Taylor v Zaman
2021 NY Slip Op 32991(U)
January 12, 2021
Supreme Court, Suffolk County
Docket Number: Index No. 618564/2018
Judge: Joseph A. Santorelli
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ORIGINAL

SHORT FORM ORDER

INDEX No. 618564/2018
CAL. No. 202000646MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 8/7/20 (002)
MOTION DATE 9/24/20 (003)
ADJ. DATE 10/29/20
Mot. Seq. # 002 MD
Mot. Seq. # 003 MD

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NICHOLAS TAYLOR,

Plaintiff,

- against -

MDATIQUZ ZAMAN, JEB TECH, INC., and C BERGQUIST,

Defendants.

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Upon the following papers read on this motion and cross motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers by Zaman defendants, dated July 10, 2020 ; Notice of Cross Motion and supporting papers by defendant Bergquist, dated August 26, 2020 ; Answering Affidavits and supporting papers by plaintiff, dated September 15, 2020 ; Replying Affidavits and supporting papers by defendants, dated September 22, 2020, and October 27, 2020 ; Other ___; it is

ORDERED that the motion by defendants Mdatiquz Zaman, and JEB Tech, Inc. seeking summary judgment dismissing the complaint is denied; and it is further

ORDERED that the cross motion by defendant C. Bergquist seeking summary judgment dismissing the complaint is denied.

Plaintiff Nicholas Taylor commenced this action to recover damages for injuries he allegedly sustained as a result of a motor vehicle accident that occurred at the intersection of Montauk Highway and Lambert Avenue in the Town of Brookhaven on April 25, 2017. It is alleged that the accident occurred when the vehicle operated by defendant Mdatiquz Zaman and owned by defendant JEB Tech, Inc. struck the rear of the vehicle owned and operated by plaintiff while it was stopped at a red light on westbound Montauk Highway. Following the impact with the Zaman vehicle, the rear of plaintiff's vehicle was struck by the vehicle owned and operated by defendant C. Bergquist. As a result of the impact between defendant Bergquist's vehicle and plaintiff's vehicle, plaintiff's vehicle was propelled forward into the preceding stopped vehicle. At the time of the accident, defendant Zaman was acting within the scope of his employment with defendant JEB Tech, Inc. By his bill of particulars, plaintiff alleges, among other things, that he sustained various personal injuries as a result of the subject collision, including multilevel disc bulges of the cervical and lumbar spines, an aggravation and exacerbation of a pre-existing cervical spine condition.

Defendants Mdatiquz Zaman, and JEB Tech, Inc. (hereinafter the Zaman defendants) now move for summary judgment on the basis that the injuries alleged to have been sustained by plaintiff as a result of the subject accident do not meet the serious injury threshold requirement of Insurance Law § 5102 (d). In support of the motion, the Zaman defendants submit, among other things, copies of the pleadings, plaintiff's deposition transcript, and the sworn medical reports of Dr. Mark Decker and Dr. Jesu Jacob. Dr. Jacob, at the Zaman defendants' request, conducted an independent orthopedic examination of plaintiff on March 6, 2020. Dr. Decker, also at the Zaman defendants' request, performed an independent radiological review of the magnetic resonance images ("MRI") films of plaintiff's cervical and lumbar spines taken on August 22, 2017. Plaintiff opposes the motion on the grounds that defendants have failed to meet their prima facie burden, and that the evidence submitted in opposition demonstrates that he sustained an injuries within the "limitations of use" and the "90/180" categories of the Insurance Law as a result of the subject accident. In opposition to the motion, plaintiff submits his own affidavit, uncertified copies of his medical records pertaining to the injuries at issue, and the sworn medical reports of Dr. Brian McNulty, Dr. Mindy Pfeffer, and Dr. Musarrat Iqbal.

It has long been established that the "legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries" (***Dufel v Green***, 84 NY2d 795, 798, 622 NYS2d 900 [1995]; *see* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]). Therefore, the determination of whether or not a plaintiff has sustained a "serious injury" is to be made by the court in the first instance (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Porcano v Lehman***, 255 AD2d 430, 680 NYS2d 590 [2d Dept 1988]; ***Nolan v Ford***, 100 AD2d 579, 473 NYS2d 516 [2d Dept 1984], *aff'd* 64 NY2d 681, 485 NYS2d 526 [1984]).

Insurance Law § 5102 (d) defines a "serious injury" as "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."

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a "serious injury" (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, [such as], affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (***Pagano v Kingsbury***, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992]). A defendant may also establish entitlement to summary judgment using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (*see* ***Fragale v Geiger***, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; ***Grossman v Wright***, 268 AD2d 79, 707 NYS2d 233 [2d Dept 2000]; ***Vignola v Varrichio***, 243 AD2d 464, 662 NYS2d 831 [2d Dept 1997]; ***Torres v Micheletti***, 208 AD2d 519,616 NYS2d 1006 [2d Dept 1994]). Once a defendant has met this burden, the plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard for "serious injury" under New York's No-Fault Insurance Law (*see* ***Dufel v Green***, *supra*; ***Tornabene v Pawlewski***, 305 AD2d 1025, 758 NYS2d 593 [4th Dept 2003]; ***Pagano v Kingsbury***, *supra*).

