

**Rich v New York City Tr. Auth.**

2023 NY Slip Op 34148(U)

November 27, 2023

Supreme Court, New York County

Docket Number: Index No. 159846/2019

Judge: Denise M. Dominguez

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. DENISE M DOMINGUEZ PART 21**

*Justice*

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**INDEX NO. 159846/2019**

DAVID S. RICH

**MOTION SEQ. NO. 003**

Plaintiff

- v -

NEW YORK CITY TRANSIT AUTHORITY, CHRISTOPHER  
ORTIZ

**DECISION AND ORDER ON  
MOTION**

Defendants

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 81, 82, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99

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

For the reasons that follow, Defendants' summary judgment motion on the grounds that Plaintiff did not suffer a serious injury is granted.

This personal injury matter arises out of a rear-end accident between Defendants' public bus and Plaintiff's vehicle. Plaintiff alleges that on September 21, 2018, on 2<sup>nd</sup> Avenue near the intersection of East 45<sup>th</sup> Street in Manhattan, while stopped for pedestrians, Defendant's bus hit the rear of his vehicle. Plaintiff then commenced this negligence action against Defendants, New York City Transit Authority and bus driver Christopher Ortiz.

By Order dated October 25, 2021 (J. Adams), Plaintiff's unopposed motion for partial summary judgment on the issue of liability was granted. Following discovery, now post-note of issue, Defendants move for summary judgment pursuant to CPLR 3212 on the grounds that Plaintiff's injuries do not meet the serious injury threshold as per Insurance Law §5102[d]. Plaintiff opposes.

### *Background*

Pursuant to Plaintiff's bill of particulars, dated January 29, 2020, as a result of this accident, Plaintiff alleged lumbar spine injuries of a left herniated disc at L2-L3 requiring two epidural steroid injections. In Plaintiff's Supplemental bill of particulars, dated August 26, 2020, Plaintiff alleged radiating pain and numbness. Based on Plaintiff's February 1, 2021, bill of particulars, Plaintiff underwent lumbar discectomy surgery at L2-L3 (NYSCEF Doc. 35, 45, 46).

At the time of this accident, on September 21, 2018, it is uncontroverted that Plaintiff had already sought medical treatment for a lower back injury. On September 17, 2018, just days before this accident, Plaintiff treated with Dr. Bottiglieri. According to the records, Plaintiff made complaints of sharp and constant lower back pain which he had been experiencing for eight days prior due to a lower back injury at a baseball game. Upon examination, range of motion testing revealed full flexion with mild pain, limited extension with pain and full side bend, but with pain to the left side; however, no measurements of the range of motion testing were noted. X-rays were taken. Plaintiff was advised to consider trigger point injections, referred to physical therapy and told to follow-up in four weeks. Plaintiff was also prescribed diclofenac and cyclobenzaprine (NYSCEF Doc. 67, 91).

On September 25, 2018, just four days after the subject accident, Plaintiff sought treatment at NJ Spine Institute. The records make no reference to Plaintiff's prior September 9, 2018 injury at a baseball game. However, it was noted that Plaintiff had been taking diclofenac and cyclobenzaprine since September 17, 2018 (Plaintiff's initial examination before the accident). There was no range of motion assessment performed (NYSCEF Doc. 70).

Plaintiff initially received physical therapy on September 26, 2018. Plaintiff reported that he had injured his lower back on September 9, 2018, prior to the accident. He complained of left-sided lower back problems that were getting worse. Plaintiff also stated that he was involved in the subject accident just days before the initial physical therapy session and reported that the accident "slightly"

increased his symptoms. At this initial physical therapy appointment, range of motion testing was performed. However, measured results of the testing were not noted, it is simply indicated that the range of motion was 75% (NYSCEF Doc. 68, 95)

Plaintiff treated again with Dr. Bottiglieri on October 15, 2018. At that time, it was noted that Plaintiff had commenced physical therapy. Upon examination, the doctor noted that Plaintiff's gait was normal, normal lordosis of the back and full range of motion to the back (flexion and extension) with no pain and there was also full side bend to the right and left with no pain. The doctor also noted that although Plaintiff suffered a "set back" due to the motor vehicle accident, there was "no apparent injury today on examination" (NYSCEF Doc. 67).

