| **Adewuyi v Tazi** |
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| 2020 NY Slip Op 35653(U) |
| May 22, 2020 |
| Supreme Court, Bronx County |
| Docket Number: Index No. 21621/2018E |
| Judge: John R. Higgitt |
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NEW YORK SUPREME COURT – COUNTY OF BRONX

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, **PART 14**

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**ADEWUYI, KEHINDE**

- against -

**TAZI, MUSTAAPHA, et al**

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Index №. **21621/2018E**

Hon. **JOHN R. HIGGITT**,

J.S.C.

The following papers in the NYSCEF System were read on this motion for **SUMMARY JUDGMENT (DEFENDANT)**, noticed on _____ and duly submitted as No. __ on the Motion Calendar of **March 31, 2020**

| | NYSCEF Doc. Nos. |
|---|---|
| Notice of Motion – Order to Show Cause - Exhibits and Affidavits Annexed | 31-42 |
| Notice of Cross-Motion - Order to Show Cause - Exhibits and Affidavits Annexed | |
| Answering Affidavit and Exhibits | 46-48, 62-69 |
| Replying Affidavit and Exhibits | 71 |
| Memoranda of Law | |
| Filed Papers | |

Upon the foregoing papers, the moving defendants' motion for summary judgment on the ground that plaintiff did not sustain a "serious injury" in the subject April 23, 2017 motor vehicle accident is granted in part.

Dated: **05/22/2020**

Hon. John R. Higgitt, J.S.C.

[*1]

**Check one:**
□ Case Disposed in Entirety
■ Case Still Active

**Motion is:**
□ Granted ■ GIP
□ Denied □ Other

**Check if appropriate:**
■ Schedule Appearance □ Settle Order
□ Fiduciary Appointment □ Submit Order
□ Referee Appointment

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IA PART 14

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KEHINDE ADEWUYI,

Plaintiff,

- against -

MUSTAAPHA TAZI, TWO ALEX TAXI INC. and OLUFEMI ADEGOKE,

Defendants.

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DECISION AND ORDER

Index No. 21621/2018E

Present: John R. Higgitt, J.S.C.

Upon the December 12, 2019 notice of motion of defendants Tazi and Two Alex Taxi Inc. and the affirmation and exhibits submitted in support thereof; defendant Adegoke's December 31, 2019 affirmation in support and the exhibits submitted therewith; plaintiff's March 6, 2020 affirmation in opposition and the affidavit and exhibits submitted therewith; the moving defendants' March 27, 2020 affirmation in reply; and due deliberation; the moving defendants' motion for summary judgment on the ground that plaintiff did not sustain a "serious injury" in the subject April 23, 2017 motor vehicle accident is granted in part.

Plaintiff claims injuries to his head, left hip and left knee, and aggravation of injuries to his lumbar spine, and alleges "serious injury" under the Insurance Law § 5102(d) categories of permanent consequential limitation, significant limitation and 90/180-day injury (*see* CPLR 3043[a][6]).

In support of the motion, the moving defendants submit the affirmed reports of orthopedic surgeon Dr. Renzoni, neurologist Dr. Sharma and radiologist Dr. Fitzpatrick, and the transcript of plaintiff's August 13, 2019. deposition testimony.

Dr. Renzoni examined plaintiff on November 4, 2019, approximately two and a half years after the accident, finding full or near-normal ranges of motion in all tested planes of

movement of plaintiff's cervical and lumbar spine, hips and knees, without tenderness or spasm. All provocative testing yielded negative results, and the neurological examination was normal. Dr. Renzoni concluded that plaintiff had sustained resolved cervical, lumbar, hip and knee sprain/strain, without objective evidence of orthopedic disability.

Dr. Sharma examined plaintiff on November 5, 2019, conducting a normal examination of plaintiff's mental status, cranial nerves, motor system, reflexes, sensation, gait and coordination, and skull and spine. Dr. Sharma measured reduced ranges of motion in the tested planes of plaintiff's cervical and lumbar spine. He concluded that plaintiff had sustained resolved cervical and lumbar sprain/strain, without objective findings to support plaintiff's subjective complaints.

Dr. Fitzpatrick reviewed the films from the May 23, 2017 MRI of plaintiff's lumbar spine, finding that they depicted degenerative disc disease.

The moving defendants' proof was sufficient to demonstrate, prima facie, a lack of causal relationship between plaintiff's claimed lumbar injuries, and that plaintiff did not sustain a permanent consequential or significant limitation of use of his hip or knee (*see Bianchi v Mason*, 179 AD3d 567 [1st Dept 2020]). Because Dr. Sharma's range-of-motion findings conflicted with his conclusion that plaintiff's injuries were resolved (*see Lewis v Revello*, 172 AD3d 505 [1st Dept 2019]), and because defendants' experts' range-of-motion findings conflicted (*see Johnson v Salaj*, 130 AD3d 502 [1st Dept 2015]), the moving defendants failed to demonstrate that plaintiff's spinal injuries were not "serious" within the meaning of the statute. With respect to plaintiff's knee, the reduction in range of motion was insufficient to defeat the moving defendants' prima facie showing (*see Il Chung Lim v Chrabaszcz*, 95 AD3d 950, 951 [2d Dept 2012]; *McLoud v Reyes*, 82 AD3d 848, 849 [2d Dept 2011]), and was, in any event, equal to that

of plaintiff's uninjured knee (*see Karounos v Doulalas*, 153 AD3d 1166 [1st Dept 2017]; *Martinez v Goldmag Hacking Corp.*, 95 AD3d 682 [1st Dept 2012]). The moving defendants' experts were not required to review plaintiff's medical or imaging records prior to forming their opinions (*see Latus v Ishtarq*, 159 AD3d 433 [1st Dept 2018]; *Chintam v Fenelus*, 65 AD3d 946 [1st Dept 2009]).

