Miah v APNI G Car Corp
2021 NY Slip Op 33970(U)
December 29, 2021
Supreme Court, Queens County
Docket Number: Index No. 709825/2019
Judge: Maurice W. Muir

Short Form Order

NEW YORK SUPREME COURT – QUEENS COUNTY

Present: HONORABLE MAURICE E. MUIR
Justice

NUR MOHAMMED MIAH,

Plaintiff,

-against-

APNI G CAR CORP AND HASHUIM R. SYED,

Defendants.

IAS Part - 42

Index No.: 709825/2019

Motion Date: 8/26/21

Motion Cal. No. 17

Motion Seq. No. 1

The following electronically filed ("EF") documents read on this motion by APNI G Corp. ("APNI") and Hashuim R. Syed ("Mr. Syed") (collectively, the "defendants") for summary judgment dismissing the complaint, pursuant to CPLR § 3212, upon the ground that Nur Mohammed Miah ("Mr. Miah" or "plaintiff") did not sustain a "serious injury" as defined by § 5102(d) of the New York's Insurance Law, as a result of the motor vehicle accident.

	Papers Numbered
Notice of Motion-Affirmation- Exhibits.....	EF 11 - 24
Affirmation in Opposition-Exhibits.....	EF 30 - 35
Reply Affirmation.....	EF 37

Upon the foregoing papers, it is ordered that this motion is determined as follows:

In this negligence action, plaintiff seeks to recover damages for personal injuries allegedly sustained in a motor vehicle accident. Mr. Miah alleges that September 4, 2018, the vehicle owned by APNI and operated by Mr. Syed, who struck him while he was walking on 72nd Street, at or near its intersection with Roosevelt Avenue, in the County of Queens, State of New York ("subject accident"). According to the bill of particulars, Mr. Miah alleges that he sustained serious injuries to his lumbar spine, left knee, cervical spine, left shoulder and thoracic spine. As a result of the subject accident, plaintiff alleged that he sustained a serious injury as defined in the Insurance Law § 5101, *et seq.* in that he sustained a permanent injury, a disabling

injury for a period in excess of 90 out of the first 180 days following this occurrence; he sustained a significant limitation of use of a bodily function or system; he sustained a significant disfigurement; scarring; he sustained a permanent consequential limitation of use of a bodily organ and/or member. As a result, on June 5, 2019, he commenced the instant action against the defendants; and on July 10, 2019, issue was joined, wherein the latter interposed an answer.

Now the defendants move for an order, pursuant to CPLR § 3212, dismissing the complaint on the ground that Mr. Miah did not sustain a "serious injury" as defined by § 5102(d) of the New York's Insurance Law. It has long been established that the "legislative intent underlying the Comprehensive Motor Vehicle Insurance Reparation Act of 1974 (now Insurance Law § 5101, *et seq* – commonly known as New York's "No-Fault" Insurance Law) was to weed out frivolous claims and limit recovery to significant injuries (*Licari v. Elliot*, 57 NY2d 230 [1982]; *Duel v. Green*, 84 NY2d 795 [1995]; *see also Toure v. Avis Rent A Car Sys.*, 98 NY2d 345 [2002]). New York's No-Fault Insurance Law § 5102 (d) defines "serious injury" as follows:

> … 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.

The Court of Appeals has held that the issue of whether a claimed injury falls within the statutory definition of a "serious injury" is a question of law for the courts in the first instance, which may properly be decided on a motion for summary judgment (*see Licari v. Elliott*, 57 NY2d 230 [1982]; *see also Charley v. Goss*, 54 AD3d 569 [1st Dept 2008] *aff'd* 12 NY3d 750 [2009]; *Porcano v. Lelzman*, 255 AD2d 430 [2d Dept 1998]; *Nolan v. Ford*, 100 AD2d 579 [2d Dept 1984], *aff'd* 64 NYS2d 681 [1984]).

On a motion for summary judgment, the defendant has the initial burden of making a *prima facie* showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a "serious injury" within the meaning of New York's No-Fault Insurance Law § 5102(d) (*see Gaddy v. Eyler*, 79 NY2d 955 [1992]; *Akhtar v. Santos*, 57 AD3d 593 [2d Dept 2008]). The defendant may satisfy this burden by submitting the plaintiff's deposition testimony and the affirmed medical report of the defendant's own examining physician (*Moore v. Edison*, 25 AD3d 672 [2d Dept 2006]; *Farozes v. Kamran*, 22 AD3d 458 [2d Dept 2005]). 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 [2d Dept 1992]). A defendant may also establish entitlement to summary judgment by using medical reports and records prepared by the plaintiff's own physicians (*see Fragale v. Geiger*, 288 AD2d 431 [2d Dept 2001]; *Grossman v. Wright*, 268 AD2d 79 [2d Dept 2000]; *Vignola v. Varrichio*, 243 AD2d 464 [2d Dept 1997]; *Torres v. Micheletti*, 208 AD2d 519 [2d Dept 1994]). The failure to make such a *prima facie* showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Xin Fang Xin v. Saft,* 177 AD3d 823 [2d Dept 2019]; *Rosenblum v. Schloss*, 175 AD3d 1339 [2d Dept 2019]; *Burns v. Stranger*, 31 AD3d 360 [2d Dept 2006]; *Rich-Wing v. Baboolal*, 18 AD3d 726 [2d Dept 2005]; *see generally, Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Once defendant has met this burden, 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 Duel v. Green*, 84 NY2d 795 [1995]; *Pagano v. Kingsbury*,182 AD2d 268 [2d Dept 1992]).

