

Morris v Ilya Cab Corp.
2008 NY Slip Op 32842(U)
October 8, 2008
Supreme Court, New York County
Docket Number: 119137/06
Judge: Paul Wooten
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN
Justice

PART 22

GODDESS MORRIS, an infant under the age of eighteen (18) years old, by her father and natural guardian, KEITH MORRIS and KEITH MORRIS, Individually,

Plaintiffs,

- v -

ILYA CAB CORP. and HUMAYUN A. CHOUDBURY,

Defendants.

INDEX NO. 119137/06

MOTION DATE _____

MOTION SEQ. NO. 002

MOTION CAL. NO. 85

The following papers, numbered 1 to _____ were read on this motion to/for _____.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits (Memo) _____
Replying Affidavits (Reply Memo) _____

PAPERS NUMBERED

1
2
3

Cross-Motion: Yes No

Defendants, Ilya Cab Corp. and Humayun A. Choudbury, move, pursuant to CPLR § 3212, for summary judgment dismissing the complaint on the ground that the plaintiffs, Goddess Morris and Keith Morris, have not met the serious injury threshold as defined by New York's No-Fault Law (Insurance Law § 5102 [d]). Defendants contend that, based upon medical examinations and objective testing, neither Goddess nor her father Keith Morris have a serious injury under the statute.

FACTUAL ALLEGATIONS

Plaintiffs Goddess and Keith Morris sustained injuries after being involved in a

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car accident on the evening of September 4, 2006 at the intersection of East 62nd Street and First Avenue in Manhattan, New York. On the date of the accident, Goddess Morris was 15 years old and her father, Keith, was 44 years old.¹ Keith Morris' vehicle was struck in the rear while stopped for a traffic signal by a car owned by Ilya Cab Corp., and operated by Humayun Choudbury. As a result of the impact, plaintiffs' Goddess Morris' right shoulder and Keith's head hit the car doors.

I. Goddess Morris

Plaintiff Goddess Morris (Goddess) alleges that she sustained a right shoulder tear of the anterior lip of the glenoid labrum, right shoulder tear of the supraspinatus tendon, bulge of the C5-6 intervertebral disc, straightening of the normal cervical lordosis, internal derangement of the right shoulder, right shoulder arthropathy, cervical derangement, thoracolumbar derangement and lumbar radiculopathy.

The day after the accident, Goddess went to Metropolitan Hospital's emergency room where she complained of right shoulder and lower back pain. At the hospital, Goddess Morris was prescribed medication and given a sling to wear which she used for one to two months.

Plaintiff Goddess visited Dr. Aric Hausknecht, a board-certified neurologist, on September 7, 2006. Goddess Morris complained of neck pain with radiating pain into her right upper extremity, back and right shoulder pain. Dr. Hausknecht noted a positive Spurling maneuver, cervical and lumbar muscle spasms, and a decreased range of motion in her spine. Due to the decreased range of motion, Dr. Hausknecht

¹ Plaintiff Keith was driving Goddess Morris, as well as two other family members who have not made any claims of injuries as a result of this accident.

ordered MRI tests of Goddess' spine and right shoulder.

On September 11, 2006, Goddess had a chiropractic examination with Dr. Mitchell Zeren, D.C., and complained of neck pain with radiating pain into her right upper extremity, back and right shoulder pain. Dr. Zeren stated that there was a positive Spurling maneuver, cervical and lumbar muscle spasms, positive straight leg raise test at 45 degrees, and decreased range of motion in her spine and right shoulder. Goddess Morris continued to receive treatment at Dr. Zeren's office and underwent a course of chiropractic treatment through October 24, 2006.

On October 7, 2006, Goddess underwent MRI tests of the cervical spine which revealed bulging of the C5-6 intervertebral disc, and tears of the glenoid labrum and supraspinatus tendon of the right shoulder.

Plaintiff Goddess visited with Dr. David Kreshover, a chiropractor, on October 31, 2006, at which time, she complained of constant neck, lower back, and right shoulder pain. Dr. Kreshover noted a positive Spurling maneuver test, Ely's test and Kemp's test, cervical and lumbar muscle spasms, and a decreased range of motion in her spine. Goddess Morris subsequently underwent chiropractic manipulation and physical rehabilitation at Dr. Kreshover's office through January 22, 2007.

