

Ellis v Cab E. LLC

2010 NY Slip Op 31430(U)

June 3, 2010

Supreme Court, New York County

Docket Number: 0111322/2007

Judge: silver

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: GEORGE J. SILVER

PART 22

Justice

Index Number : 111322/2007

ELLIS, MICHAEL

VS.

CAB EAST LLC

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

FILED

this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross Motion _____

PAPERS NUMBERED

1 _____

2, 3 _____

4 _____

5, 6 _____

NEW YORK COUNTY CLERK'S OFFICE
JUN 8 9 2010

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

In this action to recover for personal injuries allegedly sustained in a motor vehicle accident, Plaintiff Michael Ellis ("Plaintiff") moves pursuant to CPLR §3212 for an order granting summary judgment on the issue of liability. Defendants Audra and Frederick Baum (collectively "Defendants") cross move pursuant to CPLR §3212 for an order granting summary judgment and dismissing the complaint on the grounds that Plaintiff did not sustain an injury that qualifies as "serious" as defined by New York Insurance Law §5102(d).

Additionally, Co-defendant Cab East LLC ("Co-defendant Cab East") cross moves for summary judgment pursuant to CPLR §§3211 and 3212 dismissing Plaintiff's complaint. On April 3, 2009, Plaintiff, Defendants Baum, and Co-defendant Cab East entered into a stipulation of discontinuance as to Defendant Cab East. As such, the pending cross motion made by Defendant Cab East is moot.

Plaintiff's Motion on Liability

The moving party must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact to win on a summary judgment motion (*See Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Plaintiff avers that on May 12, 2007, at approximately 10:00 p.m., he was traveling northbound on Riverside Drive and as he entered the intersection of 79th Street Defendants'

Dated: 1/6 _____

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

vehicle ran a red light and collided with his vehicle. He further contends that he was traveling at approximately 25 mph and that the traffic light was green in his favor.

In opposition, Defendants argue that the traffic light turned from yellow to red as their vehicle entered the intersection and that due to the heavy rain, the driver did not want to slam on her brakes. Defendants state that Plaintiff's vehicle collided with their vehicle on the passenger side front door area and did not make any attempts to avoid the accident. Defendants state that their vehicle was traveling at approximately 30 mph.

Further, testimony of both the Plaintiff and Defendant driver indicates that Defendants' vehicle sustained damage to the front passenger side door area and that Plaintiff's vehicle sustained damage to the front, suggesting that Defendants' vehicle was positioned in or near the subject intersection prior to the impact. Such evidence, considered in conjunction with Plaintiff's statement that he saw Defendants' vehicle momentarily before he reached the intersection, raised triable issues of fact (*see Cox v Weil*, 66 AD3d 634, 887 NYS2d 170 [2d Dept 2009]; *Gonzalez v County of Suffolk*, 277 AD2d 350, 351, 716 NYS2d 404 [2d Dept 2000]).

Because summary judgment is such a drastic remedy, it should never be granted when there is any doubt as to the existence of a triable issue of fact (*See Bank of New York v Granat*, 602 NYS2d 942, 943 [2d Dept 1993]; *Rotuba Extruders v Ceppos*, 46 NY2d 223 [1978]). When the existence of an issue of fact is even debatable, summary judgment should be denied (*Royal v Brooklyn Union Gas Co.*, 122 AD2d 132, 504 NYS2d 519 [2d Dept 1986]; *Stone v Goodson*, 8 NY2d 8 [1960]). Conflicting statements in the record as to the facts surrounding an accident create a triable issue of fact as to whether Plaintiff's conduct caused or contributed to the accident, thus summary judgment is inappropriate (*See Omrami v. Socrates*, 227 AD2d 459 [2d Dept 1996]). Defendants have raised triable issues of fact as to whether Plaintiff failed to use reasonable care to avoid the accident.

Defendants' Cross Motion

Defendants Audra and Frederick Baum (collectively "Defendants") cross move pursuant to CPLR §3212 for an order granting summary judgment and dismissing the complaint on the grounds that Plaintiff did not sustain an injury that qualifies as "serious" as defined by New York Insurance Law §5102(d).

