

Gamaleldein v Ramirez
2011 NY Slip Op 31065(U)
April 25, 2011
Supreme Court, Queens County
Docket Number: 9589/2009
Judge: Robert J. McDonald
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

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WAGIH GAMALELDEIN and ABDELJALIL
NEBBARI,

Plaintiffs,

- against -

JESUS GOMEZ RAMIREZ and JOSE RAMIREZ,

Defendant.

- - - - - x

The following papers numbered 1 to 5 were read on this motion by plaintiff Gamaleldein on the counterclaim for an order pursuant to CPLR 3212 granting summary judgment and dismissing the second cause of action as against the plaintiff ABDELJALIL NEBBARI, on the ground that plaintiff, ABDELJALIL NEBBARI, did not sustain a serious injury within the meaning of Insurance Law §§ 5102 and 5104:

Papers
Numbered

Notice of Motion-Affidavits-Exhibits-Memorandum of Law...1 - 5

This is a personal injury action in which plaintiffs, Wagih Gamaleldein and Abdeljalil Nebbari seek to recover damages for injuries they each sustained as a result of a motor vehicle accident that occurred at approximately 7:00 p.m. on February 13, 2010 on the Triborough Bridge approximately one mile east of 125th Street and 2nd Avenue in the County of New York, New York.

At the time of the accident, plaintiff Abdeljalil Nebbari age 40, was a front seat passenger in the motor vehicle being driven by plaintiff Wagih Gamaleldein. They were driving on the Triborough Bridge going from Queens to Manhattan. The plaintiffs vehicle was slowing down and proceeding at a rate of approximately twenty-five miles per hour when it was hit in the

rear by the vehicle owned by defendant Jesus Gomez Ramirez and operated by defendant Jose Ramirez. Both Wagih Gamaleldein and Abdeljalil Nebbari were allegedly injured as a result of the accident.

The plaintiffs commenced this action by filing a summons and complaint on April 14, 2009. Issue was joined by service of defendants' answer on June 1, 2009. The defendants also filed a counterclaim against plaintiff Gamaleldein for contribution to the injuries of Nebbari. By order of this Court dated January 24, 2011, the motion of the law firm of Proner & Proner to be relieved as counsel for plaintiff Nebbari was granted. All further proceedings were stayed for 30 days from the date of the order to permit Nebbari to retain new counsel. As of this date, plaintiff has not retained new counsel.

The plaintiff Gamaleldein, on the counterclaim, now moves for an order pursuant to CPLR 3212(b), granting summary judgment dismissing the second cause of action for damages on behalf of Nebbari on the ground that Nebbari did not suffer a serious injury as defined by Insurance Law § 5102.

In support of the motion, defendant submits an affirmation from counsel, William B. Stock, Esq.; a copy of the pleadings; plaintiffs' verified bill of particulars; a copy of the transcript of each plaintiff's examination before trial; and the affirmed medical reports of neurologist Dr. Ravi Tikoo, orthopedic surgeon Dr. Robert Orlandi and radiologist Dr. Richard A. Heiden.

In his verified Bill of Particulars, plaintiff Nebbari states that as a result of the accident he sustained inter alia, herniated discs at C4-5, C5-6; bulging discs at C3-4, C6-7, C7-T1; left shoulder labral tear; and right lateral ankle sprain. Nebbari states that he was confined to his bed and home for approximately 2 weeks following the accident.

Nebbari contends that he sustained a serious injury as defined in Insurance Law § 5102(d) in that he sustained permanent loss of a body organ, member, function or system; permanent consequential limitation or use of a body organ or member; significant limitation of use of a body function or system; a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute his 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.

Nebbari, was examined by Dr. Ravi Tikoo, a board certified neurologist on April 14, 2010. Nebbari presented with complaints of pain in the lower back, left shoulder and left knee. He has a history of a past motor vehicle accident. He was employed as a construction worker at the time of the accident and missed three weeks from work. Based upon his examination, Dr. Tikoo concluded that the neurological exam was essentially normal. Dr. Tikoo states, "despite his subjective complaints, there were no objective findings to substantiate these complaints. It is my opinion that he does not have significant clinical evidence of neuropathy, radiculopathy, or disc herniation from the accident. Furthermore, [Nebbari] is not disabled from a neurological basis. It is my opinion that a permanent injury has not been sustained."