Based upon the adduced evidence, the Zaman defendants have failed to satisfy their prima facie burden that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra*; ***McGee v Bronner***, 188 AD3d 1033, 132 NYS3d 692 [2d Dept 2020]). The Zaman defendants failed to proffer competent medical evidence to establish that plaintiff did not sustain a serious injury to his spine within the meaning of the limitations of use categories of the Insurance Law, since their orthopedic expert, Dr. Jacob, found significant range of motion limitations in this region during his examination of plaintiff (*see* ***Williams v Maleachern***, 186 AD3d 1462, 128 NYS3d 851 [2d Dept 2020]; ***Singleton v F & R Royal, Inc.***, 166 AD3d 837, 88 NYS3d 81 [2d Dept 2019]; ***Nuñez v Teel***, 162 AD3d 1058, 75 NYS3d 541 [2d Dept 2018]), and failed to explain or substantiate with any objective medical evidence his opinion that such limitations were voluntary (*see* ***Quiceno v Mendoza***, 72 AD3d 669, 897 NYS3d 643 [2d Dept 2010]; ***Chun Ok Kim v Orouke***, 70 AD3d 995, 893 NYS2d 892 [2d Dept 2010]; ***Moriera v Durango***, 65 AD3d 1024, 886 NYS2d 45 [2d Dept 2009]). In addition, despite the Zaman defendants' radiologic expert, Dr. Decker, stating in his report that plaintiff's alleged injuries to his cervical and lumbar regions are longstanding and degenerative in nature and not causally related to the subject accident, his conclusions fail to show that the limitations noted by Dr. Jacob were not the result of an exacerbation caused by the subject accident (*see* ***Rodgers v Duffy***, 95 AD3d 864, 944 NYS2d 175 [2d Dept 2012]; ***Edouazin v Champlain***, 89 AD3d 892, 933 NYS2d 85 [2d Dept 2011]). In fact, neither Dr. Decker nor Dr. Jacob addressed plaintiff's allegations in his bill of particulars that the subject accident exacerbated/aggravated a pre-existing spinal condition (*see* ***Little v Ajah***, 97 AD3d 801, 949 NYS2d 109 [2d Dept 2012]; ***Pero v Transervice Logistics, Inc.***, 83 AD3d 681, 920 NYS2d 364 [2d Dept 2011]; ***Rabinowitz v Kahl***, 78 AD3d 678, 910 NYS2d 216 [2d Dept 2010]). Therefore, the proof submitted by the Zaman defendants failed to objectively demonstrate that plaintiff did not suffer a permanent consequential or significant limitation of use of her spine as a result of the subject accident (*see* ***Pupko v***

Hassan, 149 AD3d 988, 50 NYS3d 295 [2d Dept 2017]; ***Fudol v Sullivan***, 38 AD3d 593, 831 NYS2d 504 [2d Dept 2007]; ***Abraham v Bello***, 29 AD3d 497, 816 NYS2d 118 [2d Dept 2006]).

Since the Zaman defendants have failed to meet their prima facie burden, it is unnecessary for the Court to consider whether plaintiff's papers in opposition were sufficient to raise a triable issue of fact (*see* ***Che Hong Kim v Kossoff***, 90 AD3d 969, 934 NYS2d 867 [2d Dept 2011]; ***Gibson-Wallace v Dalessandro***, 58 AD3d 679, 872 NYS2d 156 [2d Dept 2009]). Accordingly, the Zaman defendants' motion for summary judgment dismissing the complaint is denied.

Defendant Bergquist cross-moves for summary judgment on the basis that plaintiff's injuries do not come within the meaning of the serious injury threshold requirement of the Insurance Law. In support of the motion, defendant submit copies of the pleadings, plaintiff's deposition transcript, and the sworn medical report of sworn medical reports of Dr. David Weissberg, Dr. Mathew Chacko, and Dr. Jonathan Lerner. At defendant Bergquist's request, Dr. Weissberg conducted an independent orthopedic examination of plaintiff on November 27, 2019. Also at defendant Bergquist request, Dr. Chacko conducted an independent neurologic examination of plaintiff on January 20, 2020. Lastly, Dr. Lerner, at defendant Bergquist's request, performed an independent radiologic review of the MRI studies of plaintiff's cervical spine taken on August 22, 2017. Plaintiff opposes the motion on the grounds that defendant Bergquist failed to meet his prima facie burden, and that the evidence submitted in opposition demonstrates that he sustained an injuries within the limitations of use and the 90/180 categories of the Insurance Law as a result of the subject accident. In opposition to the motion, plaintiff submits his own affidavit, uncertified copies of his medical records pertaining to the injuries at issue, and the sworn medical reports of Dr. Brian McNulty, Dr. Mindy Pfeffer, and Dr. Musarrat Iqbal.