Plaintiff alleges in his Verified Bill of Particulars and Supplemental Bill of Particulars that, as a result of the accident, he sustained a serious injury under NY Insurance Law §5102(d) by incurring exacerbation of underlying preexisting degenerative changes of the lumbar spine at L2-L3, L3-L4, L4-L5 and disc herniation at L4-L5, L5-S1 radiculopathy, exacerbation of underlying preexisting degenerative changes of the cervical spine, disc bulges at C4-C5 and C5-C6 radiculopathy, bilateral shoulder derangement and hip derangement.

Under New York Insurance Law §5102(d), a "serious injury" is defined 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.

"[A] defendant can establish that [a] plaintiff's injuries are not serious within the meaning of Insurance Law §5102 (d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (*Grossman v Wright*, 268 AD2d 79, 83-84 [1st Dept 2000]). If this initial burden is met, "the burden shifts to the plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law" (*id.* at 84). The Plaintiff is required to present nonconclusory expert evidence sufficient to support a finding not only that the alleged injury is serious within the meaning of §5102(d), but also that the injury was causally related to the accident (*Valentin v Pomilla*, 59 AD3d 184 [1st Dept 2009]).

Defendants submit the expert report of Dr. Robert Israel, orthopedic surgeon, in support of their motion. Dr. Israel examined Plaintiff on March 13, 2009. He reported that cervical compression testing was negative and range of motion revealed flexion and extension to 45 degrees compared to 45 degrees normal, right and left rotation to 70 degrees compared to 70 degrees normal, right and left lateral flexion of 45 degrees compared to 45 degrees normal. Dr. Israel further found muscle strength is graded 5/5 in the biceps, triceps, wrist flexors and extensors bilaterally. He also reported that there were no spasms or tenderness present in the lumbar spine and sitting Lasegue's test was bilaterally negative to 80 degrees compared to 80 degrees normal. Further, Dr. Israel found range of motion of the lumbar spine of forward flexion to 90 degrees compared to 90 degrees normal, extension to 30 degrees compared to 30 degrees normal, right and left lateral flexion to 45 degrees compared to 45 degrees normal.

Dr. Israel also examined the left shoulder and found no tenderness or palpitation of the acromioclavicular joint. He determined that range of motion revealed anterior flexion to 170 degrees compared to 170 degrees normal, abduction to 180 degrees compared to 180 degrees normal, adduction to 45 degrees compared to 45 degrees normal, external and internal rotation to 45 degrees compared to 45 degrees normal and posterior extension to 45 degrees compared to 45 degrees normal. Drop arm, Yergason's, apprehension and Speed tests were all negative. Further, the impingement sign was negative. Dr. Israel also examined Plaintiff's left hip and found no swelling, tenderness or shortening. Range of motion was normal with flexion to 120 degrees compared to 120 degrees normal, extension and adduction to 25 degrees compared to 25 degrees normal, abduction to 45 degrees compared to 45 degrees normal, internal rotation to 40 degrees compared to 40 degrees normal and external rotation to 50 degrees compared to 50 degrees normal. Patrick's test was also negative. Dr. Israel concluded that Plaintiff suffered from sprains

of the cervical and lumbar spine and of the left shoulder and hip, which had all resolved.

Defendants' expert report satisfies their burden of establishing *prima facie* that Plaintiff did not suffer a serious injury (*Yagi v Corbin*, 2007 NY Slip Op 7749 [1st Dept]; *Becerril v Sol Cab Corp*, 50 AD 3d 261, 854 NYS2d 695 [1st Dept 2008]). Plaintiff must now bear the burden of overcoming Defendants' submissions by demonstrating that a serious injury was sustained through the presentation of nonconclusory expert evidence causally linking the serious injury, as defined by New York Insurance Law §5102(d), to the accident in question. (*Grossman v Wright*, 268 AD2d 79, 84 [1st Dept 2000]; *Valentin v Pomilla*, 59 AD3d 184 [1st Dept 2009]).

