

Ndukwe v Ebba
2012 NY Slip Op 32707(U)
October 24, 2012
Supreme Court, Queens County
Docket Number: 25282/2010
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

FELIX NDUKWE,

Index No.: 25282/2010

Plaintiff,

Motion Date: 08/30/12

- against -

Motion No.: 29

Motion Seq.: 1

BENEDICIA EBBA,

Defendant.

- - - - - x

The following papers numbered 1 to 13 were read on this motion by defendant, BENEDICIA EBBA, for an order pursuant to CPLR 3212 granting defendant summary judgment and dismissing the plaintiff's complaint 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 - 7
 Affirmation in Opposition-Affidavits-Exhibits.....8 - 13

This is a personal injury action in which plaintiff, FELIX NDUKWE, seeks to recover damages for injuries he allegedly sustained as a result of a motor vehicle accident that occurred on April 19, 2010 at the intersection of Rockaway Boulevard and 3rd Street, Queens County, New York. The plaintiff alleges that he was injured when his vehicle which was proceeding on Rockaway Boulevard was struck by the vehicle owned and operated by defendant, BENEDICIA EBBA who was attempting to make a left turn onto Rockaway Boulevard from 3rd Street.

The plaintiff commenced this action by filing a summons and complaint on October 6, 2010. Issue was joined by service of defendants' verified answer dated November 12, 2010. Defendant

now moves 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, Joseph G. Gallo, Esq., a copy of the pleadings; plaintiff's verified bill of particulars; the unaffirmed radiology reports of Dr. McCleavey from December 10, 1999; the unaffirmed radiological reports of Dr. Beyda, the unaffirmed medical report of Dr. Sarkis, the unaffirmed medical report of neurologist, Dr. Songhorian; the unaffirmed operative report of Dr. Schwartz with respect to arthroscopic surgery on plaintiff's right knee;; the affirmed medical report of orthopedist, Dr. Robert Israel; the affirmed radiological report of Dr. Greenfield; uncertified attendance records from the plaintiff's employer; and a copy of the transcript of the examination before trial of plaintiff, Felix Ndukwe.

In his verified bill of particulars, plaintiff states that as a result of the accident he sustained, inter alia, right shoulder rotator cuff tear which required arthroscopic surgery. Plaintiff states that he was incapacitated from work from 6/15/10-7/9/10 and from 9/13/10 to 12/9/10. His surgery took place on 9/17/10.

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 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 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.

The medical records submitted which were not in admissible form were not reviewed by this court as they are without probative value (see Seck v Minigreen Hacking Corp., 53 AD3d 608 [2d Dept. 2008]; Patterson v NY Alarm Response Corp., 45 A.D.3d 656 [2d Dept. 2007]).

Dr. Robert Israel, a board certified orthopedic surgeon retained by the defendant, examined Mr. Ndukwe, age 52, on October 25, 2011. He presented with injuries to his neck, lower back, right shoulder, both elbows, left wrist/hand, both knees,

left ankle, left arm and both legs with numbness and pain radiating in the legs. He did not report work loss to Dr. Israel. Dr. Israel performed quantified and comparative range of motion tests. He found that the plaintiff had no limitations of range of motion in the cervical spine, lumbar spine, bilateral shoulders, bilateral elbows, left wrist, left arm, bilateral knees, right foot/ankle and bilateral legs. His impression was resolved sprain of the cervical spine, resolved sprain of the lumbar spine, resolved sprain of the left shoulder, resolved sprain of the bilateral elbow, resolved sprain of the left wrist, resolved sprain of the left arm, resolved sprain of the bilateral knees, resolved sprain of the right ankle, resolved sprain of the right ankle, resolved sprain of the bilateral legs and status post arthroscopy of the right shoulder. He states that based upon his examination, from an orthopedic point of view, the plaintiff has no disability as a result of the subject accident.

Dr. Greenfield reviewed the MRI of the plaintiff's right shoulder and found evidence of tendinitis of the distal supraspianthus tendon but without evidence of a tear. He states that the tendinitis is the result of chronic longstanding degenerative arthropathy. He states that this cannot be attributed to the accident in question and there were no findings which can be attributed to the subject accident beyond a reasonable medical doubt.

Plaintiff, Felix Ndukwe, age, 53, testified at an examination before trial held on August 26, 2011, that he is employed as a Civil Engineer with the New York State Department of Transportation. He stated that he missed four months from work as a result of the accident going back on December 9, 2011. He stated that at the time of the accident he was operating his vehicle on Rockaway Boulevard. His three children, ages 2, 6 and 9 were passengers seated in the rear. He was coming from Little Flower Day Care Center on Merrick Boulevard where he had just picked one of his children up. He was heading southbound on Rockaway Turnpike in the left lane. As he was passing the intersection of third street defendants car came from third street on his right and drove into the intersection striking his vehicle on the front passenger side. He did not request an ambulance because his children were with him, however, he said he was experiencing pain in his knees, shoulders left wrist and both ankles. When the police arrived, he told them that he was proceeding on Rockaway Boulevard when the defendant's vehicle came from third street and struck his vehicle broadside. Two days later he went for treatment at Rego Park Medical and saw Dr. Laudon. He had pain to his right shoulder, left wrist, left hand right knee both ankles and lower back and neck. He stated he had

been involved in a prior automobile accident in 2007 in which he injured his right knee and back. He then began a course of physical therapy at Rego Park Medical. He stopped physical therapy in October 2010 and he had surgery in September 2010 for a torn rotator cuff of the right shoulder. He then recommenced physical therapy. He stated that he still has pain in his right shoulder.

Defendant's counsel contends that the medical report of Dr. Israel, as well as the plaintiff's deposition testimony 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, Michael Dreishpoon, Esq., submits his own affirmation as well as an unaffirmed narrative operative report from Dr. Schell, a redacted report from Dr. Israel dated June 7, 2005, a portion of the plaintiff's examination before trial, the unaffirmed report of radiologist Dr. John Lyons, an affirmation from Dr. Russell Laudon dated June 14, 2012; the certified physical therapy records of Riccardo Santiago concerning the plaintiff's treatment, and an affirmation from Dr. Stephanie Bayner with respect to her recent examination of August 2, 2012.

Dr. Laudon states in his affirmed report that the plaintiff initially presented to him on April 29, 2012 for injuries sustained in the motor vehicle accident of April 19, 2010. He states that his examination at that time revealed significantly limited range of motion of the right shoulder which was causally related to the subject accident.

The certified physical therapy records show that he attended physical therapy sessions from May 2010 through April 2012.

Dr. Bayner states that she examined the plaintiff on July 31, 2012 at which time he continued to have pain of the right shoulder post-surgical repair. She conducted objective range of motion testing of the right shoulder on August 2, 2012 and found significant limitations of range of motion.

She states that the findings were consistent with plaintiff's right shoulder internal derangement which was causally related to the subject accident. She also states that in her opinion the plaintiff's limitations of range of motion are permanent.

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 competent proof submitted by the defendant, including the affirmed medical report of Dr. Israel was sufficient to meet defendants' 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 report of Drs. Laudon and Bayner attesting to the fact that the plaintiff 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 resulted from trauma causally related to the accident (see Perl v Meher, 18 NY3d 208[2011]; Dixon v Fuller, 79 AD3d 94 [2d Dept. 2010]; Ortiz v Zorbas, 62 AD3d 770 [2d Dept. 2009]; Azor v Torado, 59 ADd 367 [2d Dept. 2009]). As such, the plaintiff raised a triable issue of fact as to whether he sustained a serious injury of his right shoulder 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 ADd 606[2d Dept. 2011]; Compass v GAE Transp., Inc., 79 AD3d 1091[2d Dept. 2010]; Evans v Pitt, 77 AD3d 611 [2d Dept. 2010]).

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

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

Dated: October 24, 2012
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.