

**Kana v Olivero**

2021 NY Slip Op 33115(U)

November 30, 2021

Supreme Court, Queens County

Docket Number: Index No. 710968/2019

Judge: Chereé A. Buggs

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Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS**

IAS PART 30

**Justice**

Index No.: 710968/2019

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EELAMAN KANA and VIGNESWRY  
MURUQESO,

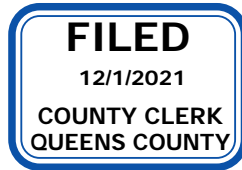
Plaintiffs,

Motion  
Date: November 17, 2021

-against-

Motion Cal. No.: 13

KELSEY OLIVERO,



Motion Sequence No.: 2

Defendant.

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The following efile papers numbered 21-32, 34-42 submitted and considered on this motion by Defendant Kelsey Olivero (hereinafter “Olivero”) seeking an Order pursuant to Civil Practice Law and Rules (CPLR) 3212 granting summary judgment in favor of Olivero, dismissing the complaint on the ground that the injuries allegedly sustained by Plaintiff Eelaman Kana (hereinafter “Kana”) do not satisfy the “serious injury” threshold requirement of Section 5102(d) of the Comprehensive Motor Vehicle Insurance Reparations Act of the State of New York, McKinney’s Insurance Law Sections 5101 et. seq. and thus, plaintiff’s claim for non-economic loss is barred under Section 5104(a) of the Statute; and for such other and further relief as this Court deems just and proper.

	<u>Papers Numbered</u>
Notice of Motion-Affidavits-Exhibits.....	EF 21-32
Affirmation in Opposition-Affidavits-Exhibits.....	EF 34-41
Reply Affirmation-Affidavits-Exhibits.....	EF 42

The above captioned litigation was commenced by Kana and co-plaintiff Vigneswry Muruqeso (hereinafter “Muruqeso”), his wife on June 24, 2019. Kana alleged that he sustained serious injuries in a “dooring” motor vehicle accident which occurred on March 22, 2018 on southbound York Avenue, City, County and State of New York. Kana claimed that Olivero negligently opened her car door without looking, onto his person while he was bicycling. In his

verified complaint, Kana claimed that he sustained a serious injury as defined under Insurance Law sections 5102(a) and (d). Muruqeso alleged derivative claims in the verified complaint as Kana's wife, asserting loss of services, comfort and enjoyment claims as a result of Kana's injuries. A Note of Issue has not been filed. Olivero moves for summary judgment under CPLR 3212, asserting that Kana cannot maintain this action because he has not sustained a serious injury as defined under the Insurance Law. In support of Olivero's application, Olivero's documentary evidence consisted of the Attorney Affirmation of Brian J. McCall, Esq.; Statement of Material Facts; pleadings; Amended verified bill of particulars dated February 13, 2020; Kana's deposition testimony; records of Dr. Alluri, one of Kana's treating physicians; a report related to Kana's cervical spine MRI taken at Neighborhood Radiology Services, P.C.; Northwell Health records; a report related to Kana's brain MRI taken at Neighborhood Radiology Services, P.C.; and, Independent Medical Examination (hereinafter "IME") report of Dr. Daniel J. Feuer.

### **Statement of Material Facts**

Olivero's Statement of Material Facts dated August 23, 2021 in accordance with 22 NYCRR 202.8 is as follows:

1. Brian J. McCall, Esq. alleged that he was an attorney for Olivero fully familiar with the facts and circumstances of the matter based upon his office file.
2. Mr. McCall submitted the statement in support of the motion for summary judgment.
3. Plaintiff, Kana, is claiming injuries to his lumbar spine, cervical spine, wrists, and head. See Exhibit C.
4. Plaintiff failed to specify which categories he is claiming injuries under. See Exhibit C.
5. Plaintiff testified that he did not injure his wrists as a result of the accident. See Exhibit D. pp 83.
6. Plaintiff had an unexplained two year gap in treatment. See Exhibit D. pp. 51-52.
7. Plaintiff sustained a prior work injury to his neck and head which he received treatment for. He last treated for his prior injuries only four months prior to the subject accident. See Exhibit D pp. 56, 57, 59. Exhibit F, and Exhibit G.
8. Plaintiff was examined by Board Certified Neurologist, Daniel J. Feuer, MD on July 7, 2021. Plaintiff demonstrated full range of motion in all areas measured. See Exhibit H.
9. The impression on the report was, "The claimant is a fifty-one year old male whose present neurological examination is within normal limits. Motor, reflex, and sensory findings are normal. There are no clinical findings to support a diagnosis of radiculopathy of either the cervical or lumbar spine." Dr. Feuer further opines, "Based on a reasonable degree of medical certainty, I believe the

claimant, Mr. Eelaman Kana, does not demonstrate any objective neurological disability or neurological permanency. He is neurologically stable to engage in full active employment as a security worker, as well as the full activities of daily living including riding his bicycle without restriction.” See Exhibit H.

