November 29, 2013 accident. Thus, as evidence, they are sufficient to raise a triable issue of fact with respect to Drs. Nason's and Eisenstadt's professional medical conclusions that Argiro did not sustain a "permanent consequential limitation" injury. Therefore, Argiro created an issue of fact as to whether he suffered a "permanent consequential limitation."

Next, defendants argue that their medical "proof ruled out the 90/180 day category of the statute," because "the category requires proof that plaintiff was medically prevented from performing 'substantially all' of his/her usual and customary activities for the requisite period." *See* notice of motion, Kane affirmation, ¶ 25. Argiro responds that he has presented medical proof of the existence of an injury, along with his own testimony that he was unable to either work or perform said usual and customary activities for five months after his accident. *See* Stern affirmation in opposition, ¶ 10. Argiro also notes that the "medical proof" that defendants mention in their argument is insufficient, as a matter of law, to sustain their burden of proof on the 90/180 day argument. *Id.* The court agrees. In *Boateng v Ye Yiyan* (119 AD3d 424 [1st Dept 2014]), the Appellate Division, First Department, held that the defendants "fail[ed] to meet their initial burden on the 90/180-day claim" where "[d]efendants' physicians' examinations took place well after the relevant 180-day period, and defendants submitted no other evidence disproving plaintiff's claim that she was disabled and unable to return to her work . . . for six months following the accident due to a medically determined injury caused by the accident." 119 AD3d at 425-426. Here, too, the only "medical proofs" that defendants have presented are the examination reports of Drs. Nason and Eisenstadt, which were prepared in 2015 and 2016, respectively, more than two years after Argiro's accident. Neither of those reports contains any information on the period of time between 90 and 180 days after that accident. The court further notes that defendants' reply papers are devoid of any further argument on the 90/180 day issue. As a result, there is an issue of fact relating to Argiro 90/180-day claim.

Finally, although defendants failed to discuss this category of "serious injury" in their moving papers, Argiro notes that his bill of particulars alleged the "fracture" category as one of

the bases of his Insurance Law § 5102 claim, and that Dr. Kleinhenz's November 11, 2014 and November 29, 2016 examination reports both included findings that Argiro had sustained "a microscopic fracture in the tarsal navicular bone" of his right foot. *See* Stern affirmation in opposition, ¶ 8 n 1; Kleinhenz aff in opposition, exhibits 2, 3. In the absence of any argument or proof to the contrary from defendants, the court finds that the "fracture" category is also available to Argiro as a basis for his Insurance Law § 5102 claim.

DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 3212, of defendants Andrew's Taxi Express Corp. and Mohammad O. Faroque is DENIED in its entirety; and it is further

ORDERED that the parties are directed to appear for a settlement conference in Part 22 at 80 Centre Street, Room 136 on February 20, 2018, at 9:30 a.m.

Dated: New York, New York
January 4, 2018

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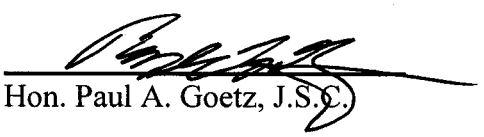

Hon. Paul A. Goetz, J.S.C.