In opposition, Plaintiff submits the expert affidavit of Dr. Albert Youssefi, chiropractor and the affirmations of Dr. David Hannanian, Dr. John Rigney and Dr. Arden Kaisman. Dr. Youssefi first treated Plaintiff on May 15, 2007 for complaints of neck, back and hip pain. On May 10, 2009, Dr. Youssefi conducted range of motion testing using a goniometer. He reported that cervical spine range of motion testing revealed flexion of 43 degrees compared to 50 degrees normal, extension of 55 degrees compared to 60 degrees normal, right rotation of 72 degrees compared to 80 degrees normal, left rotation of 68 degrees compared to 80 degrees normal, right and left lateral flexion of 42 degrees compared to 45 degrees normal. Dr. Youssefi determined that the range of motion for the lumbar spine was flexion of 84 degrees compared to 90 degrees, extension of 25 degrees compared to 30 degrees, right rotation of 24 degrees compared to 30 degrees, left rotation of 27 degrees compared to 30 degrees and right and left lateral flexion of 27 degrees compared to 30 degrees. He also reported that range of motion for the left shoulder was flexion of 135 degrees compared to 150 degrees, extension of 84 degrees compared to 90 degrees, abduction of 120 degrees compared to 150 degrees, adduction of 30 degrees compared to 30 degrees, internal rotation of 36 degrees compared to 40 degrees and external rotation of 75 degrees compared to 90 degrees. Range of motion for the right shoulder was reported as flexion of 140 degrees compared to 150 degrees, extension of 74 degrees compared to 90 degrees, abduction of 135 degrees compared to 150 degrees, adduction of 28 degrees compared to 30 degrees, internal rotation of 35 degrees compared to 40 degrees and external rotation of 75 degrees compared to 90 degrees.

Dr. Youssefi concluded that Plaintiff was suffering from chronic episodes of cervicalgia associated with chronic segmental dysfunction at cervical spine and complicated by posterior disc bulges at C4-C5, chronic episodes of mid back and low back pain associated with chronic segmental dysfunction at thoracic and lumbar spine and complicated by bilateral foraminal bulges at L2-L3 and L4-L5 and a suspect herniation at L4-L5, bilateral shoulder pain associated with rotator cuff sprain/strain, C5-C6 and L5-S1 radiculopathy and bilateral carpal tunnel syndrome. He further reported that these injuries are causally related to the accident.

Dr. Hannanian first treated Plaintiff on May 20, 2007. Dr. Hannanian performed several tests including Needle EMG and NCV studies finding that Plaintiff suffered from left C5-C6 and L5-S1 radiculopathy. He also conducted range of motion testing reporting several limitations compared to normal. The most recent range of testing conducted by Dr. Hannanian was on

March 15, 2009. This study revealed for the cervical spine flexion of 50 degrees compared to 60 degrees normal, extension of 35 degrees compared to 50 degrees normal, right lateral flexion of 35 degrees compared to 45 degrees normal, left lateral flexion of 30 degrees compared to 45 degrees normal, right rotation of 65 degrees compared to 80 degrees normal and left rotation of 60 degrees compared to 80 degrees normal. Lumbar spine range of motion revealed flexion of 90 degrees compared to 65 degrees normal, extension of 20 degrees compared to 30 degrees normal, right lateral flexion of 15 degrees compared to 20 degrees normal, left lateral flexion of 10 degrees compared to 20 degrees normal, right rotation of 25 degrees compared to 30 degrees normal and left rotation of 20 degrees compared to 30 degrees normal. Further, left shoulder range of motion testing was forward elevation of 145 degrees compared to 180 degrees normal, extension of 30 degrees compared to 45 degrees normal, abduction of 100 degrees compared to 180 degrees normal, adduction of 60 degrees compared to 90 degrees normal, internal rotation of 60 degrees compared to 70 degrees normal and external rotation of 75 degrees compared to 90 degrees normal. All range of motion measurements were taken with a goniometer. Dr. Hannanian concluded that Plaintiff was still suffering from pain and loss of motion as a result of the accident.

Dr. Rigney supervised the taking of Plaintiff's June 8, 2007 Magnetic Resonance Images ("MRIs") of the cervical and lumbar spine. His review of the films revealed bilateral foraminal bulges at L2-L3 and L3-L4 with a right foraminal bulge at L4-L5 and a suspect foraminal herniation at L4-L5. Dr. Rigney also found possible left L4 radiculopathy and a posterior bulge at C4-C5.

