

Rahman v Salley

2012 NY Slip Op 30097(U)

January 4, 2012

Supreme Court, Queens County

Docket Number: 22881/2009

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

- - - - - x

MOHAMMAD RAHMAN,
Plaintiff,

- against -

Index No.: 22881/2009
Motion Date:10/13/11
Motion No.: 33
Motion Seq.: 2

TIANA A. SALLEY,

Defendant.

- - - - - x

The following papers numbered 1 to 15 were read on this motion by defendant TIANA A. SALLEY for an order, pursuant to CPLR 3212, granting summary judgment and dismissing the complaint of plaintiff MOHAMMAD RAHMAN on the ground that plaintiff has not sustained a serious injury within the meaning of Insurance Law §§ 5102 and 5104:

	<u>Papers Numbered</u>
Notice of Motion-Affidavits-Exhibits-.....	1 - 6
Affirmation in Opposition-Affidavits-Exhibits.....	7 - 12
Reply Affirmation.....	13 - 15

This is a personal injury action in which plaintiff, MOHAMMAD RAHMAN, age 25, seeks to recover damages for personal injuries he sustained as a result of a motor vehicle accident that occurred at approximately 8:00 p.m. on April 28, 2008. The accident took place on 107th Avenue at its intersection with Pinegrove Street, Queens County, New York. The plaintiff claims that he was proceeding on 107th Street with the right of way in his favor when the defendant failed to stop at a stop sign striking the plaintiff's vehicle in the intersection. As a result of the impact the plaintiff allegedly injured his neck, back, left ankle, left knee, both shoulders and both wrists.

Plaintiff Mohammed Rahman, commenced this action against the defendant by filing a summons and complaint on August 25, 2009.

Issue was joined by service of the defendant's verified answer dated January 19, 2010. The defendant now moves for an order pursuant to CPLR 3212 dismissing the plaintiff's complaint on the ground that the injuries claimed by the plaintiff fail to satisfy the serious injury threshold requirement of Section 5102(d) of the Insurance Law.

In support of the motion, the defendant submits an affidavit from counsel, Linda Meisler, Esq; a copy of the pleadings; plaintiff's verified bill of particulars; a copy of the transcript of plaintiff's examination before trial; a copy of the emergency room records from Jamaica Hospital Medical Center, the unaffirmed medical reports of neurologist Yongming Mao, and the affirmed medical reports of orthopedist, Dr. Michael Katz and radiologist, Dr. Melissa Sapan Cohn.

In his verified bill of particulars the plaintiff states that as a result of the accident he sustained, inter alia, disc bulging at L4-L5 and L5-S1 and decreased range of motion of the cervical, lumbar and thoracic spine as well as injuries to his left ankle, left knee, bilateral shoulders and bilateral wrists.

The plaintiff, who states he was not employed at the time of the accident, claims in his bill of particulars that he was confined to bed for one month intermittently following the accident and was confined to his home for four months intermittently directly following the accident. In his complaint, the plaintiff contends that he sustained a serious injury as defined in Insurance law §5102(d).

The plaintiff, was examined by Dr. Michael Katz an orthopedic surgeon who was retained by the defendant. In his examination of January 17, 2011, the plaintiff presented with pain in his neck and back. Dr. Katz performed quantified and comparative range of motion tests. He found that the plaintiff had no significant limitations of range of motion in the cervical spine, thoracolumbosacral spine, right shoulder, left shoulder, left wrist, right wrist, left knee and left ankle. Dr. Katz's impression was that the plaintiff sustained lumbosacral strain, cervical strain, bilateral wrist contusion, left knee contusion, left ankle contusion, thoracic strain, bilateral shoulder contusion and chest contusion all of which have resolved. Dr. Katz concluded that the plaintiff "showed no signs or symptoms or permanence relative to the musculoskeletal system and relative to the accident of April 28, 2008." Dr. Katz states that the plaintiff is not disabled and is capable of full time, full duty work as a restaurant worker without restrictions.

The defendant also submits the report of board certified radiologist Dr. Melissa Sapan Cohn, M.D. who reviewed the MRI studies of the plaintiff's lumbosacral spine. In her report dated January 26, 2011, Dr. Cohn stated that plaintiff had evidence of degenerative changes at L4-L5 and L5-S1 with disc bulging at both levels. She states that the disc bulging is unrelated to trauma and is related to degenerative disc disease.

In his examination before trial taken on September 30, 2010, the plaintiff testified that he was taken from the scene of the accident in an ambulance to the Jamaica Hospital emergency room. He stated he was discharged the same day. He stated that following the accident he was not confined to his bed, nor confined to his house. When asked what parts of his body he is claiming to have injured in the accident, he stated his entire right leg from his foot to his knee, hips, his entire back and neck. Plaintiff stated, however, that at the time of his deposition he still had pain in his neck and back but no longer had pain in his leg. He stated that following the accident he began physical therapy treatments with Dr. Elcock. He stated that he did not remember when he stopped the treatments but that he stopped because he started working and he did not have medical coverage. He stated that he also was treated by an orthopedist, Dr. Rahman in 2010. Plaintiff testified that at the time of the deposition he was working as a busboy at a restaurant in Manhattan. He states that he works forty hours a week and is standing most of the time. When asked whether as a result of the injury if there are things he can no longer physically do he responded that he has difficulty lifting anything heavy or carrying anything heavy.

Defendant's counsel contends that the affirmed medical reports of Dr. Katz and Dr. Cohn who found only degenerative changes, are sufficient to establish, prima facie, that the defendant 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 as the plaintiff was not confined to bed or to his home and that he was only limited in lifting heavy objects that he 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.

In opposition, plaintiff's attorney, Kevin J. Perez, Esq., submits a copy of the pleadings; a copy of the police accident report; a copy of the plaintiff's examination before trial; photographs of the vehicles involved in the accident; an affidavit from the plaintiff dated September 14, 2011; the affidavit of Dr. Coral Elcock; the affirmed medical report of Dr. Mohamed K. Nour and the affirmation of Dr. Robert Scott Schepp concerning MRI studies of plaintiff's lumbosacral spine and cervical spine.

In his affidavit, the plaintiff states that as a result of the impact his air bag was caused to deploy resulting in his lip being cut and causing additional injury to his back, neck and right leg. He stated that he left the scene of the accident in an ambulance and was treated in the emergency room at Jamaica Hospital. He stated that he received physical therapy treatments from a chiropractor, Dr. Coral Elcock from April 2008 until December 2008. He states that he still has pain in his neck and lower back and he has difficulty bending, squatting or sitting for long periods of time. He also experiences difficulty in moving his neck and lower back which prevents him from doing a substantial part of his everyday activities that he did before the accident.

In his affirmed medical report Dr. Nour states that he examined the plaintiff on June 2, 2008, one month after the accident. At that time the doctor performed range of motion testing and found that the plaintiff revealed significant range of motion limitations of the cervical spine, right and left wrist, lumbar spine, and left knee. Dr. Nour opined that the plaintiff was partially disabled and that the range of motion limitations were causally related to the accident of April 28, 2008.

Dr. Coral Elcock, a chiropractor, submits an affidavit stating that plaintiff first presented to her office on May 2, 2008 for treatment for injuries sustained in the motor vehicle accident of April 28, 2008. On that date Dr. Elcock referred the plaintiff for MRI studies. In a recent examination on July 29, 2011, objective range of motion testing indicated restriction in range of motion of the cervical spine, lumbar and thoracic spines. Dr. Elcock stated that the plaintiff discontinued treatments after extensive therapy because further treatment would only have been palliative nature. She states that plaintiff has suffered a limitation to the use of his cervical and lumbar spine which are related to the accident in question.

The plaintiff also submits the affirmed radiology reports of Dr. Robert Scott Shepp who reviewed the plaintiff's MRI studies and found that he had sustained posterior bulging disc at L4-L5 and L5-S1.

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. Katz and Cohn as well as the deposition testimony of the plaintiff was sufficient to meet defendant's prima facie burden by demonstrating that the 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. Nour and Dr. Elcock attesting to the fact that the plaintiff had

significant limitations of range of motion of his lumbar spine and cervical spine 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]). Plaintiff's expert presented objective evidence of plaintiff's physical limitations, as well as their duration (see Chanda v Varughese, 67 AD3d 947 [2nd Dept. 2009]). As such, the 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, 81 AD3d 903[2d Dept. 2011]; Mahmood v Vicks, 81 AD3d 606 [2d Dept. 2011]; Compass v GAE Transp., Inc., 79 AD3d 1091[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. Elcock adequately explained the gap in plaintiff's treatment by stating that plaintiff could no longer afford to pay for treatments after his no-fault benefits were terminated and he 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]).

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

ORDERED, that the defendant's motion for an order dismissing the plaintiff's complaint is denied.

Dated: January 4, 2012
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.