Plaintiff, after undergoing 14 sessions of physical therapy, was discharged on December 11, 2018. In the discharge summary, the "mechanism of onset" is noted as the repeated sitting and standing at a baseball game. There is no reference to the subject accident. At discharge it was noted that sitting, sleeping, walking recreation activities and stair negotiation were minimally impaired. At his deposition, Plaintiff testified that by the end of his physical therapy he began to feel "considerably better." (NYSCEF Doc. 64, 68, 95).

About 11 days after Plaintiff ceased physical therapy, on December 22, 2018, Plaintiff went to A+ Urgent Care Center with complaints of low back pain. It is again noted that in September, Plaintiff "... developed back pain after going to a baseball game and was shortly thereafter involved in an in [motor vehicle accident]." It is also noted that Plaintiff had recently "worked out on an exercise bike and has been having low back pain since" (NYSCEF Doc. 69). At his deposition, Plaintiff acknowledged that some time after this accident he experienced excruciating pain while using a cross-training bike at the gym.

Less than 4 months after the subject accident, on January 3, 2019, Plaintiff had an MRI of his lumbar spine at New Jersey Imaging. The "history" section of the records reflects that Plaintiff had

low back pain radiating to his left leg following a motor vehicle accident (although the prior medical records and the physical therapy records do not reference any radiating pain). Notably, Plaintiff's lower back pain from the baseball game or exercise bike are not referenced. The doctor's impression was that there was a left herniated disc at L2-L3 compressing the thecal sac (NYSCEF Doc. 74, 91).

The next day, Plaintiff treated again with Dr. Bottiglieri. Plaintiff complained that his pain had worsened. There does not appear to be any reference to the exercise bike incident or Plaintiff's urgent care visit. The doctor noted that upon examination, Plaintiff's gait was normal, there was normal lordosis of the back. Pain was noted with range of motion testing. No specific range of motion testing results are indicated, and trigger point injections were recommended (NYSCEF Doc. 67).

On January 4, 2019, Plaintiff also treated with Dr. Suche at Patient Care Associates / The Physical Medicine and Rehabilitation Center. Plaintiff reported that his back pain started in September 2018 and that a week later he was in a car accident. The subsequent incident involving the exercise bike is not referenced. Plaintiff complained of pain radiating to his extremities. On January 11<sup>th</sup> and 25<sup>th</sup> 2019 Plaintiff had epidural injections to the lumbar spine (NYSCEF Doc. 71, 72, 96).

On November 6, 2019, over a year after the subject accident, Plaintiff was referred for physical therapy by Dr. Suche, and began sessions again for his lower back. It is noted that Plaintiff reported the date of injury to be "September 2018" and that he had some exacerbation two weeks prior when he was carrying a bag on his shoulder. No specific reference is made to the subject accident. Plaintiff's flexion and extension range of motion testing of the back was 100% and rotation and bending were 75%. Plaintiff was discharged from physical therapy on March 2, 2020. The "mechanism of onset" was again noted as the unspecified injury in "September 2018" with exacerbation due to carrying a bag on his shoulder. Plaintiff had undergone 35 sessions of physical therapy. It is noted that Plaintiff was able to perform recreational activities with little to minimal discomfort, sit for more than 30 minutes and sleep without waking from pain (NYSCEF Doc. 68, 95).



Based on the second sessions of physical therapy records, there is no notation that Plaintiff complained of radiating pain on September 26, 2018, October 23, 2018, December 11, 2018, November 6, 2019, December 5, 2019, January 3, 2020, January 31, 2020, or March 2, 2020, evaluations.

Plaintiff next treated with Dr. Rawlins on December 18, 2019. Plaintiff complained of low back pain. Although this accident is reported, the prior incident at the baseball game and the subsequent incidents involving the exercise bike and the bag were not. Dr. Rawlins' impression was that the x-rays taken that day "demonstrates normal alignment loss and disc height for age no evidence of spondylolisthesis or fracture." Dr. Rawlins did not recommend surgery (NYSCEF Doc. 73).

Nearly a year and a half after the subject accident, Plaintiff treated with Dr. Cole on March 2, 2020 (the same date that his second set of physical therapy sessions ceased). In a report that Plaintiff signed, (acknowledged at his deposition, NYSCEF Doc. 64), it is noted that the onset of his lower back pain began due to this accident and that Plaintiff had no prior problems with the area complained of. It was also noted that Plaintiff was working full time. Upon examination, Plaintiff's range of motion was normal (NYSCEF Doc. 74). Dr. Cole performed a lumbar discectomy on January 28, 2021.

