Escobar v Almulaiki
2021 NY Slip Op 30760(U)
February 17, 2021
Supreme Court, Kings County
Docket Number: 508957/2016
Judge: Carl J. Landicino

At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 17th day of February, 2021.

PRESENT:
CARL J. LANDICINO, J.S.C.

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SAMUEL DEJESUS ROSALES ESCOBAR,

Plaintiff,

-against-

MAHMOUD ALMULAIKI and AJAZ ANJUM,

Defendants.

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Index No.: 508957/2016

DECISION AND ORDER

Motion Sequence #1

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

	Papers Numbered (NYSCEF)
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	15-24
Opposing Affidavits (Affirmations)	30-34
Reply Affidavits (Affirmations)	

Upon the foregoing papers, and after oral argument, the Court finds as follows:

This action concerns a motor vehicle accident that occurred on November 15, 2015. On that day, the Plaintiff, Samuel Dejesus Rosales Escobar (hereinafter referred to as the "Plaintiff") was involved in a motor vehicle collision with a vehicle operated by Defendant Mahmoud Almulaiki and owned by Ajaz Anjum Defendant (hereinafter the "Defendants"). The Plaintiff alleges that the collision occurred on the Jackie Robinson Parkway at or near Jamaica Avenue, Brooklyn, New York. The Plaintiff claims, in his Verified Bill of Particulars, that he sustained a number of serious injuries including, *inter alia*, injuries to his right shoulder, cervical spine, lumbar spine, and right ankle. The Plaintiff also alleges that he was unable to perform his usual duties for 90 days out of the first 180 days following the accident.

The Defendants now move (motion sequence #1) for an order pursuant to CPLR 3212, granting summary judgment and dismissing the complaint against them on the ground that none of the injuries allegedly sustained by the Plaintiff meets the "serious injury" threshold requirement of Insurance Law § 5102(d). In support of this application, the Defendant relies on the deposition of the Plaintiff and the reports of Dr. Pierce J. Ferriter and Dr. Eric L. Cantos.

The Plaintiff opposes the motion and argues that it should be denied. The Plaintiff contends that the movants have failed to meet their *prima facie* evidentiary showing, and that even assuming that they had, there are sufficient issues of fact raised by the reports of the Plaintiff's Doctors which serve to support the denial of summary judgment.

It has long been established that "[s]ummary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact.'" *Kolivas v. Kirchoff,* 14 AD3d 493 [2d Dept 2005], *citing Andre v. Pomeroy,* 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The party seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. *See Sheppard-Mobley v. King,* 10 AD3d 70, 74 [2d Dept 2004], *citing Alvarez v. Prospect Hospital,* 68 N.Y.2d320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" *Garnham & Han Real Estate Brokers v Oppenheimer,* 148 AD2d 493 [2d Dept 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous.*

Mgmt. Corp., 34 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; *see Menzel v. Plotnick*, 202 AD2d 558, 558–559, 610 N.Y.S.2d 50 [2d Dept 1994].

In support of their motion (motions sequence #1) the Defendant proffers the affirmed medical reports of Drs. Ferriter and Dr. Eric L. Cantos. Dr. Dr. Pierce J. Ferriter examined the Plaintiff on December 31, 2018, more than three years after the date of the accident. Dr. Ferriter conducted range of motion testing of the Plaintiff's cervical spine, thoracic spine, lumbar spine, right shoulder and right foot. Dr. Ferriter found normal range of motion for each test, with the use of the goniometer. Dr. Ferriter's impression was that the "orthopedic examination is objectively normal and indicates no findings which would result in no orthopedic limitations in use of the body parts examined." Dr. Ferriter further opined that "The examinee is capable of functional use of the examined body parts for normal activities of daily living as well as usual daily activities including regular work duties." (See Defendants' Motion, Exhibit F, Report of Dr. Ferriter).

Dr. Eric L. Cantos did not examine the Plaintiff but instead review an MRI of the Plaintiff's cervical and lumbar spine. The MRI of the Plaintiff's cervical spine was performed on January 13, 2016. Dr. Cantos' review of the MRI of the cervical spine revealed "[m]ild bulging of the disc annuli from CS to T1." Dr. Cantos opined that "I see no imaging evidence of a fracture or disc herniation that could be attributed to the accident occurrence." Dr. Cantos further acknowledged that "[t]here is mild bulging of the lower cervical disc annuli." The MRI of the Plaintiff's lumbar spine was performed on January 13, 2016. Dr. Cantos stated that "[t]he imaging study fails to demonstrate evidence of a fracture or disc hermiation that could be attributed to the accident occurrence." Dr. Cantos also found "[t]here is an underlying mild scoliosis." (See Defendants' Motion, Exhibit G, Report of Dr. Cantos). He also addressed the right shoulder, but there was apparently no MRI of the right ankle.

Turning to the merits of the Defendants' motion, the Court is of the opinion that the Defendants have not met their initial burden of proof. *See Che Hong Kim v. Kossoff*, 90 AD3d 969, 969, 934 N.Y.S.2d 867 [2d Dept 2011]. The Defendants contend that the affirmed reports of Dr. Ferriter and Dr. Cantos support their contentions that the Plaintiff did not suffer a serious injury as defined under Insurance Law § 5102(d). Dr. Ferriter conducted a medical examination of Plaintiff on December 31, 2018, more than three years after the date of the accident. Dr. Cantos, reviewed a Magnetic Resonance Imaging Scans (MRIs) of the Plaintiff. These MRIs were performed relatively shortly after the motor vehicle incident. However, neither Dr. Cantos nor Dr. Ferriter spoke to the ability of the Plaintiff to conduct his daily activities during this early post-accident period, nor did they address Plaintiff's alleged "90/180" claim. Moreover, when the Plaintiff was asked, during his deposition, whether he had been out of work for any period after the accident, he responded "[t]hree months." When asked whether this was based on a doctor's advice he responded "[f]rom the therapist." When asked if he returned to full duties when he returned to work he answered "[n]o." (See Defendants' Motion, Exhibit D, Page 57)

As a result, the Court is of the opinion that the motion fails to adequately address, as a matter of law, the Plaintiff's claim set forth in the verified bill of particulars, that he sustained "a medically determined injury or impairment of a non-permanent nature which prevents the Plaintiff's injured person's usual and customary daily activities for not less than ninety days (90) during the one hundred eighty (180) days immediately following the occurrence of the injury or impairment."*See Aujour v. Singh*, 90 AD3d 686, 934 N.Y.S.2d 240 [2d Dept 2011]; *Lewis v. John*, 81 AD3d 904, 905, 917 N.Y.S.2d 575 [2d Dept 2011]; *Menezes v. Khan*, 67 AD3d 654, 889 N.Y.S.2d 54 [2d 2009]; *Faun Thai v. Butt*, 34 A.D.3d 447, 448, 824 N.Y.S.2d 131, 132 [2d Dept 2006].

Even assuming, *arguendo*, that the Defendants had met their *prima facie* burden, the Court finds that the Plaintiff has raised material issues of fact relating to his ability to meet the threshold required by

Insurance Law 5102. The Plaintiff relies primarily on the report of Joseph Gregorace, D.O. who examined the Plaintiff on August 29, 2019 and reviewed the subject January 2016 MRIs. During this examination Dr. Gregorace conducted a range of motion exam (with a goniometer) of the Plaintiff's cervical spine, lumbar spine, right shoulder, left shoulder, right ankle and left ankle. As to the cervical spine, he found limited range of motion in the right rotation 60/80 and left rotation 60/80. As to the lumbar spine, Dr. Gregace found limited range of motion flexion 70 degrees (90 degrees normal), extension 20 degrees (30 degrees normal), right side bending 20 degrees (25 degrees normal), left side bending 20 degrees (25 degrees normal). (See Plaintiff's Affirmation in Opposition, Exhibit A, Report of Dr. Gregace).

As a result, the Court finds that the Plaintiff raised material issues of fact that prevent the Court from granting summary judgment. *See McNeil v. New York City Transit Auth.*, 60 AD3d 1018, 1019, 877 N.Y.S.2d 351, 351 [2nd Dept 2009]. "An expert's qualitative assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system." *Toure v Avis Rent A Car Systems Inc.*, 98 NY2d 345, 774 N.E.2d 1197 [2002]; *see Dufel v. Green*, 84 NY2d at 798, 622 N.Y.S.2d 900, 647 NE 2d 105 [1995].

Based on the foregoing, it is hereby ORDERED as follows:

Defendants' motion (motion sequence #1) for summary judgment is denied.

This Constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino, J.S.C.

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