Dr. Kaisman first treated Plaintiff on September 18, 2008 for complaints of back and hip pain. Based on MRIs and range of motion testing, Dr. Kaisman concluded that Plaintiff suffered from disc bulges at L2-L3, L3-L4 and L4-L5 with radiculopathy. As a result, Plaintiff underwent a set of three epidural steroid injections on September 29, 2008, October 20, 2008 and November 24, 2008. Dr. Kaisman has not treated Plaintiff since late 2008.

Plaintiff additionally submits his deposition transcript in opposition to summary judgment. However, Plaintiff's self-serving deposition statements are entitled to little weight and are insufficient to raise triable issues of fact (*See Zoldas v Louise Cab Corp.*, 108 A.D.2d 378, 383 [1st Dept 1985]; *Fisher v Williams*, 289 A.D.2d 288 [2d Dept 2001]).

In their reply papers, Defendants for the first time argue that a gap in treatment interrupts the chain of causation between the accident and Plaintiff's claimed injuries. The function of a reply affidavit is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of the motion (*Ritt v Lenox Hill Hosp.*, 182 A.D.2d 560 [1st 1992]). Therefore, Defendants' gap in treatment argument will not be considered.

To qualify under the "permanent loss of use of a body organ, member, function or system," the loss must not only be permanent, but must be a total loss of use (*Gaddy v. Eyler*, 79

NY2d 955, 582 NYS2d 990 [1992]; *Oberly v Bangs Ambulance, Inc.*, 96 NY2d 295, 727 NYS2d 378 [2001]. Plaintiff has not demonstrated that he sustained a permanent and total loss of use of his back, shoulder or hip. Therefore, Defendants' summary judgment motion as to Plaintiff's permanent loss claim under New York Insurance Law §5102(d) is granted.

Under the permanent consequential limitation and significant limitation categories of Insurance Law § 5102[d], Plaintiff must submit medical proof containing "objective, quantitative evidence with respect to diminished range of motion or a qualitative assessment comparing plaintiff's present limitations to the normal function, purpose and use of the affected body organ, member, function or system" (*Gorden v Tibulcio*, 50 A.D.3d 460 [1st Dept 2008] quoting *John v Engel*, 2 AD3d 1027, 1029 [3d Dept 2003]). Drs. Youssefi and Hannanian both demonstrate a limitation of range of motion supported by objective medical findings that are based upon recent examinations of Plaintiff. This evidence raises a triable issue of fact as to whether Plaintiff suffered serious injury within the permanent consequential limitation and/or significant limitation categories of Insurance Law §5102(d).

With respect to Plaintiff's claim under the 90/180 category of Insurance Law §5102(d), Plaintiff's injuries must restrict him from performing "substantially all" of his daily activities to a great extent rather than some slight curtailment (*Szabo v XYZ, Two Way Radio Taxi Ass'n, Inc.*, 700 NYS2d 179 [1st Dept 1999]; *Thompson v Abbasi*, 788 NYS2d 48 [1st Dept 2005]; *Hernandez v Rodriguez*, 63 A.D.3d 520 [1st Dept 2009]). Plaintiff does not provide sufficient evidence in support of his 90/180 day claim (*Santiago v Bhuiyan*, 2010 N.Y. Slip Op. 1890 [1st Dept 2010]).

Accordingly, it is hereby

ORDERED that Plaintiff's motion for summary judgment on the issue of liability is denied; and it is further

ORDERED that Defendants' cross motion for summary judgment is granted as to Plaintiff's claim under the permanent loss category of Insurance Law §5102(d); and it is further

ORDERED that Defendants' cross motion for summary judgment is denied as to Plaintiff's claim under permanent consequential limitation and significant limitation categories of Insurance Law §5102(d); and it is further

ORDERED that Defendants' cross motion for summary judgment is granted as to Plaintiff's claim under the 90/180 category of Insurance Law §5102(d); and it is further

ORDERED that Plaintiff is to serve a copy of this order, with Notice of Entry upon all parties, within 30 days.

This constitutes the decision and order of the court.

FILED

George J. Silver
George J. Silver, J.S.C.

JUN 09 2010

GEORGE J. SILVER

Dated: June 3, 2010
New York County

NEW YORK COUNTY CLERK'S OFFICE
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