#### *Discussion*

The moving party in a summary judgment motion has the high burden of establishing entitlement to judgment as a matter of law and dispelling any material questions of fact for a trial (CPLR 3212; *Alvarez v Prospect Hosp.*, 68 NY2d320 [1986]). Thus, a defendant seeking dismissal on the basis that plaintiff's injuries are not serious must submit competent objective medical evidence establishing this (see *Wadford v. Gruz*, 35 AD3d 258 [1st Dept 2006]).

Under Insurance Law §5104, "there shall be no right of recovery for non-economic loss, except in the case of a serious injury." The reasoning behind this is to weed out frivolous claims and limit recovery to significant injuries (*Toure v. Avis Rent A Car Sys., Inc.*, 98 NY2d 345 [2002]).

In relation to a herniated disc injury, by itself it does not constitute a serious injury (see *Onishi v. N & B Taxi, Inc.*, 51 AD3d 594 [1st Dept 2008]; *Servones v. Toribio*, 20 AD3d 330 [1st Dept 2005]). Only when a herniated disc is accompanied by objective medical evidence establishing a plaintiff's physical limitations resulting from the injury may it be considered serious under permeant, permanent consequential limitation, or significant limitation (see *id.*).

Here, Defendants submit affirmed independent medical examination (IME) reports in support that Plaintiff's herniated disc was not a serious injury caused by the subject accident. Defendants further argue that Plaintiff's own medical records and deposition testimony also show that Plaintiff suffered a pre-existing lower back injury prior this accident.

Defendants submit their orthopedic doctor's IME report, dated February 17, 2022. Dr. Bazos reviewed Plaintiff's voluminous medical records and diagnostic images, from both before and after this accident. Upon physical examination, including range of motion testing measured with goniometer, there was normal cervical and thoracolumbar spine range of motion. Dr. Bazos' impression was that Plaintiff sustained "...a minor soft tissue strain injury to the lumbar spine." He further opined that Plaintiff's medical records reflect that Plaintiff's pre-accident examination was "...essentially the same as the follow-up visits after the subject incident. In fact, when the records from before this accident are compared to those afterward, there is virtually no change in the claimant's baseline level of comfort and function, or the nature and extent of his objective findings. Very clearly, the subject incident had no overarching impact on the claimant's status of musculoskeletal health." Dr. Bazos also opined that none of Plaintiff's lumbar MRIs reveal any findings of acute trauma attributable to the subject accident. Specifically, it is noted that acute trauma related to the lumbar disc herniation would have resulted in immediate onset of acute pain and dysfunction requiring emergent medical attention and that Plaintiff "would have presented with clinical signs typical of such and injury", which did not occur. Dr. Bazos also notes that the initial post-accident evaluation did not reflect any clinical

findings of acute disc herniation injuries or neurologic deficits and that Plaintiff was properly diagnosed with a lumbar strain. Dr. Bazos concluded that the injuries as alleged are "... based solely on [Plaintiff's] history and subjective complaints alone due to the lack of any accident-related objective findings. The [Plaintiff] sustained at most minor, self-limited, soft tissue strain injuries to the lumbar spine. These injuries would have resolved fully within just a few weeks with conservative management, based on known biologic principles. There are no injuries to the cervical spine that can be verified in this case. The lumbar discectomy performed by Dr. Cole was not medically necessary as a result of the subject incident. The claimant requires no additional medical treatment and is left with no disability or limitations in performing his normal daily activities."

Defendants also submitted their neurologic doctor's IME report. Dr. Feuer states that he reviewed Plaintiff's voluminous medical records and diagnostic images, from both before and after this accident. Upon examination, Dr. Feuer found that Plaintiff's gait and coordination were normal. The cervical and lumbar spine revealed no tenderness or spasm. Hypesthesia was noted in a left L2-L3 distribution. Dr. Feuer's impression was that Plaintiff had "Residual left L2-L3 sensory dysfunction". Dr. Feuer opined that based upon Plaintiff's treating physician, Dr. Bottiglieri's September and October 2018 reports Plaintiff's "radicular complaints referable to the left lower extremity represent a preexisting injury dating back to early September of 2018."

