

<b>Alvarado v MTA Bus Co.</b>
2021 NY Slip Op 32429(U)
November 23, 2021
Supreme Court, New York County
Docket Number: Index No. 150366/2016
Judge: Lisa S. Headley
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LISA HEADLEY PART 22

Justice

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DIMAS ALVARADO,

Plaintiff,

- v -

MTA BUS COMPANY, JOSE EDWARDS

Defendant.

-----X

INDEX NO. 150366/2016
MOTION DATE 06/22/2021
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 38, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

Upon the foregoing documents, including the motion for summary judgment, affirmation in opposition, cross-motion and reply affirmation(s) and after a virtual conference with the court, it is hereby ORDERED that defendants, MTA Bus Company and Jose Edwards'(hereinafter "defendants") motion for summary judgment to dismiss the complaint on the ground that the plaintiff's claimed injuries do not satisfy the "serious injury" threshold under New York Insurance Law § 5102(d) is denied. In addition, the plaintiff's cross-motion to strike is also granted, in part.

I. Defendants' Summary Judgment Motion to Dismiss the Complaint

Plaintiff Dimas Alvarado (hereinafter, "plaintiff") commenced this action to recover damages for personal injuries sustained as a result of a motor vehicle accident that occurred on November 21, 2014. Plaintiff alleges that he was injured near the intersection of East 116th Street and 3rd Avenue when the motor vehicle he was driving was struck by defendant MTA Bus, which was operated by co-defendant Jose Edwards. As a result, plaintiff alleges that he sustained severe and permanent injuries to his right shoulder, neck and back, parts of his body where he never experienced pain before the subject accident.

In support of the instant motion, defendant submits the independent medical examination (IME) reports of several doctors who examined plaintiff after the subject accident. First, Dr. Glenn Berman, a licensed chiropractor, diagnosed plaintiff with "cervical and lumbar strains resolved." Dr. Berman concluded that plaintiff did not need additional chiropractic treatment because there were no relevant objective examination findings in Plaintiff's neck or back. Dr. Berman also gave plaintiff a "good" prognosis, noting that he did not anticipate permanency or residual spinal deficits. In addition, Dr. Berman opined that plaintiff was capable of working and could perform all usual daily activities without restrictions from a chiropractic standpoint.

The IME report of Dr. Ebenezer K. Essuman, a board-certified neurologist, found after examining plaintiff's cervical spine, no residual tenderness or spasm over the right trapezius and cervical spine secondary to right shoulder arthroscopic surgery. Dr. Essuman measured plaintiff's cervical spine range of motion, and found no gross tenderness or soft tissue abnormalities. When

measuring plaintiff's range of motion for the lumbar spine, he made findings that his range of motion were normal. Dr. Essuman concluded that plaintiff's neurological examination was normal, with no objective findings of cervical or thoraco-lumbosacral radiculopathy. According to Dr. Essuman, plaintiff exhibited no degree of disability or neurological restriction for full-time occupational duties and activities of daily living. Dr. Essuman noted that the plaintiff's prognosis was good, that there is no neurological permanency anticipated after examination of the cervical spine, and the plaintiff had no cervical spine spasms, orthopedic disability or permanency, and that all range of motion results for plaintiff's left shoulder, wrist, and elbow were normal.

Dr. Joseph Y. Margulies, a board-certified orthopedic surgeon, also conducted an IME of plaintiff on April 17, 2015. Dr. Margulies examined plaintiff and determined that his cervical spine demonstrated full active range of motion, with no paraspinal muscle spasm or tenderness. Similarly, examination of plaintiff's lumbar spine revealed normal range of motion in all directions with no evidence of tenderness or muscle spasms. Dr. Margulies also examined plaintiff's right shoulder, and opined that there was mild limitation of range of motion, but normal muscle strength in all planes of motion. Further, Dr. Margulies diagnosed plaintiff with cervical sprain, which has resolved and lumbar sprain which has resolved. Dr. Margulies opined that plaintiff did not need special transportation, diagnostic testing, durable medical equipment or household help. According to Dr. Margulies, plaintiff could continue activities of daily living, as well as resume normal work activities.

Dr. Thomas Nipper, a board-certified orthopedic surgeon, conducted an IME of plaintiff on September 22, 2015. Dr. Nipper found no muscle spasm or tenderness to palpation, and that his range of motion of the cervical spine was normal. Dr. Nipper also found that there was no spasm, or tenderness on palpation of the lumbar spine, and that his range of motion of the lumbar spine was normal. Dr. Nipper examined plaintiff's right shoulder and found no tenderness on palpation, effusion or crepitus at the joints, and the range of motion was normal. Further, Dr. Nipper diagnosed plaintiff with cervical and lumbar sprain/strains, which has resolved; and right shoulder internal derangement, which has resolved. Dr. Nipper further reported that Plaintiff's prognosis was good; that there was no evidence of an orthopedic disability; and that Plaintiff was able to perform activities of daily living as well as his occupational duties without restrictions or limitations.

Lastly, Dr. Rafael A. Lopez Steuart conducted an IME of plaintiff on April 19, 2019. Dr. Lopez Steuart found no evidence of swelling, erythema, crepitation, spasm, atrophy or deformity of plaintiff's cervical spine, lumbar spine and shoulders. Dr. Lopez Steuart also conducted numerous orthopedic tests on plaintiff, and opined that there is no objective evidence of a disability resulting from the subject accident from an orthopedic standpoint.

In sum, defendants argue that plaintiff cannot offer any objective medical evidence to support a finding that his alleged injuries resulted in the total loss of a body organ, member, function or system or that such total loss is permanent in nature.

In opposition, plaintiff submits, *inter alia*, his affidavit, and the findings of his treating doctors, that conflicts with the findings of defendants' IME doctors. Plaintiff contends that he suffered severe and permanent injuries to his right shoulder, neck and back, and he was advised to seek orthopedic care and physical therapy for his injuries. Plaintiff submits that on January 20, 2015, he was referred for an orthopedic examination by Dr. Steven Struhl, who recommended that he have surgery to repair the rotator cuff tear in his right shoulder. Plaintiff then underwent surgery on February 2, 2015. On October 7, 2015, Dr. Struhl informed plaintiff, after examination, that

plaintiff suffered a permanent loss of range of motion in his shoulder, and that the pain would be permanent.

“In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility.” *Garcia v. J.C. Duggan, Inc.*, 180 A.D.2d 579, 580 (1st Dep’t 1992), citing *Dauman Displays, Inc. v. Masturzo*, 168 A.D.2d 204 (1st Dep’t 1990). As such, summary judgment is rarely granted in negligence actions unless there is no conflict at all in the evidence. *See Ugarriza v. Schmieder*, 46 N.Y.2d 471, 475-476 (1979). Here, upon examination of the papers submitted to this Court and after oral argument, defendants’ motion is denied because there are issues of fact precluding summary judgment. Here, this Court determines, there are issues of fact including but not limited to, the conflicting medical reports, even among defendants’ doctors pertaining to plaintiff’s range of motion. In addition, there are issues as to whether plaintiff’s limitations are significant and permanent. Specifically, plaintiff’s doctors’ affidavits directly contrast with defendant’s doctors’ findings that plaintiff is currently without limitation. As such, defendants’ motion for summary judgment must be denied as issues of fact exist.

## **II. Plaintiff’s Cross-Motion to Strike the Errata Sheet**

Here, plaintiff filed a cross-motion to strike the Errata Sheet regarding the deposition of defendant-driver Jose Edward (“defendant Edwards”), and argues that the Errata Sheet contains “unexplained substantive changes to the deposition taken of the defendant Edwards.” Defendants oppose the motion, and argue that defendant Edward’s minor changes are neither critical nor relevant to the central issues in this case, and that defendant Edwards has set forth sufficient reasons for changing his testimony. Specifically, defendants contend that defendant Edwards made two minor, non-substantive changes to his testimony, including to correct his answer to reflect that he filled out his own report following the accident; and defendant Edwards wanted to change his response as to how long it took for him to drive from 68<sup>th</sup> Street to 116<sup>th</sup> to “unsure,” rather than his initial response of “an hour.”

Generally, under *CPLR §3116* deponents are permitted to submit changes to their deposition testimony within sixty days of the witness’s receipt of the transcript. It is well settled that substantive changes are permissible only upon the witness providing a sufficient explanation as to the reasons for each change. *See e.g., Carrero v. NY City Hous. Auth.*, 162 A.D.3d 566 (1st Dep’t 2018), [the court struck the errata sheet with substantive changes without providing sufficient explanation]. Upon a review of the proposed corrections and objections submitted, the court finds that the change submitted on behalf of defendant Jose Edwards as to page 30, line 20 is, thus, permissible, and defendant Edwards can be cross-examined as it concerns this deposition testimony. However, as to the change made by defendant Jose Edwards as to page 44, lines 12-15, and 16, which pertains to his response to how long he traveled from 68<sup>th</sup> Street to 116<sup>th</sup> Street, is stricken as the court finds it is substantive in nature, without a sufficient explanation for the change, and, therefore, is not permitted under *CPLR§ 3116*.

Accordingly, it is

**ORDERED** that defendants motion for summary judgment dismissing the complaint on the ground that the plaintiff’s claimed injuries do not satisfy the “serious injury” threshold under *New York Insurance Law §§ 5102(d)* is DENIED; and it is further

**ORDERED** that plaintiff's cross-motion to strike the Errata Sheet is **GRANTED ONLY TO THE EXTENT** that the changes made to defendant Jose Edwards' EBT held on September 19, 2019, page 44 lines 12-15 and line 16, **only**, and this change is not permitted; and it is further

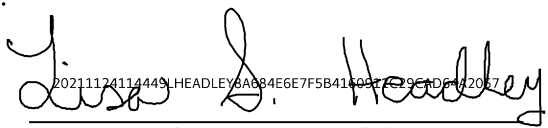
**ORDERED** that any relief sought not expressly addressed herein has nonetheless been considered; and it is further

**ORDERED** that within 30 days of entry, defendants shall serve a copy of this decision/order upon plaintiff with notice of entry.

This constitutes the Decision/Order of the Court.

11/23/2021

DATE



LISA HEADLEY, 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"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER			OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN			REFERENCE