On March 13, 2007, Goddess had a follow-up visit with Dr. Hausknecht, at which time she complained of right shoulder pain. Dr. Hausknecht states that the pain in Goddess' neck and back had improved. Dr. Hausknecht diagnosed Goddess with cervical derangement with a disc bulge at C5-6 and right shoulder arthropathy and states that Goddess needs further treatment and evaluations including symptomatic rehabilitation and orthopedic evaluation of her right shoulder joint.

Goddess last saw Dr. Kreshover on October 31, 2007, at which time Dr. Kreshover stated that she continues to suffer constant neck, back, and right shoulder pain, has residual tenderness in the cervical and lumbar spine, positive Spurling maneuver, Ely's test and Kemp's test.

Plaintiff Goddess maintains that, due to the injuries, she missed two to three weeks of school, was not allowed to participate in gym class for a month, remains limited in her gym class activities, continues to suffer pain in her right shoulder and back a couple times per week, and has trouble sleeping, doing chores, playing football, and playing with her brother.

At the request of the defendants, on September 20, 2007, Goddess had a neurological examination conducted by Dr. Norman J. Sobol, M.D., a board-certified neurologist. Dr. Sobol's examination revealed that Goddess demonstrated a full range of motion. After conducting several tests, Dr. Sobol concludes that Goddess exhibited a normal neurological exam, with no objective findings of any continuing or permanent injury, disability, or significant limitation, and is fully capable of performing all of her normal activities without restrictions.

On September 20, 2007, at the request of the defendants, Dr. Michael Rafiy, M.D., a board-certified orthopedist, performed an examination of Goddess. Dr. Rafiy conducted several objective tests and notes that Goddess demonstrated a full range of motion. Based upon his physical examination of Goddess, Dr. Rafiy concludes that there exists no objective findings of any continuing, permanent injury, disability, or limitation and that Goddess is capable of performing all of her normal activities.

[* 5]

ii. Keith Morris

Plaintiff Keith Morris (Keith) alleges that as a result of the accident, he suffered a left shoulder tear of the anterior and posterior lip of the glenoid labrum, an exacerbation of a prior herniation of the C3-4 and C5-6 intervertebral discs, medial nerve neuropathy of the C3-4 and C5-6 intervertebral discs, medial nerve neuropathy of the upper extremity confirmed on NCV, ulnar nerve neuropathy of upper extremity confirmed on NCV, internal derangement of the left shoulder, left shoulder arthropathy, cervical myelopathy, cervical radiculopathy, cervical sprain, traumatic myalgia and myofascitis.

Plaintiff Keith also went to Metropolitan Hospital's emergency room on September 5, 2006, complaining of left shoulder and neck pain and was prescribed medication. Keith visited Dr. Hausknecht on September 7, 2006, complaining of neck pain and left shoulder pain. Dr. Hausknecht noted tenderness and crepitus of the left shoulder joint, a positive Spurling maneuver, cervical and lumbar muscle spasms, and a decreased range of motion in the cervical spine. Dr. Hausknecht ordered MRI's of Keith's spine, left shoulder, and a course of rehabilitation.

On September 11, 2006, plaintiff Keith met with Dr. Zeren, and complained of neck and left shoulder pain. On October 7, 2006, Keith underwent MRI tests of the cervical spine which revealed herniations of the C3-4 and C5-6 intervertebral discs and tears of the glenoid labrum of the left shoulder. On October 31, 2006, a physical therapist in Dr. Zeren's office noted that Keith complained of problems lifting and bending, had a decreased range of motion in his neck and left shoulder and had muscle spasms.

On March 13, 2007, plaintiff Keith returned for a follow-up visit with Dr.

Hausknecht at which time he complained of having sharp neck pain radiating to his left shoulder, left arm weakness, and experienced difficulty lifting. Dr. Hausknecht also observed decreased left shoulder abduction as well as cervical spine decreased range of motion and diagnosed Keith with cervical derangement with C3-4 and C5-6 disc herniations, aggravation of a prior neck injury and left shoulder arthropathy with an associated glenoid labrum tear.

Dr. Kreshover saw plaintiff Keith Morris on October 30, 2007 at which time he found residual tenderness in the cervical and lumbar spine, a positive Spurling maneuver, Soto Hall test and cervical distraction test. Dr. Kreshover stated that Keith suffered from severe trauma to his neck which directly caused cervical disc herniations.

Plaintiff Keith Morris contends that as a result of the injuries sustained in the car accident, he stopped working for six to seven months. He testified at his examination before trial that he had been employed as a "private contractor," delivering packages by car. Although Keith returned to work for two to three months, he had to quit permanently due to pain from his injuries, and has remained unemployed.² Keith maintains that he continues to suffer constant pain in his neck and left shoulder, and can no longer play with his son by throwing a ball, running or climbing. He also has difficulty picking up his son and can no longer exercise or lift objects weighing more than ten pounds. Keith previously injured his neck in an accident in 1990, and as a

² Plaintiff Keith's deposition testimony conflicts with the reports of several doctors regarding his employment status at the time of the accident. According to Dr. Hausknecht's medical report dated September, 7, 2006, Keith was an electrician that was unemployed. (Kane Affirm., ex. K). According to the September 20, 2007 report of Dr. Sobol as well as the September 20, 2007 report of Dr. Rafiy, Keith was unemployed at the time of the accident. (*Id.*, exs. G, H).

result of that earlier accident, he had cervical surgery.

At defendants' request, Dr. Sobol conducted a neurological examination of plaintiff Keith Morris on September 20 2007. Dr. Sobol concludes that based upon his complete exam as well as objective tests, Keith exhibited a full range of motion and a normal neurological exam with no objective findings of any continuing/permanent injury, disability, or limitation.

Defendants also requested that Keith be examined by an orthopedist. Dr. Rafiy examined Keith on September 20, 2007 and notes that he exhibited a normal examination, demonstrated a full range of motion and exhibited no objective findings of any continuing permanent injury, disability or limitation.

DISCUSSION

It is well settled that the "legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to serious injuries." (*Toure v. Avis Rent-A-Car Sys., Inc.*, 98 N.Y.2d 345, 350 [2002] quoting *Dufel v. Greene*, 84 N.Y.2d 795, 798 [1995]) The issue of whether a claimed injury falls within the statutory definition of "serious injury" is a question of law for the courts which may decide the issue on a motion for summary judgment. (*Perez v. Rodriguez*, 25 A.D.3d 506, 507 [1st Dept 2006])

Section 5102 (d) of New York State's Insurance Law defines the term "serious injury" as:

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.

It is indisputable that five of the nine categories of serious physical injuries discussed by Insurance Law 5102 (d) are not applicable herein as there is no allegation of death, dismemberment, significant disfigurement, fracture, or loss of a fetus. Therefore, the court must determine if the injuries asserted by Goddess constitute a permanent loss of use of a body organ, member, function, or system; or, a significant limitation of use of a body function or system; or, a permanent consequential limitation of use of a body function or system; and/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 90 days during the 180 days immediately following the occurrence of the injury or impairment.

Section 5102(d)(7) of the Insurance Law states that a permanent consequential limitation of use of a body organ or member qualifies as a "serious injury" for the purpose of the No-Fault Law. Under this section of the law the medical proof must establish in a non-conclusory manner that the plaintiff has suffered a permanent limitation (*Mickelson v. Padang*, 237 A.D.2d 495 [2nd Dept 1997]) that is not minor or slight, but rather is consequential. (*Gaddy v. Eycler*, 79 N.Y.2d 955 [1992]) Consequential has been defined by the courts as an important or significant limitation.

(*Countermine v. Galka*, 189 A.D. 2d 1043 [3rd Dept 1993])

A significant limitation of the use of a body function or system also may qualify as a "serious injury" under Section 5102(d)(8) of the Insurance Law. Under this category, plaintiff must present admissible evidence which identifies a limitation that is causally related to the accident. "Whether a limitation is significant (i.e. important) relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part." (*Toure*, 98 N.Y.2d at 353 [internal citations and quotations omitted])

