

**Janho v Christos Kay, Inc.**

2012 NY Slip Op 30537(U)

February 27, 2012

Supreme Court, Queens County

Docket Number: 28256/09

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

NAJWA and NICK JANHO, Index No.: 28256/09
Plaintiffs, Motion Date: 02/16/12
- against - Motion No.: 16
CHRISTOS KAY, INC. and CONSTANTIN Motion Seq.: 1
CABA,

Defendants.

- - - - - x

The following papers numbered 1 to 15 were read on this motion by
defendants, CHRISTOS KAY, INC. and CONSTANTIN CABA, for an order
pursuant to CPLR 3212 granting defendants summary judgment and
dismissing the complaint of NAJWA and NICK JANHO on the ground
that plaintiff NAJWA JANHO 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 - 7
Affirmation in Opposition-Affidavits-Exhibits.....8 - 12
Reply Affirmation.....13 - 15

This is a personal injury action in which plaintiff, NAJWA
JANHO, seeks to recover damages for injuries she sustained as a
result of a motor vehicle accident that occurred on September 3,
2008, at the intersection of 57th Street and the entrance to the
Queensboro Bridge in New York County, New York.

At the time of the accident, plaintiff, Najwa Janho, was a
pedestrian who was struck by the taxi cab owned by Christos Kay
Inc. and operated by defendant Constantin Caba. The taxi cab was
making a right turn from 57th Street onto the Queensboro Bridge
entrance when it struck the plaintiff causing her to hit the
ground. As a result of the accident, plaintiff allegedly
sustained injuries to her head, back, chest, abdomen, pelvis,

arms, legs and feet.

The plaintiffs commenced this action by filing a summons and complaint on October 20, 2009. In addition to a cause of action for damages due to the plaintiff sustaining a serious physical injury, the complaint asserts a cause of action for loss of consortium by defendant Nick Janho. Issue was joined by service of defendants' verified answer dated November 11, 2009. Defendants now move for an order pursuant to CPLR 3212(b), granting summary judgment dismissing the plaintiffs' complaint on the ground that plaintiff Najwa Janho did not suffer a serious injury as defined by Insurance Law § 5102.

In support of the motion, defendants submit an affirmation from counsel, Cynthia Hung, Esq., a copy of the pleadings; plaintiff's verified bill of particulars; and the affirmed medical reports of neurologist, Jean-Robert Desrouleaux, neuroradiologist, Jeffrey Lang and orthopedic surgeon, Lisa Nason.

In her verified Bill of Particulars plaintiff alleges that as a result of the accident she sustained a crushing of the foot and unspecified injuries about the body, back, head and legs as well as aggravation of pre-existing lumbar degenerative disease.

Plaintiff contends that as a result of the accident she sustained a serious injury as defined in Insurance Law § 5102(d) in that she sustained a permanent loss of use of a body organ, member function or system; a permanent consequential limitation or use of a body organ or member; a significant limitation of use of a body function or system; and a medically determined injury or impairment of a nonpermanent nature which prevented her from performing substantially all of the material acts which constitute her respective 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. Lisa Nason, a board certified orthopedic surgeon retained by the defendants, examined Ms. Janho on March 31, 2011. Dr. Nason performed quantified and comparative range of motion tests. Her affirmed report states that the plaintiff told her that she injured her bilateral shoulders, chest, lower back, abdomen, pelvis, bilateral legs and bilateral feet and sustained left foot abrasions as a result of the accident. On the date of the examination, the plaintiff presented with pain in the lumbar spine, left leg and left foot. Dr. Nason's examination revealed no limitations of range of motion of the shoulders, thoracic spine, lumbar spine, hips, feet and ankles. Her impression was:

"alleged injury to bilateral shoulders - resolved; alleged injury to chest - resolved, alleged injury to thoracic and lumbar spines - resolved; alleged injury to the pelvis - resolved; alleged injury to bilateral legs - resolved; and alleged injury to bilateral feet - resolved." Dr Nason states that there is no evidence of permanency or residuals.

Dr. Desrouleaux, a board certified neurologist retained by the defendants, examined the plaintiff on March 31, 2011. In his affirmed report he states that a history revealed that the plaintiff left the scene of the accident in an ambulance and was transported to Bellevue Hospital emergency room where she was discharged the same day. She presented with pain in the lumbar spine, left leg and left foot. His examination revealed no limitations of range of motion of the thoracic spine, lumbar spine and legs. He states that the alleged injury to the thoracic and lumbar spine has resolved and that no further neurological treatment is indicated. He states that no permanence or residual effect is anticipated in the plaintiff's condition.

Board certified neuroradiologist Jeffrey Lang states in his affirmed report that he reviewed the MRI of the plaintiff's lumbar spine which did not reveal any disc bulges or herniations. He only observed degenerative disc disease and states that any findings on the MRI are unrelated to the accident of September 3, 2008.

Defendant's counsel contends that the medical reports of Drs. Lang, Desrouleaux and Nason are sufficient to establish, prima facie, that Najwa Janho has not sustained a permanent consequential limitation or use of a body organ or member; a significant limitation of use of a body function or system; or a medically determined injury or impairment of a nonpermanent nature which prevented her from performing substantially all of the material acts which constitute her 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.

In opposition, plaintiffs' attorney, Leslie J. Levine submits his own affirmation as well as the unaffirmed and uncertified medical records of the Holy Cross Hospital and Orthopedic Center in Florida where the plaintiff received physical therapy, the affidavit of Najwa Janho, and the unaffirmed medical report of Dr. Verano Hermida.

In her affidavit dated February 6, 2012, plaintiff states that on September 3, 2008 she was hit by a taxi cab on

the left side of her body and the cab ran over her feet. She states that as a result of the accident she still has pain in her lower back, and her left leg and left ankle. She states that she can no longer work as a cook because she cannot stand for long periods of time.

Counsel asserts that the medical records of Dr. Verano Hermida an orthopedist consulted by the plaintiff after the accident determined that she had suffered an acute lumbosacral sprain/strain with exacerbation of an L5-S1, spondylolisthesis, a contusion of the right leg and crush injury to both feet. Dr. Hermida states in an unaffirmed report dated January 17, 2012, that after the accident Ms. Janho went to stay with family in Boston. She then returned to her home in Florida where she commenced her treatment with Dr. Hermida on September 17, 2008. His initial examination indicated limited range of motion of the lumbar spine and abrasions on the left foot. From his review of unaffirmed MRI reports he found that the accident caused an aggravation of a preexisting lumbar degenerative disc disease. His final examination which took place on January 17, 2012 indicated that she had recurrent low back pain. He diagnosed a permanent injury as a result of the accident with a 3 percent impairment rating for the lumbar spine, and 3 per cent for the left ankle. Although Dr. Hamida's report was notarized in Florida it does not contain a statement that the doctor affirms to the truth of the contents of the report.

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 defendants, including the affirmed medical reports of Drs. Nason, Land and Desrouleaux were sufficient to meet its prima facie burden by demonstrating that plaintiff Najwa Janho 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 opposition, plaintiff failed to raise a triable issue of fact (see Zuckerman v City of New York, 49 NY2d 557, [1980]; Cohen v A One Prods., Inc., 34 AD3d 517 006]). The records and report of Dr. Hermida are not certified or affirmed and therefore not in admissible form. The court finds that as the unaffirmed medical records and reports submitted by the plaintiff in opposition to the motion for summary judgment are not in proper evidentiary form they lack probative value (see Balducci v Velasquez, 2012 NY Slip Op 921 [2d Dept. 2012]; Scheker v Brown, 2012 NY Slip OP 00355 [2d Dept. 2012]; Lively v Fernandez, 85 AD3d 981 [2d Dept. 2011]). Further, to the extent that Dr. Hamida states that his opinion is based on his review of the unsworn MRI reports prepared by other doctors, such medical evidence is inadmissible and rendered his affirmation without probative value in opposing the motion (see Casiano v Zedan, 66 AD3d 730 [2d Dept. 2009]; Gonzales v Fiallo, 47 AD3d 760 [2d Dept. 2008]; Marziotto v Striano, 38 AD3d 623 [2d Dept. 2007]; Iusmen v Konopka, 38 AD3d 608 [2d Dept. 2007]; Sammut v Davis, 16 AD3d 658 [2d Dept. 2005]; Mahoney v Zerillo, 6 AD3d 403[2d Dept. 2004] [plaintiff's physician impermissibly relied upon unsworn reports of other doctors]).

Without an admissible medical report indicating the plaintiff's current physical condition, the plaintiff's submissions were insufficient to raise a triable issue of fact as to whether the plaintiff sustained a serious injury (see Harris v Ariel Transp. Corp., 55 AD3d 323[2d Dept. 2008]; Sullivan v

Johnson, 40 AD3d 624 [2d Dept. 2007]; Barrzey v Clarke, 27 AD3d 600 [2d Dept. 2006]; Farozes v Kamran, 22 AD3d 458 [2d Dept. 2005][in order to raise a triable issue of fact the plaintiff was required to come forward with objective medical evidence, based upon a recent examination, to verify his subjective complaints of pain and limitation of motion]; Ali v Vasquez, 19 AD3d 520 [2d Dept. 2005]).

Even if this court were to review the report of Dr. Hermida, his conclusion based upon his recent examination in January 2012 indicates that the plaintiff demonstrated only a three percent range of motion limitation of the lumbar spine and a three percent limitation of the left ankle. Such minor limitations of range of motion are insufficient to raise a triable issue of fact as to whether the plaintiff sustained a significant injury (see McCloud v Reyes, 82 AD3d 848 [2d Dept. 2011][12% limitation in range of motion was insignificant within the meaning of the no-fault statute]; McMullin v Walker, 68 AD3d 943 [2d Dept. 2009]; Trotter v Hart, 285 AD2d 772 [3<sup>rd</sup> Dept. 2001]).

Lastly, the plaintiff failed to submit competent medical evidence that the injuries allegedly sustained by her as a result of the subject accident rendered her unable to perform substantially all of their daily activities for not less than 90 days of the first 180 days following the accident (see Valera v Singh, 89 ad3d 929 [2d Dept. 2011]; Nieves v Michael, 73 AD3d 716 [2d Dept. 2010]; Joseph v A & H Livery, 58 AD3d 688 [2d Dept. 2009]).

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

ORDERED, that the defendants' motion for summary judgment is granted and the complaint of plaintiffs NAJWA JANHO and NICK JANHO is dismissed

The clerk is directed to enter judgment accordingly.

Dated: February 27, 2012  
Long Island City, N.Y.

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**ROBERT J. MCDONALD**  
**J.S.C.**