

Deoliveira v Singh

2011 NY Slip Op 31068(U)

April 20, 2011

Supreme Court, Queens County

Docket Number: 19339/2007

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

- - - - - x

JAMES P. DEOLIVEIRA and CANDIDO
BOGADO,

Plaintiffs,

- against -

Index No.: 19339/2007
Motion Date: 02/24/2011
Motion No.: 15
Motion Seq.: 2

DAVINDER SINGH,

Defendant.

- - - - - x

The following papers numbered 1 to 10 were read on this motion by defendant for an order pursuant to CPLR 3212 granting summary judgment and dismissing the plaintiffs' complaint on the ground that plaintiffs, James P. Deoliveira and Candido Bogado did not sustain a serious injury within the meaning of Insurance Law §§ 5102 and 5104:

	<u>Papers Numbered</u>
Notice of Motion-Affidavits-Exhibits-Memorandum of Law...	1 - 3
Affirmation in Opposition-Affidavits-Exhibits.....	4 - 7
Reply Affirmation.....	8 - 10

This is a personal injury action in which plaintiffs, James P. Deoliveira and Candido Bogado seek to recover damages for injuries they each sustained as a result of a motor vehicle accident that occurred at approximately 7:30 p.m. on June 7, 2007 on the westbound Grand Central Parkway near its intersection with the Van Wyck Expressway, in the County of Queens, New York.

As stated in this Court's prior decision on liability, dated February 15, 2011, at the time of the accident, James P. Deoliveira, age 38, was driving his 1992 Toyota automobile in a westbound direction on the Grand Central Parkway where it merges

with the Van Wyck Expressway, in Jamaica, Queens, when the defendant's taxi cab allegedly skidded on a wet roadway and collided into the rear of the plaintiffs' vehicle pushing the plaintiffs' vehicle into a guardrail. Both Mr. Deoliveira and Mr. Bogado, who was a front seat passenger, were allegedly injured as a result of the accident.

The plaintiffs commenced this action by filing a summons and complaint on August 3, 2007. Issue was joined by service of defendant's answer on August 24, 2007. By decision and order dated February 15, 2011, this court granted the plaintiffs' motion for partial summary judgment on the issue of liability.

The defendant now moves for an order pursuant to CPLR 3212(b), granting summary judgment dismissing the plaintiffs' complaint on the ground that the neither plaintiff suffered a serious injury as defined by Insurance Law § 5102.

In support of the motion, defendant submits an affirmation from counsel, Erdal Turnacioglu, 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 radiologist, Dr. David A. Fisher; dentist, Dr. Jack Shatzkamer with respect to Deoliveira's claim of TMJ; and the affirmed medical report of board certified orthopedist, Dr. Steven G. Robbins, with respect to both Deoliveira and Bogado.

In their verified Bill of Particulars, plaintiff Deoliveira, age 36, states that as a result of the accident he sustained, a tear of a ligament of the right wrist for which he required arthroscopic surgery; a torn meniscus of the right knee for which he required arthroscopic surgery; a torn rotator cuff of the right shoulder for which he also needed arthroscopic surgery; disc bulges at C5-6 and C6-7; central herniation at L5-S1; right ankle sprain; and TMJ. Deoliveira states that he was confined to his home from June 7, 2007 until January 1, 2008 following the accident and again from April 7, 2008 until August 1, 2008. He has not been able to return to work since the accident.

Plaintiff Bogado states that as a result of the accident he sustained herniations at L3-4 and L4-5 with impingement; central herniation at L5-S1 with extension of disc; bulging discs at C4-5 and C5-6; and right ankle sprain. Bogado states that he was confined to his home from June 7, 2007, the date of the accident until October 1, 2007, a period of four months.

Plaintiffs contend that they each sustained a serious injury

as defined in Insurance Law § 5102(d) in that they 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.

Dr. Fisher, a radiologist, reviewed the MRI studies for both Deoliveira and Bogado on behalf of the defendant. With respect to Deoliveira, Dr. Fisher found his right knee MRI was normal; his left shoulder MRI was normal and showed no rotator cuff tear; his right shoulder MRI was normal and also showed no tear; his right ankle MRI was normal and showed no trauma from the accident; his cervical spine MRI showed no herniations or bulges and only indicated degenerative changes at C3-4 through C6-7. Dr. Fisher also found that the lumbar spine MRI showed no bulging discs or herniations but only degenerative changes at L5-S1. Deoliveira was examined by Dr. Shatzkamer on July 5, 2010 with regard to his claim of TM joint injury. Since the accident he has not been treated by a dentist for his jaw injury. Deoliveira told Dr. Shatzkamer that he was involved in a prior motor vehicle accident in 2000 which involved trauma to the jaw. He told Dr. Shatzkamer that this accident aggravated his prior TMJ. Dr. Shatzkamer concluded, after examining the plaintiff, that there was no objective evidence of TM joint or dental trauma causally related to the motor vehicle accident of June 7, 2007. He stated that any subjective complaints of pain were associated with the prior accident and he concludes that the prior accident is the cause of his dental symptoms. Further he states that there is no objective evidence that the accident of 2007 aggravated or exacerbated his preexisting TM joint dysfunction. He concludes that Deoliveira has no dental disability and no impairment.

Deoliveira, was examined by Dr. Robbins on May 14, 2010. He reported a prior accident to Dr. Robbins where he injured his head, neck, back, both shoulders and both knees. He reported that despite having undergone arthroscopic surgery he still has pain in his neck, right arm, thoracic spine, right shoulder and right knee. Dr. Robbins performed quantified and comparative range of motion tests using a hand held goniometer. He found that Deoliveira displayed normal range of motion of his cervical and lumbar spines, shoulders, wrists and knees. He states that the plaintiff's subjective complaints of pain far outweigh any objective findings, and, in fact, he finds that there is no

evidence that a permanent injury occurred as a result of the accident of June 7, 2007.

In his examination before trial, taken on April 20, 2010, Deoliveira stated that he was not employed at the time of the accident having been laid off from his prior position as a driver for the AIDS Center of Queens County. He testified that he was involved in a prior motor vehicle accident in 2000. He was sitting in a parked vehicle when his car was hit by a truck. In that accident he injured his right knee, lower back, middle back, neck, right shoulder, left shoulder his jaw and his head. As a result of that 2000 accident he had surgery to his right knee, left shoulder and right shoulder. Following the instant accident he went for treatment to Dr. Bella Sandler for injuries to his right foot, right knee, right wrist, right shoulder, left shoulder, lower back, middle back, neck, jaw and head. With respect to this accident he testified that he had arthroscopic surgery to his right shoulder, right knee and right wrist in 2007. The last time he had physical therapy was in 2008 because he was told he had reached the maximum benefit of physical therapy.

Plaintiff, Candido Bogado, age 59, was examined by Dr. Robbins on May 14, 2010. Bogado reported that he had bilateral hip replacement surgery in 2002. Because of his hip replacement he was disabled at the time of the accident. Dr. Robbins performed quantified and comparative range of motion tests using a hand held goniometer. He found that Bogado displayed normal range of motion of his cervical and lumbar spines and normal range of motion in his shoulders, knees and ankles. Dr. Robbins concluded that as a result of the accident, there was no mechanism of injury that would cause the host of injuries that he complained of. He found no evidence of permanent injury.

Dr. Fisher's reports concerning Bogado's MRI studies of the right knee show no mensical tear or any causally related injury to the right knee. Dr. Fisher's review of the cervical spine and lumbar spine MRIs showed degenerative changes to the C4/5, C5/6 and a mild disc bulge at the L5/S1 levels. No herniations were seen.

In his examination before trial taken on April 20, 2010, Candido Bogado testified that he had not worked in ten years prior to the accident due to an on the job injury that resulted in a fractured hip. He testified that after the accident he was treated by Dr. Bella Sandler for injuries to his shoulder, back, hip, knee and ankle. He went to her three days a week for a year and a half. He stopped treatment because he was told they could

not do anything further for him. Bogado testified that as a result of the accident he was confined to his bed for three days and was not confined to his house for any period of time after that.

Defendant's counsel contends that the deposition testimony of the parties as well as the medical reports of Drs. Fisher and Robbins are sufficient to establish, prima facie, that neither plaintiff has 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 plaintiffs have 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.

In opposition, plaintiffs' attorney Michael Siegal, Esq., submits his own affirmation as well as the affirmed medical reports of Dr. Bella Sandler and Dr. Dov Berkowitz. Dr. Sandler examined Deoliveira on June 18, 2007, eleven days after the accident. She was aware that plaintiff was in a prior motor vehicle accident in 2000. Upon examination of the cervical spine, lumbar spine and thoracic spine, Dr. Sandler found that Deoliveira had significant range of motion limitations which were causally related to the current trauma. Dr. Sandler reexamined Deoliveira on January 31, 2011 at which time she found that Deoliveira still had significant range of motion limitations in his cervical, thoracic and lumbar spines. She concluded that as a result of the 2007 accident, Deoliveira, despite the arthroscopic surgeries, still suffered from limitation of normal function with an appreciable chance that the limitations from this accident are permanent. Dr. Berkowitz, an orthopedic surgeon also examined Deoliveira on June 21, 2007 and found significant limitations of range of motion in his right shoulder. Dr. Berkowitz performed arthroscopic surgery on Deoliveira's right shoulder to repair a torn rotator cuff. Dr. Berkowitz reevaluated Deoliveira in January, 2011 and found that he still had limitations of range of motion of the right wrist and right shoulder. Dr. Berkowitz was aware of Deoliveira's prior accident and prior surgeries and concluded that he sustained permanent injuries causally related to the motor vehicle accident of June 7, 2007.

Candido Bogado was also examined by Dr. Sandler on June 18, 2007. She was aware of his prior hip replacement surgery

which was a result of a prior accident at work. She found limitations of range of motion in his cervical, thoracic and lumbar spines which were causally related to the June 2007 accident. Bogado was examined by Dr. Berkowitz on November 22, 2010 at which time he still had limitations of range of motion in the cervical spine, right shoulder. Dr. Berkowitz concluded that Bogado had sustained permanent injuries from the June 2007 accident to his lumbar spine and right shoulder.

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 Dr. Fisher and Dr. Robbins was sufficient to meet its prima facie burden by demonstrating that each plaintiff 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]).

However, this Court finds that the plaintiff raised triable issues of fact by submitting the affirmed medical reports of Dr. Sandler and Dr. Berkowitz attesting to the fact that the plaintiffs had significant limitations in range of motion both contemporaneous to the accident and in a recent examination, and concluding that the plaintiff's limitations were significant and permanent and resulted from trauma causally related to the accident (see Ortiz v. Zorbas, 62 AD3d 770 [2d Dept. 2009]; Azor v Torado, 59 ADd 367 [2d Dept. 2009]). As such, each plaintiff raised a triable issue of fact as to whether he sustained a serious injury under the permanent consequential and/or the significant limitation of use categories of Insurance Law § 5102(d) as a result of the subject accident (see Khavosov v Castillo, 2011 NY Slip Op 1442 [2d Dept. 2011]; Mahmood v Vicks, 2011 NY Slip Op 653 [2d Dept. 2011]; Compass v GAE Transp., Inc., 2010 NY Slip Op 9881 [2d Dept. 2010]; Evans v Pitt, 77 AD3d 611 [2d Dept. 2010]; Tai Ho Kang v Young Sun Cho, 74 AD3d 1328 743 [2d Dept. 2010]).

In addition, Dr. Sandler adequately explained the gap in plaintiffs' treatment by stating that they were advised to stop treatment as each one had reached a plateau where maximum therapeutic benefits were achieved (see Gaviria v. Alvarado, 65 AD3d 567 [2d Dept. 2009]; Bonilla v. Tortori, 62 AD3d 637 [2d Dept. 2009]; Shtesl v. Kokoros, 56 AD3d 544 [2d Dept. 2008]).

Further both of the plaintiff's expert's acknowledged and accounted for each plaintiff's prior accidents (Keum Lee Jeong v Imperial Contract Cleaning, Inc., 63 AD3d 795 [2d Dept. 2009]; cf. Germain v. Irizarry, 2011 NY Slip Op 1799 [2d Dept. 2011]; Moore v Sarwar, 29 AD3d 752 [2d Dept. 2006]).

Accordingly, for the reasons set forth above, it is hereby

ORDERED, that the defendant's motion for an order granting summary judgment dismissing the complaint of plaintiff James P. Deoliveira and Candido Bogado is denied.

Dated: April 20, 2011
Long Island City, N.Y.

ROBERT J. MCDONALD, J.S.C.