Once the proponent of a motion for summary judgment has set forth a prima facie case that the claimed injury is not serious, the burden shifts to the plaintiff to demonstrate by the submission of objective proof of the nature and degree of the injury, that he/she did sustain a serious injury or that there are questions of fact as to whether the alleged injury was "serious". (*Toure*, 98 N.Y.2d at 350; *Cortez v. Manhattan Bible Church*, 14 A.D.3d 466, 467 [1st Dept 2005]) However, even when there is medical proof, when additional contributing factors, such as a gap in treatment, interrupt the chain of causation between the accident and the claimed injury, summary dismissal of the complaint may be appropriate. (*Pommells v. Perez*, 4 N.Y.3d 566, 572 [2005]; *Perez v. Rodriguez*, 25 A.D.3d at 508;

I. Goddess Morris

Defendants contend that upon viewing the facts most favorable to Goddess, it is clear that her injuries are not serious as defined by § 5102 (d) of the Insurance Law

because Goddess does not have a significant limitation of a body function or system. The qualitative assessment of the physicians that examined Goddess on defendants' behalf is that she has a normal range of motion and full function with no limitations or other indications of any residual loss of function. As defendants have met their burden by producing the affirmations of Dr. Sobol and Dr. Rafiy, the burden shifts to Goddess to come forward with evidence to prove that she sustained a serious injury within the meaning of the Insurance Law. *Gaddy v Eyler*, 79 NY2d 955, 957 (1992); *Shinn v Catanzaro*, 1 AD3d 195, 197 (1st Dept 2003).

The Court of Appeals has examined whether a limitation of use or function is significant or consequential. That Court has held that a limitation is significant or consequential if there is a "comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part." *Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d 345, 353 (2002), quoting *Dufel v Green*, 84 NY2d 795, 798 (1995). "In order to prove the extent or degree of physical limitation, an expert may designate a numeric percentage of a plaintiff's loss of range or motion or may make a qualitative assessment of plaintiff's condition, provided that the latter evaluation has an objective basis and compare the plaintiff's limitations to the normal use of the affected body system or function." *Shinn v Catanzaro*, 1 AD3d at 198.

Here, Dr. Rafiy's examinations and conclusions regarding Goddess's range of motion differ from the conclusions of Dr. Hausknecht, thereby presenting an issue of fact as to the "significant limitation of use of a body function or system" category of Insurance Law § 5102 (d). Specifically, while Dr. Rafiy states that Goddess demonstrates a full range of motion and concludes that there were no objective findings

of any continuing or permanent injury, disability, or limitation and that Goddess is capable of performing all of her normal activities, Dr. Hausknecht affirms in his March 13, 2007 report that Goddess has cervical derangement with C5-6 disc bulge and right shoulder arthropathy and “[t]here is objective evidence of cervical spine impairment including loss of mobility and abnormal MRI findings.” (Anderson affirm., ex. A). Dr. Hausknecht states that Goddess has cervical paravertebral hypertonicity and pain in the right shoulder joint with abduction and decreased range of motion in the left lateral flexion of the spine, and that “with a reasonable degree of medical certainty, her condition is permanent.” (*Id.*).

Goddess Morris also contends in her bill of particulars that she suffered an injury under the “90/180” category of the Insurance Law. “When construing the statutory definition of a 90/180-day claim, the words ‘substantially all’ should be construed to mean that the person has been prevented from performing his usual activities to a great extent, rather than some slight curtailment.” *Thompson v Abbasi*, 15 AD3d 95, 100-101 (1st Dept 2005). Goddess Morris testified at her deposition that as a result of the accident, she missed two to three weeks of school, was not allowed to participate in gym class for a month, remains limited in her gym class activities, has trouble sleeping, playing with her brother, playing football, playing in the park and doing chores. While some of Goddess Morris’ activities have been affected as a result of the accident, there is no evidence that Goddess Morris has sustained injuries which have prevented her from performing substantially all of the material acts that constitute her usual and customary daily activities for at least 90 days during the 180 days immediately following the accident.

Although Goddess Morris' injuries do not fall under the "90/180" category of serious injury, the motion must otherwise be denied as to this plaintiff since she has met her burden of raising a triable issue of fact as to the "significant limitation of use of a body function or system" category of § 5012 (d) of the Insurance Law.

II. Keith Morris

Defendants argue that based upon viewing the facts most favorable to Keith, it is clear that his injuries are not serious as defined by § 5102 (d) of the Insurance Law as he does not have a significant limitation of use of a body function or system.

