Cameo v Bai Zhi Ying
2020 NY Slip Op 35639(U)
September 14, 2020
Supreme Court, Kings County
Docket Number: Index No. 522976/2017
Judge: Carl J. Landicino
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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, On the 14th day of September, 2020.

PRESENT:
CARL J. LANDICINO, J.S.C.

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ITSHAK CAMEO,
Plaintiff,

-against-

BAI ZHI Y1NG,
Defendants.

---x

Index No.: 522976/2017

DECISION AND ORDER

Motion Sequence #2

Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion:

	Papers Numbered (NYSCEF)
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	16-25
Opposing Affidavits (Affirmations)...	31-35
Reply Affidavits (Affirmations)	38

Upon the foregoing papers, and after oral argument, the Court finds as follows:

This lawsuit arises out of a motor vehicle accident that allegedly occurred on November 9, 2017. Plaintiff Itshack Cameo (hereinafter "the Plaintiff") alleges in his Complaint that on that date he suffered personal injuries after the vehicle he was operating, was in a collision with a vehicle owned and operated by Defendant Bai Zhi Ying (hereinafter the "Defendant"). The Plaintiff alleges in his complaint that the motor vehicle collision occurred on Ocean Avenue at or near its intersection with 18th Avenue, in the County of Kings, City and State of New York. In his Verified Bill of Particulars the Plaintiff alleges injuries to his left knee (medial meniscal tear), lumbar, thoracic and cervical spine, including herniations, and that he suffered "a medically determined injury or impairment of a non-permanent nature which prevents the Plaintiff's injured person's usual and customary daily activities for not less than ninety days (90)

during the one hundred eighty (180) days immediately following the occurrence of the injury or impairment."

The Defendant now moves (motion sequence #2) for an order pursuant to CPLR 3212, granting summary judgment and dismissing the complaint on the ground that none of the injuries allegedly sustained by the Plaintiff meet the "serious injury" threshold requirement of Insurance Law § 5102(d). The Plaintiff opposes the motion and argues that the Defendants have failed to meet their burden and as a result the motion should be denied.

It has long been established that "[s]ummary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact.'" *Kolivas v. Kirchoff,* 14 AD3d 493 [2d Dept 2005], *citing Andre v. Pomeroy,* 35 NY2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2d Dept 2004], *citing Alvarez v. Prospect Hospital*, 68 NY2d320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.,* 64 NY2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2d Dept 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; *see Menzel v. Plotnick,* 202 AD2d 558, 558–559, 610 N.Y.S.2d 50 [2d Dept 1994].

In support of the motion, the Defendant proffers affirmed medical reports from Scott A. Springer, D.O., Alan J. Zimmerman, M.D., and Anisa Heravian, M.D. Dr. Springer examined MRIs of the Plaintiff's left knee and cervical, thoracic, and lumbar spine. As to the cervical spine, Dr. Springer noted that "the MRI of the cervical spine performed 15 days following the incident reveals reversal of the normal lordotic curvature which is chronic and related to the extensive degenerative changes and chronic disc herniations." As to Dr. Springer's review of the

MRI of the Plaintiff's lumbar spine performed one month and 27 days following the incident, the doctor opined that it, "reveals near complete straightening of the lordotic curvature, compatible with degenerative changes." In both reports Dr. Springer explained why he believed that the Plaintiff's condition was degenerative and stated that the disc desiccation could not have occurred during the period between the date of the accident and the date of the MRI. As to the left knee Dr. Springer noted that, "the remnant meniscus is small with a peripheral tear." He stated that this was also a degenerative condition (See Defendant's Motion Exhibit "D").

Dr. Zimmerman conducted a physical examination of the Plaintiff on August 21, 2019, more than a year after the date of the accident. As part of the examination, Dr. Zimmerman conducted range of motion testing of the Plaintiff's lumbar, cervical and thoracic spine with the use of a goniometer. Dr. Zimmerman found normal range of motion in the thoracic and cervical spine. As for the lumbar spine, Dr. Zimmerman noted flexion 45 degrees with normal 60 degrees, but also implied, without further explanation, that this was a subjective limitation. Dr. Zimmerman also found limited range of motion of the Plaintiff's left knee. As to the knee replacement he stated that it was "carried out for preexisting, degenerative and not causally related conditions" without further explanation. (See Defendant's Motion Exhibit "E").

Dr. Heravian did not examine the Plaintiff but instead examined a"pre-hospital care report" and "Emergency Department Records - Maimonides Medical Center Emergency Department." Dr. Heravian states that "after review of the records, it is my conclusion that the injuries claimed in the Bill of Particulars are inconsistent with the initial presentation and the documentation in the medical records." Dr. Heravian further stated that "[h]ad there been a significant injury to the knee, one would expect a splint, immobilizing brace, and ambulatory assist devices such as a cane or crutches to be given." The Defendant also attaches a report from Dr. Marc P. Kanter, who did not examine the Plaintiff but reviewed records relating to the Plaintiff's EMS and emergency room treatment. Dr. Kanter opined that "[a]fter review of the records it is my conclusion that the injuries claimed in the bill of particulars are inconsistent with the initial presentation and the documentation in the medical records." (Defendant's Motion, Exhibit "H").