Nebbari was also examined by Dr. Robert J. Orlandi, a board certified orthopedic surgeon on June 22, 2010. Dr. Orlandi found that Nabbari displayed normal range of motion in his cervical spine, both shoulders, lumbar spine and left knee. He concludes that he cannot detect a musculoskeletal disability or permanent residuals.

Dr. Heiden, a board certified radiologist, reviewed the MRI studies of Nebbari's cervical spine and left shoulder. With respect to the cervical spine, Dr. Heiden found disc bulges at C3-4, C4-5 and C6-7, however he stated that the bulging was a manifestation of degenerative disease. With respect to the MRI of the left shoulder, Dr. Heiden found no evidence of a rotator cuff tear.

Gamaleldein's counsel contends that the deposition testimony of Nebbari as well as the medical reports of Drs. Tikoo, Orlandi and Heiden are sufficient to establish, prima facie, that Nebbari has not sustained a permanent loss of a body organ, member, function or system; that he has not sustained a permanent consequential limitation of a body organ or member or a significant limitation of use of a body function or system. Counsel also contends that the plaintiff has not sustained a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff, for not less than 90 days during the immediate one hundred days following the occurrence, from performing substantially all of his usual daily activities.

The plaintiff Abdeljalil Nebbari has not submitted any papers in opposition to the motion.

On a motion for summary judgment, where the issue is whether

the plaintiff has sustained a serious injury under the no-fault law, the defendant bears the initial burden of presenting competent evidence that there is no cause of action (Wadford v. Gruz, 35 AD3d 258 [1st Dept. 2006]). "[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 [1st Dept. 2000]). Whether a plaintiff has sustained a serious injury is initially a question of law for the Court (Licari v Elliott, 57 NY2d 230 [1982]).

Initially it is defendant's obligation to demonstrate that the plaintiff has not sustained a "serious injury" by submitting affidavits or affirmations of its medical experts who have examined the litigant and have found no objective medical findings which support the plaintiff's claim (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]). Where defendants' motion for summary judgment properly raises an issue as to whether a serious injury has been sustained, it is incumbent upon the plaintiff to produce evidentiary proof in admissible form in support of his or her allegations. The burden, in other words, shifts to the plaintiff to come forward with sufficient evidence to demonstrate the existence of an issue of fact as to whether he or she suffered a serious injury (see Gaddy v. Eyler, 79 NY2d 955 [1992]; Zuckerman v. City of New York, 49 NY2d 557[1980]; Grossman v. Wright, 268 AD2d 79 [2d Dept 2000]).

Here, the proof submitted by the defendant, including the affirmed medical reports of Drs. Tikoo, Heiden and Orlandi was sufficient to meet its prima facie burden by demonstrating that Nebbari did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]).

In addition, as Nebbari stated in his bill of particulars that he was confined to his home for only two weeks after the accident, he failed to show that he sustained a serious injury under the 90/180-day category of Insurance Law § 5102(d) (see Kreimerman v Stunis, 74 AD3d 753 [2d Dept. 2010]; Nesci v. Romanelli, 74 AD3d 765 [2d Dept. 2010]; Hamilton v Rouse, 46 AD3d 514 [2d Dept. 2007]; Mercado v Garbacz, 16 AD3d 631 [2d Dept. 2005]).

The plaintiff, by failing to respond, has failed to raise a

triable issue of material fact.

Accordingly, based upon the foregoing, it is hereby

ORDERED, that the motion by plaintiff Gamaleldein on the counterclaim, for summary judgment is granted and the second cause of action alleging that plaintiff Nebbari sustained a serious injury as a result of the accident is dismissed.

Dated: April 25, 2011
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.