In support of the instant motion, the defendants provide the affirmed medical report of Pierce J. Ferriter, M.D ("Dr. Ferriter"), who is Certified Orthopedic Surgeon. On February 3, 2020, Dr. Ferriter performed an independent orthopedic examination upon the plaintiff: In particular, Dr. Ferriter performed a range of motion test, with a goniometer, wherein he found normal ranges of motion in the plaintiff's lumbar spine, right shoulder, cervical spine and left shoulder. All testing was negative and within normal limits. As a result, Dr. Ferriter opined to the following:

> The examinee presents with a normal orthopedic examination on all objective testing. The orthopedic examination is objectively normal and indicates no findings which would result in orthopedic limitations in use of the body parts examined. 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. Mr. Miah reports that he was not employed at the time of the accident. He remains with the same status at the present time.

In further support of the instant motion, the defendants provide the affirmed report of Darren Fitzpatrick, M.D. ("Dr. Fitzpatrick"), who is a Board-Certified Radiologist. On June 6, 2020, Dr. Fitzpatrick reviewed the magnetic resonance imaging ("MRI") of plaintiff's cervical spine and lumbar spine only, which were prepared by All County LLC. With respect to the plaintiff's cervical spine, Dr. Fitzpatrick impression was "[m]oderate, multilevel cervical

degenerative disc disease. Moreover, with respect to the plaintiff's lumbar spine, he observed "[s]evere degenerative disc disease at L3-L4 and L4-L5 producing moderate to severe canal stenosis and neural foraminal narrowing with type I Modic changes noted at L3-L4."

In opposition, the plaintiff provides the affirmed medical report from Shahid Mian, M.D. ("Dr. Mian"), who is a Certified Orthopedic Surgeon. On October 5, 2020, Dr. Mian conducted a comprehensive orthopedic examination of Mr. Miah. He measured Mr. Miah ranges of motion of the left shoulder, left knee, cervical and lumbar spines utilizing the goniometer and an arthroidal protractor; and his results were analyzed in comparison with the "normal" ranges of motion published by the American Medical Association ("AMA") guideline and the NYS Division of Disability Determination. Dr. Mian found positive finding in the left shoulder, left knee, cervical and lumbar spines. With respect to the plaintiff's cervical spine, flexion is 25 degrees (normal is 45 degrees), extension is 25 degrees (normal is 45 degrees), right lateral is 25 degrees (normal is 45 degrees), left lateral is 30 degrees (normal is 45 degrees), right rotation is 45 degrees (normal is 80 degrees), left rotation is 50 degrees (normal is 80 degrees). With respect to the plaintiff's lumbar spine, flexion is 55 degrees (normal is 90 degrees), extension is 15 degrees (normal is 30 degrees), left and right lateral is 20 degrees (normal is 30 degrees), left and right rotation is 20 degrees (normal is 30 degrees). With respect to the plaintiff's left shoulder, flexion is 135 degrees (normal is 180 degrees), abduction is 130 degrees (normal is 180 degrees), adduction is 20 degrees (normal is 30 degrees), extension is 40 degrees (normal is 60 degrees), internal rotation is 30 degrees (normal is 70 degrees), external rotation is 45 degrees (normal is 90 degrees). With respect to the plaintiff's left knee, flexion is 115 degrees (normal is 150 degrees) in the left knee. Furthermore, Dr. Mian reports that based on the proximity of the symptoms to the car accident and lack of prior injuries and further based on the mechanism of injury and site and nature of pathology involved, he believes to a reasonable degree of medical certainty that the above conditions and associated impairments are causally related to the motor vehicle accident of September 4, 2018. Additionally, Dr. Mian opines that "[t]he patient had a MVA on 9-4-2018 with injury neck, mid back, low back, left shoulder and left knee. Injury to left shoulder is permanent. Considering longevity of complaints, positive clinical findings and positive MRI's permanency is expected in neck, mid back, low back and left knee."

In further opposition to the instant motion, the plaintiff provides the affirmed medical reports from Narayan Paruchuri, M.D. ("Dr. Paruchuri"), who is a Board -Certified Radiologist, *inter ali*. The plaintiff's MRI reveals the following, *inter ali*:

Partial-thickness bursal surface tear of the anterior fibers of the supraspinatus tendon, a tear of the superior, anterior and posterior superior labrum, diffuse high-grade cartilage loss throughout the glenohumeral joint with marrow edema, partial-thickness tear of the biceps anchor, low-lying acromion with a lateral downslope, subacromial/subdeltoid fluid, ligament tears in the left shoulder resulting in surgery;

Complex undersurface tear in the peripheral aspect of the body of the medial meniscus and lateral meniscus, thickening of the anterior cruciate ligament likely reflecting partial thickness tear, joint effusion, prepatellar soft tissue edema reflecting soft tissue contusion, edema in the quadriceps fat pad and quadriceps tendinosis with partial-thickness tear of the lateral distal fibers in the left knee;

Disc bulging at the L2-L3 level flattening the thecal sac, disc bulging at the L3- L4, L4-L5, L5-S1 and disc bulging at the T10-T11 and T11-T12 interspaces flattening the thecal sac in the lumbar spine; and

Right central disc herniation at C3-C4 flattening the thecal sac with IVF narrowing on the right, broad based central and more prominent right central disc herniation at C5-C6, right central disc herniation at C6-C7, Disc bulging at the C2-C3 level flattening the thecal sac and disc bulging at the C7-T1 disc space in the cervical spine.

Additionally, in opposition to the defendant's motion for summary judgement, the plaintiff provides the notarized report from Carol Elcock, D.C. ("Dr. Elcock"), who is a licensed Chiropractor. Pursuant to Dr. Elcock's report, dated October 22, 2020, she noted significant limitations in the plaintiff's range of motion in connection with the relevant body parts. Dr. Elcocok also confirmed that the ranges of motion were measured by using a goniometer and her results were analyzed in comparison with the "normal" ranges of motion published by the American Medical Association ("AMA").

Here, the court finds that the defendants did not make a *prima facie* showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d): In other words, the defendants did not satisfy its burden by demonstrating the following: (1) plaintiff has not suffered significant disfigurement; (2) plaintiff did not suffer a permanent consequential limitation of use of a body organ or member; (3) the plaintiff has had no significant limitation on the use of a body function or system; and (4) that plaintiff did not have a medically determined injury or impairment of a non-permanent nature which prevented said plaintiff from performing substantially all of the material acts which constitute plaintiff's usual and customary daily activities for not less than the 90 days during the 180 days immediately following the incident. In fact, it must be noted that Dr. Ferriter did not review any treating medical records, MRI's or the surgical report of the plaintiff prior to arriving to his conclusions. Moreover, Dr. Ferriter did, in fact, find that the plaintiff has limited ranges of motion in his right shoulder, left shoulder,

right knee, and left knee. Additionally, the defendants' radiologist did not review plaintiff's MRI for either his left shoulder, thoracic spine or left knee.

Notwithstanding the same, the court also finds that there are conflicting medical reports submitted by the parties, which raise triable issues of fact as to whether plaintiff sustained serious injuries within the meaning of Insurance Law § 5102(d). (*Tinao v. City of New York*, 112 AD2d 363 [2d Dept 1985]; *Cassagnol v. Williamsburg Plaza Taxi*, 234 AD2d 208 [1st Dept 1996]; *Caliendo v. Ellington*, 104 AD3d 635 [2d Dept 2013]). It is well settled that conflicting medical evidence on the issue of the permanency and significance of a plaintiff's injuries warrants denial of summary judgment. (*Pommells v. Perez*, 4 NY3d 566 [2005]; *Wilcoxen v. Palladino*, 122 AD3d 727 [2d Dept 2014]; *Garcia v. Long Island MTA*, 2 AD3d 675 [2d Dept 2013]; *Noble v. Ackerman*, 252 AD2d 392 [1st Dept 1998]).

Lastly, with respect to the alleged gap in treatment, the courts finds that plaintiff provided an adequate explanation by averring that the no-fault insurance ceased paying for his treatment; and he could not afford to pay out of his own funds. In fact, Dr. Elcock reports that Mr. Miah stopped receiving physical therapy from his faculty, because his no-fault insurance cut off and he could not afford to pay any money out of his own pockets. When he stopped treating at his facility, he was still experiencing pain in his left shoulder, cervical and lumbar spines. Additionally, Dr. Mian reported that Mr. Miah's injuries to his left shoulder, left knee, cervical and lumbar spine are permanent. Therefore, any additional treatment that Mr. Miah might have received would have been entirely useless. (*see Encarnacion v. Castillo*, 146 AD3d 600 [1st Dept. 2017]; *Jenkins v. Livo Car Inc.*, 176 AD3d 568, 569-570 [1st Dept. 2019]).

Accordingly, it is hereby

ORDERED that the defendants' motion for summary judgment on the issue of serious injury, pursuant to CPLR § 3212, is denied; and it is further,

ORDERED that plaintiff shall serve a copy of this decision and order with notice of entry upon the defendants and the clerk of this court on or before January 31, 2022.

The foregoing constitutes the decision and order of the court.

Dated: December 29, 2021
Long Island City, NY

Maurice E. Muir

MAURICE E. MUIR, J.S.C.