Upon review, Defendants with objective medical evidence, coupled with Plaintiff's medical records and Plaintiff's sworn testimony, have established their burden in that Plaintiff's herniated disc was not a serious injury, it was not caused by the subject accident and the surgery was not medically necessary (see *Onishi*, 51 AD3d 594; see also *Style v Joseph*, 32, AD3d 212 [1<sup>st</sup> Dept 2008]; *Santana v Khan Santana*, 48 AD3d 318 [1<sup>st</sup> Dept 2008]).

In opposition, Plaintiff's evidence does not rebut Defendant's entitlement to judgment on the serious injury threshold (see *Alvarez*, 68 NY2d320; *Wadford*, 35 AD3d 258). While Plaintiff



established a rear end collision as a matter of law, Plaintiff does not show that his injury was significant and that it was caused by this motor vehicle accident.

To establish the herniated disc injury, Plaintiff submits the report and affirmation of Dr. Kolb who reviewed Plaintiff's MRIs. Dr. Kolb reviewed Plaintiff's MRIs dated January 3, 2019, March 24, 2020, February 17, 2021, and April 20, 2022. Importantly however, Dr. Kolb did not review his prior medical history. The doctor specifically states that "to the best of [his] knowledge, [Plaintiff] had not sustained any prior injury to his lower back and had not undergone any MRI to the lumbar spine prior to the date of the collision." Notably, the initial MRI was taken after Plaintiff's injury at a baseball game and the other MRI's were taken after Plaintiff's lower back injuries from using an exercise bike and carrying a shoulder bag.

To establish that the herniated disc, falls under one of the nine categories of serious injury, Plaintiff submits the sworn statement of Dr. Cole. He states under oath that Plaintiff "sustained permanent injuries to his lumbar spine" requiring the surgery. Yet, Dr. Cole treated Plaintiff over a year after the accident and based upon reviewing numerous medical records, treating Plaintiff, and performing Plaintiff's lumbar discectomy surgery, opines that "with regard to the patient's lumbar spine injuries, and his current related pain, [he] apportions 30% of the damage to pre-existing conditions and 70% to the accident. However, this doctor does not provide objective findings for stating that Plaintiff sustained a serious injury and how he reached this medical opinion. Nor does he make any references to Plaintiff's initial treating doctor. Rather, his findings contradict his own notes and those of Plaintiff's initial treating doctor. Dr. Cole examined Plaintiff for the first time on March 2, 2020 and there is no notation that any range of motion testing were performed. During the second examination on April 15, 2020, Dr. Cole noted that Plaintiff's gait and lumbar range of motion were normal. Dr. Cole did not see Plaintiff again until the discectomy surgery on January 28, 2021. Nor does Dr. Cole make any reference to Dr. Bottiglieri notes who found no injury to

Plaintiff after the automobile accident. Thus, here a medical report that is not contemporaneous in time to the injury, that simply uses words from the statute, without objective medical examinations explaining the findings, is insufficient to raise a material question of fact about the seriousness and causation of Plaintiff's injury (see e.g. *Onishi*, 51 AD3d 594; *Style*, 32 AD3d 212 ; *Santana*, 48 AD3d 318; *Pommells v. Perez*, 4 NY3d 566 [2005]; *Linton v. Nawaz*, 62 AD3d 434 [2009]; *Antepara v. Garcia*, 194 A.D.3d 513, 514, 148 N.Y.S.3d 451 [1st Dept 2021]).

Accordingly, in light of Plaintiff's pre-existing injuries, post-accident injuries, and lack of credible objective and contemporaneous medical reports, summary judgment is warrant for Defendants. Plaintiff has not rebutted that his herniated disc was caused by this accident nor that the injury falls under the serious injury categories of permanent, consequential or significant physical limitations.

It is hereby

ORDERED that the Defendant's motion for summary judgment is granted and the matter is dismissed as to Defendants; and it is further

ORDERED that Defendants within 30 days shall serve and file a copy of this order with no notice of entry upon the Clerk of the Court.

11/27/2023  
DATE

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input checked="" type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

APPLICATION:

CHECK IF APPROPRIATE:

**HON. DENISE M. DOMINGUEZ**

<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	REFERENCE
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT		

J.S.C.