Popovic v City of New York
2009 NY Slip Op 33378(U)
July 9, 2009
Supreme Court, New York County
Docket Number: 115083/2006
Judge: Harold B. Beeler

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

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DRAGAN POPOVIC,

Plaintiff,

-against-

THE CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY, and MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY,

Defendants

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Index No. 115083/2006
SEQUENCE MS003
DECISION & ORDER

HAROLD B. BEELER, J.S.C.:

Defendants New York City Transit Authority and Manhattan and Bronx Surface Transit Authority (collectively, "Transit Authority") move for summary judgment dismissing the complaint, on the grounds that plaintiff has not suffered a "serious injury" as defined by New York Insurance Law § 5102(d). Plaintiff opposes the motion, and cross-moves for a determination that plaintiff has suffered a serious injury. On February 27, 2009, the Court requested, via short-form order, that the parties brief the issue of whether plaintiff's injury was "the result of the motor vehicle accident, thus triggering the application of the serious injury standard."

After careful review of the initial and supplemental briefs, the Court holds that plaintiff's injury arises from the "use or operation of a motor vehicle," and therefore must satisfy the serious injury threshold in order for the Court to exercise its jurisdiction. The court also denies both parties' motions for summary judgment on the issue of plaintiff's serious injury, on the grounds that there are material issues of fact as to whether plaintiff satisfies the "90/180 day prong"of § 5102 (d).

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Facts

Plaintiff alleges that on June 16, 2006, he was injured while exiting the rear door of an M86 bus heading east on East 86th Street. The bus stopped on the south side of 86th Street, with the rear door approximately four feet from the curb and approximately 36 feet east of First Avenue. After the bus stopped, plaintiff exited from the rear door and stepped into a designated bus location, falling into a "broken, cracked, raised and/or depressed section of the roadway." Plaintiff alleged that Transit Authority failed to provide plaintiff with a safe place of egress or to warn him of the roadway defect at the designated bus stop.[1]

Three days following the accident, plaintiff saw Dr. Karen Wu. Dr. Wu found that plaintiff had an "inversion injury to the left ankle...severe pain and extreme difficulty with weight bearing." On a subsequent visit on August 15, 2006, she later noted "[h]e is unable to work." On a subsequent visit in September 6, 2006, she noted that plaintiff was "out of work until 10/1/2006," and on September 28, 2006, she stated that plaintiff is "scheduled to return to work on 10/12/2006," on a reduced schedule of 6-7 hours per day.

On July 8, 2006, plaintiff had an MRI taken at Park Avenue Radiologists in New York. Dr. Marc Liebeskind, a physician, affirmed and certified the films. Plaintiff first saw Dr. Enrique Ergas, an orthopedic surgeon, on August 2, 2006. Dr. Ergas reviewed Dr. Wu's records as well as the July 8 MRI, and found that he suffered from the following to his left ankle: "a partial tear of the anterior talofibular ligament, internal derangement, extensive bone bruises of left talus and calcaneus and sprained medical and posterior ligaments." He also reviewed the x-ray taken June 19, "which showed a chip off the superior aspect of the left talus."

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[1] The claims against City of New York allege that City created or permitted the dangerous condition. These claims are not the subject of this motion.

Plaintiff testified that he was unable to work for at least 90 consecutive days following the accident. He is a salesperson at a boutique store, and his job requires him to stand for nine hours a day, five days a week, selling Lancome products. He also must lift heavy boxes, stock shelves, clean the store, and walk around to communicate with customers. Because the injury left him unable to stand for long periods of time, he took a leave of absence from work. He further states that he was unable to leave his apartment except to see his treating physician Dr. Wu, and he claims that he only took taxicabs. He was unable to continue his regular activities, such as going to the gym and shopping for groceries.

Dr. Wu's reports indicate that plaintiff was no longer in pain by October 12, 2006, and that he was scheduled to return to work at that time.

On April 23, 2007, ten months after the accident and six months after plaintiff served the summons and complaint on defendants, plaintiff saw Dr. Baruch, on referral from Transit Authority, for an orthopedic examination. Dr. Baruch's report states that he reviewed Dr. Wu's notes from June 19, 2006, but does not indicate that he reviewed the July 8 MRI. Based on his physical examination, Dr. Baruch found right and left dorsiflexion of 20 degrees (20 degrees normal), and plantar flexion of 40 degrees (40 degrees normal), with no evidence of instability of the ankle. Plaintiff had a normal gait, and he did not limp. He is able to stand on his toes and heels without discomfort. Based on this examination, Dr. Baruch's diagnosis was a left ankle sprain with some slight venous swelling in the left ankle area. Dr. Baruch indicated that plaintiff could continue his regular work, and found that the injuries did not appear to be permanent.

Discussion

Under New York Insurance Law § 5103(a)(1), injured persons are entitled to compensation for any "loss arising out of the use or operation of...[a] motor vehicle," by the insurance carrier of the owner of such vehicle. This "no-fault" system is the exclusive remedy for such an injured person, and, as such, a person injured from a motor vehicle accident is not entitled to this court's jurisdiction unless that person can demonstrate a "serious injury." New York Insurance Law § 5104(a); *See Hill v. Metropolitan Suburban Bus Auth.*, 157 A.D.2d 93, 555 N.Y.S.2d 803 (2d Dept 1990); Insurance Law § 5102 (d) defines 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 perming 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."

Therefore, where a plaintiff pursues a tort action based on an injury arising from the use or operation of a motor vehicle, the party must present evidence of a serious injury in order to maintain the action. *See Hill*, 157 A.D.2d at 98, 555 N.Y.S.2d 803.

Because Transit Authority seeks to have the complaint dismissed on the grounds that plaintiff cannot demonstrate a serious injury, it must first establish that the injury itself arose from the use or operation of the bus. *Cf. In the Matter of the Arbitration between Manhattan & Bronx Surface Transit Operating Auth. and Gholson*, 71 A.D.2d 1004, 1005, 420 N.Y.S.2d 298 ("*Gholson*"). The bus must not merely be a factor in the injury, but rather the injury must arise

from the "intrinsic nature" of the vehicle. *Cf. Mihalakis v. Liberty Lines*, 130 Misc.2d 241, 242, 498 N.Y.S.2d 91 (1st Dept 1985); *Walpole v. Lockhart*, 6 A.D.3d 1087, 1088, 775 N.Y.S.2d 640 (4th Dept 2004).

The no-fault insurance law and the serious injury threshold serve two important intertwined objectives: first, to ensure that those who are injured in motor vehicle accidents can recover from the insurance system, without the burden of proving fault on anyone's part, *Oberly v. Bangs Ambulance, Inc.*, 96 N.Y.2d 295, 296-97, 751 N.E.2d 457, 458, 727 N.Y.S.2d 378, 379 (2001), and second, to keep such accidents out of the domain of the court system, unless a plaintiff has a "serious injury" that warrants a jury trial on the merits. *See Raffellini v. State Farm Mutual Automobile Ins. Co.*, 9 N.Y.3d 196, 105, 878 N.E.2d 583 (2007); *Zecca v. Riccardelli*, 293 A.D.2d 31, 33, 742 N.Y.S.2d 76 (2d Dept 2002).

Keeping those objectives in mind, it is worthwhile to note that case law involving the "use or operation" threshold follow two distinct patterns. In the first pattern, a plaintiff seeks to overcome a motion to dismiss a complaint on the grounds that plaintiff has not sustained a serious injury, by arguing that the serious injury threshold does not apply. *See, e.g. Mihalakis*, 130 Misc.2d 241, 498 N.Y.S.2d 91; *Walpole*, 6 A.D.3d 1087, 775 N.Y.S.2d 640. In the second pattern, a plaintiff brings a challenge to a denial of insurance coverage, where a defendant insurance carrier argues that plaintiff's accident did not arise out of the use or operation of a motor vehicle. *See, e.g. Gholson*, 71 A.D.2d 1004, 420 N.Y.S.2d 298. In the latter situation, plaintiff is seeking the benefit of no-fault insurance, and the issues of serious injury or negligence are irrelevant. In the former, as in the instant case, a plaintiff is seeking to avoid resorting to the no-fault system. It follows that where a claimant cannot demonstrate a serious injury for an

accident arising out of use or operation of a motor vehicle, although preventing that person from commencing or continuing actions in court, the plaintiff will benefit from access to the no-fault system and the absence of a requirement to demonstrate another party's negligence.

Although plaintiff's theory of negligence is not uncommon, no court has decided whether this precise type of accident falls within the no-fault law. The closest factual pattern arose in *Hill*, where plaintiff fell out of the bus while exiting, after her arm became caught in the door and she tripped on a flaw in the step. 157 A.D.2d at 95, 555 N.Y.S.2d 803. The Second Department held that this accident arose out of the use of the operation of the motor vehicle, although the issue was apparently conceded by plaintiff and the court did not provide an analysis. *Id.* at 97. Transit Authority relies on this decision, but *Hill* is notably distinguishable in that plaintiff's allegations were based on defects in the bus itself, and therefore arose from the bus's "intrinsic nature." *Cf. Mihalakis*, 130 Misc.2d at 242, 498 N.Y.S.2d at 91 (holding plaintiff's injuries did not arise from the intrinsic nature of the vehicle, where plaintiff suffered heat prostration and dehydration due to the failure of the vehicle's air conditioning).

In *Walpole*, a bus allegedly discharged a woman passenger at an unsafe location. The woman then crossed a traveling lane where she was struck and killed by another vehicle. *Walpole,* 6 A.D.3d at 1087-88, 775 N.Y.S.2d 640. Unlike the instant case, the plaintiff was the driver who struck the woman, apparently suing for his psychological injuries arising from the accident. *Id.* The court held that the driver's claim against the bus did not arise out of the intrinsic nature of the bus, noting that the bus was neither the proximate cause of the accident nor the actual instrumentality which produced the injury. *Id.* at 1088, 775 N.Y.S.2d 640. Although the estate of the decedent woman also sued the bus company in a different action based on the

bus company's failure to discharge her at a safe location, there was never a decision as to whether or not her claim required a serious injury under the no-fault law (a question that would have been irrelevant, because her death was clearly a finding of serious injury under § 5102 (d)). *Lockhart v. Aidrondack Transit Lines Inc.*, 289 A.D.2d 686, 733 N.Y.S.2d 533 (3d Dept 2001).

The First Department has held that a claim based on being assaulted by a cab driver's does not arise out of the use or operation of the vehicle, because neither the operation or driving function of the vehicle nor the condition of the vehicle itself was the proximate cause of the passenger's injuries. *Horney v. Tisyl Taxi Corp.*, 93 A.D.2d 291, 461 N.Y.S.2d 799 (1st Dept 1983); *see also Lancer Ins. Co. v. Peterson*, 175 A.D.2d 239, 572 N.Y.S.2d 704 (2d Dept 1991) (holding that where bus passenger was bit by another passenger, "operation of the bus was wholly incidental" to the injury, and therefore no fault benefits were unavailable); *Gholson*, 71 A.D.2d 1004, 420 N.Y.S.2d 298 (denying no-fault benefits where plaintiff was driver was stabbed by passenger). Furthermore, where a plaintiff allegedly suffered hydration due to failure of a vehicle's air conditioning, the First Department held that the injuries did not arise from the intrinsic nature of the vehicle. *Mihalakis*, 130 Misc.2d at 242, 498 N.Y.S.2d at 91.

It is clear then, that where a vehicle itself causes injury, no-fault law applies. In the instant case, however, the alleged injury was not caused by the vehicle itself, but rather as a result of the bus driver's discharge of the plaintiff at an allegedly unsafe location. To fall under the no-fault law, it is not sufficient that plaintiff was injured while the bus was in operation, or injured while the bus was discharging passengers. The necessary element is that plaintiff's claim is based on the negligent use or operation of the bus in discharging him. *Hill*, 157 A.D.2d at 97, 555 N.Y.S.2d 803; *Mazzarella v. Paloangeli*, 2009 WL 1687764, * 1 (3d Dept 2009); *Zaccari v.*

Progressive Northwestern Ins. Co., 35 A.D.3d 597, 599, 827 N.Y.S.2d 204 (2d Dept 2006).

This element is satisfied. The discharge of passengers is a fundamental use and operation of a bus. *Gholson*, 71 A.D.2d at 1004, 420 N.Y.S.2d 298 ("there is no question that the use of a bus entails the discharge of passengers at designated locations"). Because the allegation stems from negligence in the bus's discharge of plaintiff, the no-fault law applies and plaintiff must demonstrate a serious injury to bring this cause of action.

Having found that plaintiff must demonstrate that he suffered a serious injury in order to pursue civil litigation for negligence, the court now turns to the parties' respective motions on whether he has.

Plaintiff argues that he has satisfied the "90/180 day" component of the serious injury definition, New York Insurance Law § 5102 (d), because after the injury he could not work for nearly four months. He submits the examinations of Dr. Wu, and Dr. Ergas, who both saw him within close proximity to the time of the accident, and the MRI which Dr. Ergas relied upon for his diagnosis that plaintiff suffered the aforementioned injuries to his left ankle that prevented his standing for long periods of time. Transit Authority argues that because Dr. Baruch found that plaintiff merely had an ankle sprain with no permanent injury, it has demonstrated that plaintiff has not sustained a serious injury.

Just as in any motion for summary judgment, defendant Transit Authority has the initial burden of establishing a prima facie case that plaintiff has not sustained a serious injury. *See Thompson v. Ramnarine*, 40 A.D.3d 360, 835 N.Y.S.2d 566 (1st Dept 2007). Dr. Baruch's conclusion that plaintiff has no permanent injury to his ankle is sufficient to meet that burden with respect to the "significant limitation" or "permanent subsequent limitation" prongs of §

5102 (d). *See Thompson*, 40 A.D.3d at 361, 835 N.Y.S.2d at 567 (1st Dept 2007) (holding that defendant established its prima facie burden where defendant's neurologist concluded that plaintiff's injuries were resolved). Plaintiff has not specifically addressed these aspects of § 5102 (d), and therefore this court awards summary judgment on these prongs.

However, Dr. Baruch's conclusion is insufficient to meet Transit Authority's burden with respect to the "90/180 day" prong, because Dr. Baruch addressed plaintiff's condition ten months after the accident, and did not make a determination as to plaintiff's incapacity within the first 180 days of his injury. *Thompson*, 40 A.D.3d at 360-61, 835 N.Y.S.2d at 567 (holding that neurologist's examination of plaintiff nine months after the accident is insufficient to establish that plaintiff was not incapacitated for 90 out of the 180 days following the accident); *see also Rivera v. Super Star Leasing, Inc.*, 57 A.D.3d 288, 288-89, 868 N.Y.S.2d 665, 666 (1st Dept 2008) (two years after accident); *Loesburg v. Jovanovic*, 264 A.D.2d 30, 694 N.Y.S.2d 362, 363 (1st Dept 1999) (three and a half years after the accident).

Likewise, plaintiff has not established that it is entitled to summary judgment on the 90/180 day prong. Plaintiff claims in his affidavit that he was unable to work for four months following the accident. The affidavit is accompanied by a single exhibit deemed "certified business records," which is an assortment of employee forms and intra-office e-mails, some of which appear to suggest that plaintiff requested a leave of absence on the day following the accident. Plaintiff has not clarified which document from this medley of papers establishes his entitlement to summary judgment. *See Higen Assocs. v. Serge Elevator Co. Inc.*, 190 A.D.2d 712, 713, 593 N.Y.S.2d 319 (2d Dept 1993) (holding that where plaintiff submitted an assortment of business-related items in support of its motion, "[i]t is far from clear...that this

confusing melange of paper establishes the defendant's right to summary judgment"). Moreover, plaintiff's doctors did not make a legally sufficient determination, based upon objective evidence, that plaintiff's purported injury was a result of the accident, or that the injury left him unable to work. Dr. Wu's report, in particular, appears to rely on plaintiff's own subjective determination to stop working. Therefore, this court cannot hold as a matter of law that plaintiff's absence from work is due to a "medically determined injury."

Accordingly, although neither party is entitled to summary judgment as to the 90/180 day prong of the serious injury requirement, plaintiff is precluded from arguing any other prong of the definition. *See Thompson*, 40 A.D.3d 360, 835 N.Y.S.2d 566 (holding that defendant has not established its burden with respect to the 90/180 day injury, but awarding summary judgment to defendant on the "permanent consequential limitation" and "significant limitation" prongs).

This constitutes the decision and order of the court.

Dated: New York, New York

July 9, 2009

ENTER:

Harold B Beeler

Harold B. Beeler, JSC