

Bevans v Villanueva
2012 NY Slip Op 32704(U)
October 22, 2012
Supreme Court, Queens County
Docket Number: 15809/10
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

MARK BEVANS,

Index No.: 15809/2010

Plaintiff,

Motion Date: 08/02/2012

- against -

Motion No.: 5

Motion Seq.: 2

CHRISTIAN VILLANUEVA and JENNIFER
 DAVIES,

Defendants.

- - - - - x

The following papers numbered 1 to 17 were read on this motion by defendants, CHRISTIAN VILLANUEVA and JENNIFER DAVIES, for an order pursuant to CPLR 3212 granting defendants summary judgment and dismissing the complaint of MARK BEVANS on the ground that plaintiff 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 - 8
 Affirmation in Opposition-Affidavits-Exhibits.....9 - 14
 Reply Affirmation.....15 - 17

This is a personal injury action in which plaintiff, MARK BEVANS, seeks to recover damages for injuries he allegedly sustained as a result of a motor vehicle accident that occurred on August 11, 2008 on 77th Street near its intersection with Astoria Boulevard in the County of Queens, New York.

The plaintiff alleges that at the time of the accident he was stopped at a red traffic signal on the eastbound lanes of Astoria Boulevard when his vehicle was struck in the rear by the vehicle operated by defendant, CHRISTIAN VILLANUEVA, and owned by defendant, JENNIFER DAVIES. Plaintiff alleges that as a result of the impact he sustained serious physical injuries.

Defendants now move for an order pursuant to CPLR 3212(b), granting summary judgment dismissing the plaintiff's complaint on the ground that plaintiff did not suffer a serious injury as defined by Insurance Law § 5102.

In support of the motion, defendant submits an affirmation from counsel, Kathleen E. Fioretti, Esq; a copy of the pleadings; plaintiff's verified bill of particulars; the affirmed medical reports of radiologist, Dr. Sondra J. Pfeffer; orthopedic surgeon, Dr. Robert Israel; and a copy of the transcript of the examination before trial of plaintiff, Mark Bevans.

In his verified Bill of Particulars, plaintiff, age 49, states that as a result of the accident he sustained, inter alia, a herniated disc at L5-S1. At the time of the accident, plaintiff was self-employed as a glazier by M & M Glass and Mirror Construction. He states in the bill of particulars that he was incapacitated from work for a period of seven days immediately following the accident.

Plaintiff contends that he sustained a serious injury as defined in Insurance Law § 5102(d) in that he sustained a permanent loss of use of a body organ, member function or system; a permanent consequential limitation of 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 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. Robert Israel, a board certified orthopedic surgeon, retained by the defendants, examined Mr. Bevans on January 12, 2012. Plaintiff presented with pain in his lower back and both shoulders. Dr. Israel performed quantified and comparative range of motion tests. He found that the plaintiff had no limitations of range of motion in both shoulders, in the cervical spine, thoracic spine, and lumbar spine. He also had no limitations of range of motion of the right hip and both knees. He concluded that the plaintiff had a resolved sprain of the cervical spine, resolved sprain of the lumbar spine, resolved sprain of the thoracic spine, resolved sprain of both shoulders, resolved sprain of the right hip and resolved sprain of both knees. He states that based upon his examination, from an orthopedic point of view, the plaintiff has no disability as a result of the accident in question.

Dr. Sondra J. Pfeffer, a radiologist, reviewed the MRI studies of the plaintiff's lumbar spine and left hip. She states that she observed mild disc dessication which was more long standing and pre-dated the subject accident. She also states that the disc herniation was indeterminate as to age but showed no impingement which would render it functionally significant from a radiologic perspective. With respect to the MRI of plaintiff's left hip she stated that there was preexisting necrosis of the right hip but no findings which were trauma related.

In his examination before trial, taken on November 30, 2011, plaintiff states that after the accident he returned to his home and sought treatment about one week later. He stated that Dr. Waseem treated him for pain to his back, right shoulder and right knee. Dr. Waseem referred him to a chiropractor for physical therapy. He went to the chiropractor from August 2008 until the first week in January 2009 for pain in his right knee back and right shoulder. He states that he had to stop because he had hip replacement surgery for his right hip in January 2009 which was unrelated to the subject accident. Because of the hip surgery he was not able to continue with physical therapy again. He stated that he missed 10 - 20 days from work due to the injuries he suffered in the accident.

Defendant's counsel contends that the medical reports of Drs. Pfeffer and Israel are sufficient to establish, prima facie, that the plaintiff 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 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.

In opposition, plaintiff's attorney Ken Yilmaz, Esq., submits his own affirmation as well as the affidavit of the plaintiff dated June 28, 2012, and unaffirmed reports from radiologist, Dr. James R. McCleavey, unaffirmed radiological reports from Dr. Ham, unaffirmed reports from chiropractor, Dr. Gillman, unaffirmed reports from Dr. Morgenstern, unaffirmed reports from Dr. Hostin, unaffirmed reports from Dr. Sadigh and unaffirmed reports from Dr. Notabartolo.

In his affidavit, the plaintiff states that on August 11, 2008 the motor vehicle he was operating was struck in the rear by the defendant's vehicle while his vehicle was stopped at a red

traffic control signal. He states that as a result of his injuries he went to Jamaica Hospital, All Family Medical P.C., and New York Medical and Diagnostic Center where he saw Dr. Waseem, Dr. Neil Morgenstern and Dr. Emmanuel Hostein. He states that "in addition to my pain and suffering, I am limited in my everyday activities and I have been significantly curtailed in my everyday movement." He states that he still suffers from lower back pain and right hip pain intermittently.

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]).

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. Pfeffer and Israel as well as the deposition testimony of the plaintiff stating that he missed no more than 20 days from work following the accident was sufficient to meet its 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]).

In opposition to the motion, the plaintiff failed to provide any proof in admissible form which would raise a question of fact as to whether the plaintiff sustained serious injuries which were causally related to the accident (see Choi v Guerrero, 82 AD3d

1080 [2d Dept. 2011]; Srebnick v Quinn, 75 AD3d 637[2d Dept. 2010]). Plaintiff failed to provide any evidence in admissible form from a treating chiropractor or physician which would show that the plaintiff sustained injuries soon after the accident (see Perl v Meher, 18 NY3d 208 [2011]). The failure to present competent evidence regarding a limitation of range of motion contemporaneous with the accident renders any attempt to connect his present day injuries to the accident speculative (see Joseph v A & H Livery, 58 AD3d 688 [2d Dept. 2009]; Batts v Medical Express Ambulance Corp., 49 AD3d 294 [1st Dept. 2008]). Without such contemporaneous findings, the plaintiff did not establish the duration of the injuries required to raise a triable issue of fact as to whether the plaintiff sustained a serious injury under the permanent consequential limitation or significant limitation of use categories of the no-fault law as a result of the subject accident (see Jack v Acapulco Car Service, Inc., 72 AD3d 646 [2d Dept. 2010]; Bleszcz v Hiscock, 69 AD3d at 891 [2d Dept. 2010]; Simanovskiy v Barbaro, 72 AD3d 930 [2d Dept. 2010]).

Further, plaintiff failed to provide any evidence in admissible form that the defendant had any limitations of range of motion in a recent examination. Without a medical report in admissible form 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]; Faroze 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])

Lastly, the plaintiff failed to submit competent medical evidence that the injuries allegedly sustained by him as a result of the subject accident rendered him unable to perform substantially all of his daily activities for not less than 90 days of the first 180 days following the accident. The plaintiff himself testified that he did not miss more than twenty days of work as a result of the accident (see Ayotte v Gervasio, 81 NY2d 1062 [1993]; Valera v Singh, 89 ADd 929 [2d Dept. 2011]; Lewars v Transit Facility Mgt. Corp., 84 AD3d 1176 [2d Dept. 2011]; Nieves v Michael, 73 AD3d 716 [2d Dept. 2010]; Joseph v A & H Livery, 58 AD3d 688 [2d Dept. 2009]).

Accordingly, because the evidence relied upon by plaintiff is insufficient to create a triable issue of fact with respect to

any of the statutory categories of serious injury and for the reasons set forth above, it is hereby,

ORDERED, that the defendants' motion for summary judgment is granted and the plaintiff's complaint as against defendants CHRISTIAN VILLANUEVA and JENNIFER DAVIES is dismissed, and it is further,

ORDERED, that the Clerk of Court is directed to enter judgment accordingly.

Dated: October 22, 2012
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.