The moving defendants also assert that a 2006 motor vehicle accident in which plaintiff injured his head and lower back demonstrates a lack of causal connection between the subject accident and plaintiff's claimed injuries to those body parts (*see Hamilton v Marom*, 178 AD3d 424 [1st Dept 2019]; *Massillon v Regalado*, 176 AD3d 600 [1st Dept 2019]).

The moving defendants also assert that plaintiff's testimony that he ceased all treatment four months after the accident establishes a cessation of treatment requiring explanation (*see Pommells v Perez*, 4 NY3d 566, 574 [2005] ["a plaintiff who terminates therapeutic measures following the accident, while claiming "serious injury," must offer some reasonable explanation for having done so"]). In opposition to the motion, plaintiff averred that he ceased receiving treatment when his No-Fault benefits were terminated, which is sufficient to raise an issue as to a reasonable explanation for the cessation of treatment (*see Jenkins v Livo Car Inc.*, 176 AD3d 568 [1st Dept 2019]).

In opposition, plaintiff submits the affirmed reports of orthopedic surgeon Dr. Rose and radiologist Dr. Paruchuri, and treatment records from Physical Medicine and Rehabilitation of New York (PMR).[1]

Plaintiff's proof of contemporaneous and recent range-of-motion limitations consistent with positive imaging and causally related to the accident was sufficient to raise an issue of fact

[1] The moving defendants did not object to the admissibility of the records submitted by plaintiff.

as to whether plaintiff sustained a permanent consequential or significant limitation of use of his hip and knee (*see Torres v Ndongo*, 105 AD3d 480 [1st Dept 2013]).

Plaintiff failed to raise an issue of fact as to his claimed head injuries. He submitted a single evaluation occurring one month after the accident but no imaging reports or records of treatment (*see Cano v U-Haul Co. of Ariz.*, 178 AD3d 409 [1st Dept 2019]; *Moctezuma v Garcia*, 176 AD3d 578 [1st Dept 2019]). Plaintiff's doctor failed to explain why the prior accident could be ruled out as a cause of plaintiff's complaints (*see Maraj v Fletcher*, 180 AD3d 621 [1st Dept 2020]). Because plaintiff failed to raise an issue of fact as to causation, he may not recover for head injuries, regardless of whether it is found that he sustained some other "serious injury" (*see Taylor v Delgado*, 154 AD3d 620 [1st Dept 2017]). In any event, plaintiff abandoned the head injuries in opposition (*see Kuehne & Nagel, Inc. v Baiden*, 36 NY2d 539 [1975]; *Henry v Carr*, 161 AD3d 424 [1st Dept 2018]), and the "serious injury" claims premised on those injuries are therefore dismissed (*see Ng v NYU Langone Med. Ctr.*, 157 AD3d 549 [1st Dept 2018]).

Plaintiff failed to raise an issue of fact as his claimed lumbar injuries. His doctors acknowledged but failed to address the prior accident (*see Cano*, *supra*), and they did not report that plaintiff claimed to be asymptomatic prior to the subject accident (*cf. Ortiz v Boamah*, 169 AD3d 486 [1st Dept 2019]) or that his history was non-contributory (*see Torres*, *supra*). These omissions are significant, given that plaintiff claims exacerbation. Plaintiff's subjective assertion that he had recovered from the prior accident, unsupported by medical evidence, is insufficient to raise an issue of fact (*see Mitchell v Atlantic Paratrans of NYC, Inc.*, 57 AD3d 336 [1st Dept 2008]). Accordingly, plaintiff may not recover for lumbar spine injuries.

With respect to plaintiff's 90/180-day claim, plaintiff's bill of particulars alleged that he was confined to home for six months. Plaintiff testified, however, that he was confined to his home for only five days and missed one week of work. This proof is sufficient to defeat the claim (*see Abreu v Miller*, 2020 NY Slip Op 01552 [1st Dept 2020]; *Gordon v Hernandez*, 2020 NY Slip Op 01462 [1st Dept 2020]). Plaintiff failed to raise an issue of fact.

Accordingly, it is

ORDERED, that the aspects of the moving defendants' motion for summary judgment dismissing plaintiff's claims of "serious injury" under the Insurance Law § 5102(d) category of 90/180-day injury, and premised on injuries to his head and lumbar spine, are granted, and those claims are dismissed; and it is further

ORDERED, that the motion is otherwise denied; and it is further

ORDERED, that the parties shall appear before the undersigned in Part 14, courtroom 407, at 9:30 a.m. on **September 4, 2020** for a status conference.

This constitutes the decision and order of the court.

Dated: May 22, 2020

Hon. John R. Higgitt, J.S.C.