

Nagin v Singh

2021 NY Slip Op 32136(U)

October 28, 2021

Supreme Court, New York County

Docket Number: Index No. 155539/2017

Judge: Lisa Headley

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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. LISA HEADLEY **PART** **22**

Justice

-----X

MATTHEW NAGIN,

Plaintiff,

- v -

AMANDEEP SINGH, 15TH STREET HOLDCO, L.P.,
TRITON CONSTRUCTION COMPANY, LLC

Defendant.

-----X

INDEX NO. 155539/2017

MOTION DATE 08/31/2021

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, it is hereby ORDERED that defendant, Amandeep Singh's (hereinafter "defendant Singh") motion for summary judgment and co-defendants 15th Street Holdco, L.P. and Triton Construction Company, LLC's cross-motion for summary judgment, dismissing the complaint on the ground that the plaintiff, Matthew Nagin's (hereinafter, "plaintiff"), claimed injuries do not satisfy the "serious injury" threshold under *New York Insurance Law* §§ 5102(d) are denied. Plaintiff filed opposition papers, and defendants 15th Street Holdco, L.P., and Triton Construction Company, LLC, submitted a reply affirmation.

Plaintiff commenced this action to recover damages for personal injuries sustained as a result of a motor vehicle accident that occurred on August 13, 2016. Plaintiff alleges that he was a pedestrian crossing West 15th Street, between 9th and 10th Avenues, in New York, NY when the vehicle owned and operated by defendant Singh struck plaintiff. Plaintiff's claim against co-defendant 15th Street Holdco, L.P. include their failure to maintain and repair the public sidewalk, which caused and created a dangerous condition. In addition, plaintiff claims that co-defendant, Triton Construction Company, LLC, was hired to perform work on the adjacent building and caused the sidewalk to be closed/barricaded without sufficient notice to pedestrians. As a result, plaintiff alleges that he sustained serious injuries as defined under *New York Insurance Law* § 5102(d), including injuries to his cervical and lumbar spines, and left wrist.

In support of his motion, defendant Singh submits the objective findings of expert independent medical examiner (IME) orthopedic surgeon Dr. Alan Zimmerman, the objective findings of expert independent medical examiner neurologist Dr. Robert April, and plaintiff's sworn deposition testimony. Dr. Zimmerman's exam found, *inter alia*, plaintiff's cervical, thoracic, lower back sprain, and left wrist lacerations were resolved. Dr. Zimmerman found that plaintiff does not have an orthopedic disability and there is no permanency in said injuries. Dr. Zimmerman also concluded that the plaintiff is capable of pursuing gainful employment and activities of daily living without restriction. Dr. April's exam found, *inter alia*, that the

accident of record did not produce a neurological diagnosis, disability, limitation, or need for further intervention. Dr. April concluded that plaintiff is capable of returning to a wide variety of gainful activities. Defendant also asserts that plaintiff does not meet the 90/180 threshold for serious injury based on plaintiff's sworn deposition. Specifically, defendant asserts that the plaintiff testified that he only missed one month from work.

In support of their cross-motion, co-defendants 15th Street Holdco, L.P. and Triton Construction Company, LLC adopt and incorporate the substantive arguments raised in defendant Singh's summary judgment motion. In their affirmation in reply, co-defendants 15th Street Holdco, L.P. and Triton Construction Company, LLC assert that the serious injury threshold defense applies to all named defendants, and that plaintiff's theory of liability is grounded in claims of negligence with respect to plaintiff being struck by defendant Singh's motor vehicle. Further, co-defendants contend that plaintiff must establish a serious injury in order to recover for non-economic loss with respect to all defendants in this lawsuit.

In addition, co-defendants assert that plaintiff does not meet the 90/180 threshold for serious injury, the permanent consequential limitation, or the significant limitation categories of serious injury based on plaintiff's sworn deposition and the objective findings of expert IME orthopedic surgeon Dr. Alan Zimmerman. As to the 90/180 threshold, co-defendants assert that the plaintiff testified that he resumed work as a professor approximately one month after his accident, and that he missed no time from work as he returned at the start of the fall semester. Co-defendants further allege, *inter alia*, that there was an unexplained three-year gap in treatment, and his sporadic physical therapy attendance.

In opposition, plaintiff submits medical reports, including the affirmation of neurologist Dr. Aric Hausknecht, which is based upon a review of records maintained by Dr. Hausknecht's office including MRI findings and CityMD medical records. Dr. Hausknecht determined, *inter alia*, that as a result of plaintiff's August 13, 2016 accident, the plaintiff's cervical, thoracic, and lumbar injuries prevented him from performing substantially all of his usual and customary daily activities for more than 90 days during the 180 days immediately following his accident. Based on Dr. Hausknecht's objective testing of plaintiff's range of motion in his spine, plaintiff suffered a significant limitation of use of and a permanent consequential loss of use of his cervical, thoracic, and lumbar spine. On August 4, 2020, Dr. Hausknecht performed electrodiagnostic testing which revealed objective evidence of nerve damage. Dr. Hausknecht found that plaintiff's condition has deteriorated in the nearly four years since the accident based upon reductions in diminished values of range of motion from the August 23, 2016 initial evaluation. Based upon plaintiff's continuing range of motion deficits and complaints of pain nearly four years after his accident, Dr. Hausknecht opined that plaintiff's range of motion limitations and nerve damage were significant and permanent in nature. Dr. Hausknecht further opined that Plaintiff's range of motion limitations are permanent and lifelong in nature, that Plaintiff remained partially disabled during the August 4, 2020 examination, which was caused as a result of the subject accident.

Plaintiff also submitted orthopedic surgeon, Dr. Jeffrey S. Kaplan's medical opinion, Dr. Robert Cohen's medical opinion, plaintiff's physical therapy medical records, and plaintiff's sworn deposition. Plaintiff contends that two days after the accident, he went to CityMD urgent care with back-muscle spasms, and that three days after the accident, he was seen by orthopedic surgeon Dr. Jeffrey S. Kaplan for complaints of left wrist, bilateral knee, neck, and back pain, with swelling and headaches. Dr. Kaplan referred plaintiff to begin physical therapy. Plaintiff further contends that on the same day, plaintiff was seen by Dr.

Robert Cohen, his primary care physician, who prescribed Vicodin to treat plaintiff's pain. Plaintiff states that on August 19, 2016, he began a course of physical therapy, initially two times per week, and continued approximately 1-2 times per week until his no-fault coverage expired. Thereafter, Plaintiff continued physical therapy approximately one to two times per month under his private insurance. Plaintiff contends that his part-time employment as a college professor, to which he returned approximately one month after the accident, formed a small fraction of his usual and daily customary activities. Plaintiff contends that in addition to his employment as a professor, he was a stand-up comedian and film actor, and after the accident, he missed four stand-up comedy jobs and one film acting role, he booked prior to the accident. In addition, prior to the accident he regularly played outdoor basketball, he exercised at the local gym at least once per week, ran along the West Side Highway, skied, climbed and hiked. After the accident, plaintiff asserts that his injuries have prevented him from performing those activities.

In opposition to the cross-motion, plaintiff contends that co-defendants, 15th Street Holdco, L.P. and Triton Construction Company, LLC may not rely upon the insurance law as they are not "covered persons" as defined by *Insurance Law §5104*, which states that "in any action by or on behalf of a covered person against another covered person for personal injuries arising out of negligence in the use of operation of a motor vehicle in this state, there shall be no right of recovery for non-economic loss, except in the case of a serious injury, or for basic economic loss." *See, Insurance law §5104*. Here, plaintiff argues that the claims against the co-defendants do not arise from their negligence in the use or operation of a motor vehicle, and therefore, their cross-motion for summary judgment should be denied. In addition, plaintiff contends that the cross-motion for summary judgment should be denied because co-defendants did not submit supporting medical affirmations.

"In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility." *Garcia v. J.C. Duggan, Inc.*, 180 A.D.2d 579, 580 (1st Dep't 1992), *citing Dauman Displays, Inc. v. Masturzo*, 168 A.D.2d 204 (1st Dep't 1990). As such, summary judgment is rarely granted in negligence actions unless there is no conflict at all in the evidence. *See, Ugarriza v. Schmieder*, 46 N.Y.2d 471, 475-476 (1979).

Here, upon examination of the papers submitted to this Court, defendant Amandeep Singh's motion for summary judgment and defendants' 15th Street Holdco, L.P.'s, and Triton Construction Company, LLC's cross-motions are denied because there are issues of fact precluding summary judgment. There are conflicting medical reports regarding whether the plaintiff's injuries, including cervical disc herniations, derangement, lumbar disc herniations with nerve root impingement, and left wrist laceration/arthropathy are permanent in nature and whether the plaintiff is currently without limitation. As such, defendant Amandeep Singh's motion for summary judgment and co-defendants' 15th Street Holdco, L.P.'s, and Triton Construction Company, LLC's motions are denied.

Accordingly, it is

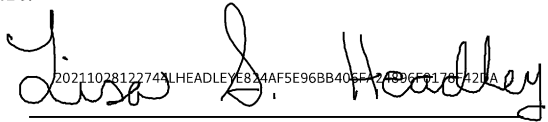
ORDERED that defendant Amandeep Singh's motion for summary judgment and co-defendants 15th Street Holdco, L.P.'s, and Triton Construction Company, LLC's cross-motion for summary judgment dismissing the complaint on the ground that the plaintiff's claimed injuries do not satisfy the "serious injury" threshold under *New York Insurance Law §§ 5102(d)* are DENIED; and it is further

ORDERED that any relief sought not expressly addressed herein has nonetheless been

considered; and it is further

ORDERED that within 30 days of entry, movant-defendant shall serve a copy of this decision/order upon plaintiff with notice of entry.

This constitutes the Decision/Order of the Court.



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LISA HEADLEY, J.S.C.

10/28/2021
DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE