

**Assante v Gerry's Taxi Serv., Inc.**

2011 NY Slip Op 34129(U)

March 31, 2011

Supreme Court, Bronx County

Docket Number: 303266/09

Judge: Stanley B. Green

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NEW YORK SUPREME COURT - COUNTY OF BRONX

BRONX COUNTY CLERK'S OFFICE

APR 07 2011

IA-6

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: IA-6

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EMMANUEL ASSANTE and SALIM ASSANTE,

INDEX No.:303266/09

Plaintiff(s),

- against-

GERRY'S TAXI SERVICE, INC. And KNONDKARIN HOQUE,

Present:  
HON. STANLEY GREEN  
J.S.C.

Defendant(s).

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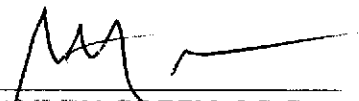
The following papers numbered 1 to 4 read on this motion  
No. on the Calendar of January 28, 2011

PAPERS NUMBERED

Notice of Motion -Exhibits and Affidavits Annexed.....	1
Answering Affidavit and Exhibits.....	3
Replying Affidavit and Exhibits.....	4
Sur-reply Affidavits and Exhibits.....	
Stipulation(s) - Referee's Report - Minutes.....	
Memoranda of Law.....	2

Upon the foregoing papers, this motion is decided in accordance with the attached memorandum decision.

Dated: March 31, 2011

  
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STANLEY GREEN, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: IA-6

-----X  
EMMANUEL ASANTE and SALIM ASANTE,

INDEX No. 303266/09

Plaintiff(s),

- against-

GERRY'S TAXI SERVICE, INC. and KNONDKARIN HOQUE,

Defendant(s).

DECISION

-----X

**HON. STANLEY GREEN:**

The motion by defendants for an order pursuant to CPLR §3212 granting summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102(d) is granted.

Plaintiffs commenced this action to recover damages for personal injuries allegedly sustained by Emmanuel Asante as a result of an motor vehicle accident on October 10, 2008.

Plaintiff claims that as a result of the accident he sustained: (1) herniated discs at C4-5, C5-6, C6-7 and C7-T1; (2) diffuse bulging at C2-3 and C3-4; (3) diffuse facet hypertrophy with impingement on the lateral recesses bilaterally at L4 through L5-S1; (4) lumbar spondylolisthesis with bulges at L2-3 through L5-S1; and (5) marked distension of the bladder and soft tissue lesion in the left pelvis. He also claims that he was confined to his bed for two months, to his home for an additional two months and that he was unable to return to his employment as a taxi driver.

Defendants seek dismissal of the complaint based upon the affirmed report of Dr.

Weiland, who performed a neurological examination of plaintiff on April 14, 2010, which revealed normal range of motion findings and no evidence of disability, the affirmed report of Dr. Davis, who performed a urological examination of plaintiff on May 1, 2010, which revealed normal findings and the affirmed reports of Dr. Tantleff, who reviewed the MRI of plaintiff's cervical spine taken on February 5, 2009 and the MRI of plaintiff's lumbar spine, taken on February 6, 2009.

Dr. Tantleff opines that the MRI of plaintiff's cervical spine revealed advanced degeneration and discogenic changes at C5-6, C6-7 and C7-T1 levels, degenerative disc bulging at the C2-3 level and a degenerative herniation at the C3-4 level, all of which required years and decades to develop and which are unrelated to the date of the accident. Dr. Tantleff opines that the MRI of plaintiff's lumbar spine revealed discogenic and degenerative changes of the lower thoracic and lumbar spine which are longstanding, age-related discogenic changes that required years to develop and are not related to the date of the accident.

Defendants also submit a transcript of plaintiff's deposition testimony in which he testified that his neck was "fine" and that he was not making any claim for injury to his bladder or pelvis.

Plaintiff contends that defendants have failed to establish their entitlement to judgment as a matter of law and that his affidavit and the affirmations of his treating physicians raise triable issues of fact as to whether he sustained a serious injury.

In opposition to the motion, plaintiff submits: (1) his own affidavit, in which he claims that he continues to have severe pain in his neck and back as a result of the accident; (2) the affirmation of his treating physician, Dr. Kaledzi; (3) the affirmation and reports of Dr.

Stemmerman, who performed MRI's of his cervical spine and lumbar spine in February 2009; and (4) a copy of a Workers Compensation Board notice of decision and forms which indicate that plaintiff received payments for loss of earnings from the date of the accident until November 9, 2009.

In his affidavit, plaintiff states that he first sought treatment with Dr. Kaledzi on October 15, 2008, with complaints of neck and back pain radiating to his legs. He states that Dr. Kaledzi referred him to Rhemna Physical Therapy where he underwent treatment three times a week for twenty months. He states that he discontinued therapy because he was advised that he had reached maximum medical improvement and that he should use over the counter pain and anti-inflammatory medication as needed. Plaintiff states that after the accident, he was unable to do any of his "usual and customary daily activities" and that he received Workers' Compensation payments for loss of earnings from October 10, 2008 through November 2009. He also states that he was not able to work until June 2010, when he obtained a job as a porter.

Dr. Stemmerman's affirmation and reports show that he performed MRI's of plaintiff's cervical spine and lumbar spine in February 2009 which revealed herniated discs in the cervical spine at C5-6, C6-7 and C7-T-1, bulging of C2-3 and C3-4, diffuse facet hypertrophy with impingement on the lateral recesses bilaterally at the L4 through L5-S1 and extension of disc material into the neural foramen bilaterally at L2-3 through L5-S1. However, he does not proffer an opinion as to causal relationship between his findings and the accident.

Dr. Kaledzi's affirmation shows that he first examined plaintiff on October 15, 2008. At that time, plaintiff complained of neck and back pain with pain radiating to both legs. Dr. Kaledzi describes the MRI findings and states that it is his opinion that the "injuries revealed in

the above referenced MRI's are causally related to Mr. Asante's motor vehicle accident of October 10, 2008 and are not degenerative in nature." Dr. Kaledzi states that although plaintiff received physical therapy treatment for 20 months after the accident and from him on a consistent basis, at the end of the therapy, his symptoms had still not improved.

Dr. Kaledzi states that at the time he last examined plaintiff on January 7, 2011, he noted restricted range of motion of plaintiff's cervical spine and lumbar spine, which he quantifies in terms of percentages. However, he does not state the normal range of motion or describe any objective tests that he used to determine the range of motion. Dr. Kaledzi opines that as a result of the accident, plaintiff sustained a permanent partial loss of use of his cervical and lumbar spine and a significant and consequential limitation of use of the body function and system that constitutes his cervical and lumbar spine.

Despite plaintiff's contention to the contrary, the affirmed reports of Dr. Weiland, Dr. Davis, which show that plaintiff had no objective evidence of injury at the time they examined him, coupled with the affirmed reports of Dr. Tantleff, who opines that MRI's of plaintiff's cervical and lumbar spine revealed only pre-existing degenerative conditions at the location of the alleged injuries that took decades to develop and were not causally related to the date of the accident, are sufficient to establish prima facie, that plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102(d) as a result of the October 10, 2008 accident (Franchini v. Palmieri, 1 NY3d 536; Valentin v. Pomilla, 59 AD3d 184). Thus, the burden shifted to plaintiff to submit competent evidence sufficient to raise a material issue of fact. He has failed to do so.

While plaintiff has submitted the affirmations of Dr. Stemerman and Dr. Kaledzi in

support of the motion, Dr. Stemerman offers no opinion regarding causal relationship between his findings and the accident and Dr. Kaledzi's affirmation is deficient because he provides no documentation regarding his findings at the time he first examined plaintiff and no contemporaneous evidence of limitations (Valentin, supra). In addition, Dr. Kaledzi fails to adequately address defendants' evidence of a pre-existing degenerative condition of plaintiff's cervical and lumbar spine (Pommells v. Perez, 4 NY3d 566; Porter v. Bajana, 2011 NY Slip Op. 01715, March 8, 2011).


While Dr. Kaledzi states that it is his opinion that the MRI findings of disc bulges and herniations are causally related to the accident and "not degenerative," he fails to explain why he ruled out degenerative changes as the cause of plaintiff's spinal injuries, something that is particularly significant because Dr. Stemerman's reports indicates that there were degenerative changes at multiple levels of plaintiff's cervical spine and diffuse disc dessication of the lumbar spine. Under the circumstances, there is no objective basis for concluding that plaintiff's alleged injuries and most recent limitations and continuing pain are due to the accident of October 10, 2008 rather than to the degenerative condition. This renders Dr. Kaledzi's opinion speculative, conclusory and insufficient to raise a triable issue of fact as to whether plaintiff sustained a serious injury as a result of the October 10, 2008 accident (Pommells, supra; Valentin, supra).

With respect to plaintiff's claim that he sustained an injury that prevented him from performing his usual daily activities for more than 90 days out of the 180 days immediately following the accident, in the absence of competent medical evidence to support this claim, his subjective statement that he could not perform his usual and customary daily activities and that he was unable to work for nearly two years is insufficient to establish a 90/180 day claim

(Riviello v. Kambasi, 2011 NY Slip Op. 01931, March 17, 2011; Blake v. Portexit Corp., 69 AD3d 426; Reyes v. Esquilin, 54 AD3d 615). Accordingly, defendants' motion for summary judgment is granted.

Movant shall serve a copy of this order with notice of entry on the Clerk of the Court who shall enter judgment dismissing the complaint.

Dated: March 31, 2011



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**STANLEY GREEN, J.S.C.**