Turning to the merits of the Defendant's motion, the Court is of the opinion that the Defendant has not met his initial burden of proof. *See Che Hong Kim v. Kossoff*, 90 A.D.3d 969, 969, 934 N.Y.S.2d 867 [2nd Dept, 2011]. The Defendant contends that the affirmed reports of

Drs. Springer, Zimmerman and Haravian support his contention that the Plaintiff did not suffer a serious injury as defined under Insurance Law § 5102(d). However, the Plaintiff does state in his Verified Bill of Particulars that he was "confined to bed at home, and to home for 3 months post accident." (See Defendant's Motion, Exhibit C, Paragraph 13). In his deposition, the Plaintiff states that he was self-employed in the clothing business. (Defendant's Motion, Exhibit H, Page 10). He also stated that he missed a couple of months from work as a result of the accident and when he was asked if there came a time where he returned to work from nine to seven he answered "[n]o." (Defendant's Motion, Exhibit H, Pages 58-59). Moreover, none of the Defendant's Doctors specifically addressed the Plaintiff's "90/180" claim. As a result, the Court is of the opinion that the motion fails to adequately address, as a matter of law, the Plaintiff's claim set forth in the verified bill of particulars, that he sustained "a medically determined injury or impairment of a non-permanent nature which prevents the Plaintiff's injured person's usual and customary daily activities for not less than ninety days (90) during the one hundred eighty (180) days immediately following the occurrence of the injury or impairment."*See Aujour v. Sing*h, 90 AD3d 686, 934 N.Y.S.2d 240 [2d Dept 2011]; *Lewis v. John*, 81 AD3d 904, 905, 917 N.Y.S.2d 575 [2d Dept 2011]; *Menezes v. Khan*, 67 AD3d 654, 889 N.Y.S.2d 54 [2d 2009]; *Faun Thai v. Butt*, 34 AD3d 447, 448, 824 N.Y.S.2d 131, 132 [2d Dept 2006].

Even assuming, *arguendo,* that the Defendant had met his *prima facie* burden, the Court finds that the Plaintiff has raised material issues of fact relating to his ability to meet the serious injury threshold required by Insurance Law 5102. The Plaintiff relies on an initial evaluation from Yvette Davidov, M.D. Dr. Davidov examined the Plaintiff on several occasions, starting on November 20, 2017 (eleven days after the accident) through most recently December 11, 2019. Dr. Davidov conducted an objective range of motion exam by computerized examination or with a goniometer of the Plaintiff's left knee and cervical spine. Dr. Davidov opined that it was his opinion that the Plaintiff was "asymptomatic before the accident, to a reasonable degree of medical certainty, that any prior knee injury Mr. Cameo might have had which ultimately resolved before the subject accident, was exacerbated by the November 9, 2017 accident, which required a total knee replacement on June 27, 2019." Dr. Davidov also opined that "to a reasonable degree of medical certainty, that immediately following his accident, up until presently, Mr. Cameo was prevented from performing substantially all of the material acts which constitute Mr. Cameo's usual and customary daily activities." (See Plaintiff's Affirmation in

Opposition, Exhibit 2). As a result, the Court finds that the Plaintiff raised material issues of fact that prevent the Court from granting summary judgment at this time. *See McNeil v. New York City Transit Auth.,* 60 AD3d 1018, 1019, 877 N.Y.S.2d 351, 351 [2d Dept 2009]. "An expert's qualitative assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system." *Toure v Avis Rent A Car Systems Inc.*, 98 NY2d 345, 774 N.E.2d 1197 [2002]; *see Dufel v. Green*, 84 NY2d at 798, 622 N.Y.S.2d 900, 647 N.E.2d 105 [1995].

As to any perceived gap in treatment, Plaintiff explains in his affidavit and deposition, that his treatments were curtailed by a reduction in no fault coverage. (Plaintiff's Opposition at Exhibit "A", Plaintiff's affidavit and Defendant's Motion at Exhibit "H", Plaintiff's deposition, pages 45-47). See *Jules v. Barbecho*, 55 AD3d 548, 866 N.Y.S.2d 214 [2d Dept 2008] and *Pindo v. Lenis*, 99 AD3d 586, 587, 952 N.Y.S.2d 544 [1st Dept 2012].

Based upon the foregoing, it is hereby ORDERED as follows:

Defendant's motion for summary judgment (motion sequence #2) is denied.

The foregoing constitutes the Decision and Order of the Court.

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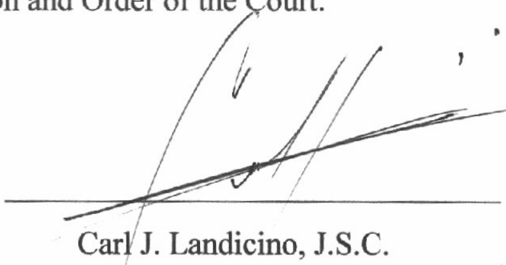

Carl J. Landicino, J.S.C.

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