Defendants contend that based upon Dr. Sobol and Dr. Rafiy's qualitative assessment, Keith is capable of performing all of his normal activities, including occupational duties, without any restrictions. As defendants have met their burden by producing the affirmations of both Dr. Sobol and Dr. Rafiy, the burden shifts to Keith to come forward with evidence to prove that he sustained a serious injury within the meaning of the Insurance Law. *Shinn v Catanzaro*, 1 AD3d at 197.

Dr. Hausknecht's conclusion regarding Keith's range of motion differs from the conclusions of Dr. Sobol and Dr. Rafiy. Both Dr. Sobol and Dr. Rafiy conclude that Keith exhibited a full range of motion and exhibited no objective findings of any continuing permanent injury, disability or limitation. However, Dr. Hausknecht's March 13, 2007 medical report revealed a reduced range of motion of the cervical spine. Dr. Hausknecht's tests found left lateral flexion was 20 degrees (50 degrees normal), right lateral flexion was 25 degrees (50 degrees normal), left rotation was 40 degrees (80 degrees normal), and right rotation was 50 degrees (80 degrees normal). Dr. Hausknecht also concludes that Keith has sustained significant limitation of function of

his neurologic and musculoskeletal system.

As there exists a dispute of fact concerning Keith's range of motion and his limitations as result of the injuries, summary judgment must be denied. There also remains a dispute as to the relationship of Keith's prior spinal injuries to the injuries he sustained on September 4, 2006. Although Dr. Hausknecht states that Keith never fully recovered from past injuries and that the September 4, 2006 accident exacerbated his prior injury, Dr. Hausknecht does not indicate what Keith's condition or range of motion was prior to this accident. Therefore, a question of fact exists as to the relationship of Keith's prior injuries to his present condition.

Keith also contends in his bill of particulars that he suffered an injury under the "90/180" category of the Insurance Law. Keith testified at his deposition that as a result of the accident, he has trouble running, lifting his son, and lifting heavy objects. The First Department has held that standing, sitting, bending and lifting may be considered a minor, mild or slight limitation which is insufficient to constitute a serious injury. See *Arjona v Calcano*, 7 AD3d 279, 280 (1st Dept 2004).

However, as Keith testified that he had to quit his job permanently as a result of his injuries and has been unemployed ever since, there exists a question of fact as to whether his injuries fall within the 90/180 category of serious injury. Therefore, as there is a question of fact regarding the seriousness of Keith's injuries and as he has met his burden of raising a triable issue of fact as to the "significant limitation of use of a body function or system" category of § 5012 (d) of the Insurance Law, summary judgment must be denied.

Defendants also maintain that the reports of both Dr. Zeren and Dr. Kreshover

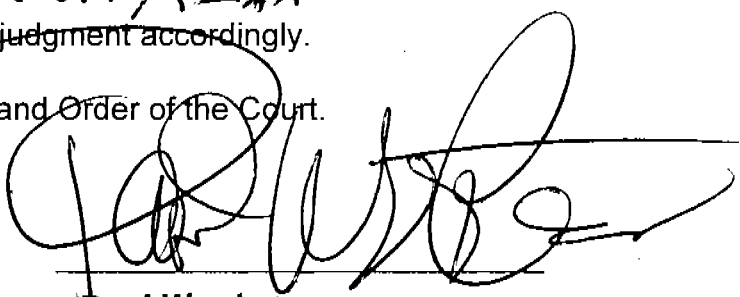
are unsworn and lack probative value. Although Dr. Zeren's report does not include an affirmation regrading Goddess Morris' and Keith's condition, the report of Dr. Kreshover includes a statement that pursuant to the applicable provisions to the CPLR § 2106 his statements are true and accurate. Defendants also contend that in the absence of an admissible supporting medical affirmation, MRI evidence, on its own, is rendered inadmissible as a matter of law. However, plaintiffs submit affirmations from Dr. Jacob Lichy, who evaluated Goddess and Keith Morris' MRI's.

For these reasons and upon the foregoing papers, it is,

ORDERED that the motion of defendants Ilya Cab Corp. and Humayun A.

Choudbury for summary judgment is denied. *CONFERENCE ON OCTOBER 20, 2008*
RN. 103 (DCN), 80 CENTRE ST., 9TH FL
The Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.



Dated: 10-8-08
OCT 08 2008

Paul Wooten
J.S.C. Paul Wooten J.S.C.

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