10. Plaintiff’s medical records demonstrate that he has not sustained a brain injury. See Exhibit I.

### **Kana’s Amended Verified Bill of Particulars**

Kana asserted in the Amended Verified Bill of Particulars dated February 13, 2020 that the occurrence took place on March 22, 2018 on York Avenue between East 64<sup>th</sup> Street, County, City and State of New York. Kana alleged that Olivero, without warning opened the driver’s side door of her vehicle into the lane that he was riding his bicycle and that the door came into contact with him, causing the following serious injuries as within the scope and meaning of Section 5102(d) of the New York State Insurance Law, including cerebral concussion with loss of consciousness; post-concussion syndrome; wrist, cervical and lumbar spine injuries which were aggravated, exacerbated and/or precipitated by the accident; dizziness, headaches and blurred vision; and, pain radiating to upper and lower extremities. Kana alleged that all of the injuries were permanent in nature. Further, he was confined to his bed and home partially and intermittently from the date of the accident, and for an indefinite period of time in the future, and he could not work from March 22, 2018 through the time of the amended verified bill of particulars. He stated that he would be making a claim for lost earnings but was not aware of the exact amount at that time. Muruqeso asserted derivative claims of loss of services, comfort and enjoyment of her husband Kana, caused by the incident.

### **Kana’s Deposition Testimony**

On March 15, 2021 Kana provided sworn testimony in his case. He was married to Murugusu in 2009. He stated that the accident occurred on March 22, 2018 near the intersection of York Avenue and 64<sup>th</sup> Street in Manhattan. He was riding his bicycle at or near the intersection when Olivero opened her driver side door into his lane of traffic, causing him to hit the door, fall to the ground and sustain injuries. His head hit the door, and he said he fell down unconscious, and immediately after the accident he felt pain in his neck and back. He was treated by paramedics at the scene of the incident, and although the accident did not occur very far from a hospital was located, he declined to be taken to the hospital. At the time of the accident he was employed at an Indian restaurant as a dishwasher and delivery person, six days a week, from 11:00 A.M. to 10:30 P.M. After the occurrence he returned to the restaurant but was unable to complete his work due to pain. He testified that he did not return to work until April 2019, and that when he returned to work he was only working part-time three days a week. He stated that he was unable to work at that time due to neck and back pain he was experiencing following the accident. He was now employed as a security guard, working three days a week.

A few days after the incident he sought medical treatment. He saw Dr. Alluri for pain in his neck and back. He underwent physical therapy at Northwell Hospital. He also received medical treatment briefly when he was out of the United States. Kana testified that prior to the accident he had been treating with Dr. Alluri for about four months for neck pain. He did not recall injuring his neck or back before the subject accident and did not have any subsequent injuries to these areas. He stated that he had last seen Dr. Alluri a week before testifying due to back pain and complaints of pain in his legs and feet. Kana testified that he did not injure his wrists in the accident. At the time of the deposition, Kana related that he was still experiencing pain in his neck and back, inability to stand or walk for long periods of time, and difficulty with heavy lifting.

### **Records of Dr. Alluri**

Olivero attached a Note from Dr. Jagga Alluri, Kana's treating physician related to Kana's presentation to Dr. Alluri on March 10, 2021 for a neurological consultation due to complaints of neck pain and lower back pain. The last time he was seen according to the note was June 12, 2019. Kana complained of lower back pain that recurred in February 2021 as well as epigastric pain when eating and neck pain which was radiating to his upper extremities. The note referred to his March 22, 2018 accident. Results from MRI reports were also discussed. The doctor also performed a neurological examination. Straight leg raise test was positive at 30 degrees, and Kana had a decreased pinprick. The doctor plan was for Kana to undergo NCV and EMG testing of the upper and lower extremities, as well as prescribing Kana medication for pain.

### **Prior Cervical MRI**

Kana underwent a MRI of his cervical spine on November 18, 2017 at Neighborhood Radiology Services, P.C. The impression was the following: "Straightening of the cervical lordosis can be seen in the setting of muscle spasm; Left C2-C3 and C3-C4 neural foramen stenosis secondary to severe facet arthrosis at these levels; C5-C6 disc bulge, effacing the subarachnoid space and resulting in mild central canal (AP diameter 9 mm) and left greater than right neural foramen stenosis with uncovertebral spurring; C6-C7 disc bulge, effacing the subarachnoid space and resulting in mild central canal (AP diameter 10 mm) stenosis.

### **Kana's Brain MRI**

Kana underwent a MRI of his brain on November 17, 2018 at Neighborhood Radiology Services, P.C. According to the history section of the report, Kana history was the following: "Work-related injury March 22, 2018, Headaches. Forgetfulness. Drowsiness." The impression was "[n]o abnormal findings are identified on MRI scan of the brain." Kana had mild opacifications in his sinuses.

### **Prior records of Northwell Health**

In support of the motion, Olivero also submitted records of Kana's from Northwell Health Rehabilitation Network related to treatment for radiculopathy of the cervical region. The initial evaluation date was January 24, 2018. Prior cervical spine diagnosis were indicated based upon his MRI taken on November 18, 2017. According to the records, physical therapy was recommended three times a week for six weeks in duration. A note dated February 21, 2018 refers to his bicycle accident and how he had been progressing nicely prior to the accident, however, the subject accident was a set back, and continued physical therapy was recommended.

### **IME Report of Daniel J. Feuer, M.D.**

Dr. Daniel J. Feuer, Diplomate of the American Board of Psychiatry and Neurology, Clinical Instructor of Neurology at Mount Sinai School of Medicine, conducted a neurological IME on Kana on July 7, 2021. Kana advised the doctor that he was injured while working and riding a bicycle when he was struck by an open car door, and that he injured his head, neck and lower back. Kana reported a brief loss of consciousness. He denied any past symptoms or trauma. The doctor reviewed Kana's verified bill of particulars and various medical records. Range of motion testing was performed with a goniometer and the values of measurements were compared to normal active range of motion values according to the publication "Guidelines to the Evaluation of Permanent Impairment, 6<sup>th</sup> Edition", published by the American Medical Association and was the following:

**Cervical Spine**- flexion at 50 degrees (50 degrees normal); extension at 60 degrees (60 degrees normal); right and left lateral flexion at 45 degrees (45 degrees normal); right and left rotation at 80 degrees (80 degrees normal);

**Lumbar Spine**-flexion 60 degrees (60 degrees normal); extension 25 degrees (25 degrees normal); right and left lateral bending 25 degrees (25 degrees normal); right and left lateral flexion 25 degrees (25 degrees normal). Straight leg raise was negative.

Dr. Feuer further found Kana's mental status, cranial nerves, motor functions (upper and lower extremities), sensory, coordination and gait were all normal. In Dr. Feuer's opinion, Kana's neurological examination was normal. There were no findings of radiculopathy of his cervical or lumbosacral spine. Dr. Feuer advised that Kana had sustained head trauma without structural injury of the brain as his imaging studies reported normal findings, although Kana had subjective complaints of headaches which were consistent with a posttraumatic headache syndrome for which he was not currently receiving treatment. Dr. Feuer's diagnosis was "Posttraumatic headaches; normal neurological examination."

## Discussion

“To obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor (CPLR 3212 [b]), and he must do so by tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposition party must show facts sufficient to require a trial of any issue of fact.” (*See Friends of Animals, Inc. v Assoc. Fur Mfrs., Inc.*, 46 NY2d 1065 [1979] [internal quotations omitted]). A “serious injury” is defined pursuant to New York’s Insurance Law §5102(d) 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.”

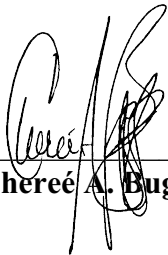
Here, the Court finds that Olivero failed to demonstrate entitlement to judgment as a matter of law due to her failure to demonstrate that Kana did not sustain a serious injury within the meaning of Insurance Law § 5102(d) (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]). Olivero relied upon Kana’s deposition testimony to establish entitlement to judgment under this category however “this evidence failed to identify the plaintiff’s usual and customary activities during the specific time frame, and did not compare the plaintiff’s pre-accident and post-accident activities during that relevant time frame.” *Jong Cheol Yang v Grayline N.Y. Tours*, 186 AD3d 1501 [2d Dept 2020]). The opposition papers included a Supplemental Verified Bill of Particulars dated November 12, 2020 which the Court assumed was inadvertently omitted from the moving papers. Kana set forth additional injuries and his asserted claims of serious injuries under the Insurance Law. Based upon same, Olivero failed to demonstrate that Kana did not sustain a serious injury under the 90/180 day category of the Insurance Law. (*see Raphael v City of New York, et al.*, –AD3d–, 2021 WL 5499993 [2d Dept 2021]; *Gonzalez v Krumholz*, 192 AD3d 1086 [2d Dept 2021]; *Zahoudanis v United Parcel Service Gen. Servs. Co.*, 192 AD3d 949 [2d Dept 2021]; *Ali v Williams*, 187 AD3d 1107 [2d Dept 2020]; *Jong Cheol Yang v Grayline N.Y. Tours*, 186 AD3d 1501 [2d Dept 2020]; *Che Hong Kim v Kossoff*, 90 AD3d 969 [2d Dept 2011]; *Rouach v Betts*, 71 AD3d 977 [2d Dept 2010]). Also, years after the accident, Olivero’s expert Dr. Feuer acknowledged in his impression that Kana was still suffering from headaches caused by the accident. (*See CPLR 3212; Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980].)

Thus, the Court need not address the sufficiency of Kana’s opposition papers (*see Reddick v Hickey*, 197 AD3d 581 [2d Dept 2021]).

Therefore, defendant's motion is denied.

This constitutes the decision and Order of this Court.

Dated: November 30, 2021

  
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**Hon. Chereé A. Buggs, JSC**