Here, defendant Bergquist has failed to establish a prima facie case that plaintiff did not sustain a serious injury within the meaning of Section 5102(d) of the Insurance Law (*see* ***Hernandez v Pagan Corp.***,174 AD3d 513, 101 NYS3d637 [2d Dept 2019]; ***Mercado v Mendoza***, 133 AD3d 833, 19 NYS3d 757 [2d Dept 2015]; ***Farrah v Pinos***, 103 AD3d 831, 959 NYS2d 741 [2d Dept 2013]). Defendant Bergquist has submitted contradictory evidence in support of his motion. While Dr. Weissberg concludes, following an examination of plaintiff, that plaintiff has full range of motion in his spine and that the spinal injuries he allegedly sustained have resolved, Dr. Chacko found significant range of motion limitations in plaintiff's cervical and lumbar regions during his examination of plaintiff, which occurred almost three years after the subject accident (*see* ***Britt v Bustamante***, 77 AD3d 781, 909 NYS2d 138 [2d Dept 2010]; ***Kjono v Fenning***, 69 AD3d 581, 893 NYS2d 157 [2d Dept 2010]; ***Held v Heideman***, 63 AD3d 1105, 883 NYS2d 246 [2d Dept 2009]). Where conflicting medical evidence is offered on the issue of whether a plaintiff's injuries are permanent or significant, and varying inferences may be drawn, an issue of credibility for the jury has been presented (*see* ***Barrett v New York City Tr. Auth.***, 80 AD3d 550, 914 NYS2d 269 [2d Dept 2011]; ***Jacobs v Rolon***, 76 AD3d 905, 908 NYS2d 31 [1st Dept 2010]; ***Mercado-Arif v Garcia***, 74 AD3d 446, 902 NYS2d 72 [1st Dept 2010]). The discrepancies between defendant Bergquist's experts create an issue of fact for the jury to determine (*see* ***Martinez v Pioneer Transp. Corp.***, 48 AD3d 306, 851 NYS2d 194 [1st Dept 2008]; ***Martin v Schwartz***, 308 AD2d 318, 766 NYS2d 13 [1st Dept 2003]; ***Velasquez v Quijada***, 269 AD2d 592, 703 NYS2d 518 [2d Dept 2000]).

Additionally, defendant Bergquist's examining radiologist, Dr. Lerner, states in his report that plaintiff suffers from osteoarthritis and degenerative disc disease, which are chronic degenerative process changes, and not attributable to an acute traumatic event. Dr. Lerner further states that there is no causal relationship between the subject accident and plaintiff's alleged injuries. Dr. Lerner also obliquely states that the findings, such as disc bulges, spondylolisthesis, disc degeneration and disc loss are so common in patients in plaintiff's age group that they must be interpreted with caution and in the context of a clinical setting. However, like Drs. Weissberg and Chacko, Dr. Lerner fails to address plaintiff's allegation that the subject accident exacerbated his pre-existing cervical spine condition (*see* ***D'Augustino v Bryan Auto Parts, Inc.***, 152 AD3d 648, 59 NYS3d 104 [2d Dept 2017]; ***Washington v Asdotel Enters., Inc.***, 66 AD3d 880, 887 NYS2d 623 [2d Dept 2009]). Consequently, Dr. Lerner's conclusions are speculative, unsubstantiated, and without probative value (*see* ***Irizarry v Lindor***, 110 AD3d 846, 973 NYS2d 296 [2d Dept 2013]; ***Casimir v Bailey***, 70 AD3d 994, 896 NYS2d 112 [2d Dept 2010]). As a result, defendant Bergquit's evidence raises triable issues of fact as to whether plaintiff sustained an injury within the limitations of use or the 90/180 categories of the Insurance Law (*see* ***Offman v Singh***, 27 AD3d 284, 813 NYS2d 56 [1st Dept 2006]; ***Korpalski v Lau***, 17 AD3d 536, 793 NYS2d 195 [2d Dept 2005]). Further, defendant Bergquist's evidentiary submissions demonstrated the existence of a triable issue of fact as to whether the alleged injuries sustained by plaintiff were caused by the subject accident (*see* ***Straussberg v Marghub***, 108 AD3d 694, 968 NYS2d 898 [2d Dept 2013]; ***Synder v Rivera***, 98 AD3d 1104, 951 NYS2d 233 [2d Dept 2012]).

Inasmuch as defendant Bergquist failed to meet his prima facie burden of establishing entitlement to judgment as a matter of law, the Court need not address the sufficiency of the papers submitted in opposition to the motion by the plaintiff (*see* ***Werthner v Lewis***, 120 AD3d 490, 990 NYS2d 267 [2d Dept 2014]; ***Keenum v Atkins***, 82 AD3d 843, 918 NYS2d 547 [2d Dept 2011]). Accordingly, defendant Bergquist's motion for summary judgment dismissing the complaint is denied.

Dated: JAN 12 2021

HON. JOSEPH A. SANTORELLI
J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION