

Kelly v King

2012 NY Slip Op 32967(U)

December 4, 2012

Sup Ct, Queens County

Docket Number: 27884/2010

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

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| RADCLIFF KELLY, | Index No.: | 27884/2010 |
| | Motion Date: | 00/20/12 |
| Plaintiff, | Motion No.: | 22 |
| - against - | Motion Seq.: | 1 |
| EVAN KING, | | |
| Defendant. | | |

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The following papers numbered 1 to 16 were read on this motion by defendant, EVAN KING, for an order pursuant to CPLR 3212, granting defendant summary judgment and dismissing the complaint on the ground that plaintiff RADCLIFF KELLY did not sustain a serious injury within the meaning of Insurance Law §§ 5102 and 5104:

| | <u>Papers Numbered</u> |
|--|----------------------------|
| Notice of Motion-Affidavits-Exhibits..... | 1 - 7 |
| Affirmation in Opposition-Affidavits-Exhibits..... | 8 - 13 |
| Reply Affirmation..... | 14 - 16 |

This is a personal injury action in which the plaintiff, RADCLIFF KELLY, seeks to recover damages for injuries he sustained as a result of a motor vehicle accident that occurred on August 2, 2009, at or near the intersection of Foch Boulevard and Barron Street, Queens County, New York. Plaintiff commenced the within action on November 4, 2010. Issue was joined by service of a verified answer dated February 14, 2011.

In his verified Bill of Particulars, plaintiff states that as a result of the accident he sustained, inter alia, partial tear of the supraspinatus tendon of the left shoulder requiring surgery; herniated discs at C4-5, C5-6 and L5-S1, and disc bulges at C3-4 and L4-5.

The 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.

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, Marcella Gerbasi Crewe, Esq; a copy of the pleadings; plaintiff's verified bill of particulars; the affirmed medical report of board certified orthopedic surgeon, Dr. Michael Katz; the affirmed report of Dr. Ilya Smuglin with regard to a prior accident; the unaffirmed report of orthopedic surgeon, Dr. Lanzone, the unaffirmed radiological reports of Dr. Shapiro performed in 2007 and a copy of the transcript of the examination before trial of plaintiff, Radcliff Kelly.

Dr. Michael J. Katz, an orthopedic surgeon, retained by the defendant, examined Radcliff Kelly on December 5, 2011. At the time of the examination he was 45 years of age. He told Dr. Katz that as a result of the accident he injured his neck, back and left shoulder. Plaintiff stated that he had arthroscopic surgery on his left shoulder performed by Dr. Lanzone on February 9, 2011. He stated that he lost one month from his job as a result while recuperating from surgery. He also told Dr. Katz that he had a prior arthroscopic surgery of the left shoulder in 1997 for a work related injury and he had a prior motor vehicle accident in June, 2007 in which he injured his back, right shoulder, and right knee. Dr. Katz performed quantified and comparative range of motion tests. He found that the plaintiff had no limitations of range of motion in the cervical spine, lumbosacral spine, right shoulder and arm, left shoulder and arm, right wrist and hand, left wrist and hand, right hip and leg, left hip and leg, and left knee. His diagnosis is stated to be: cervical strain, resolved; lumbosacral sprain, resolved; and status post arthroscopic surgery left shoulder with prior arthroscopy. In his comments, Dr. Katz states that the injuries sustained by the plaintiff in the accident of August 2, 2009 have all resolved and

plaintiff's prognosis is excellent. Dr. Katz states the plaintiff showed no signs of permanence relative to the neck or the back. He states that he is capable of gainful employment without restrictions and is capable of his activities of daily living.

Dr. Smuglin examined the plaintiff in connection with his accident of June 2, 2007. At that time he injured his neck, both shoulders, lower back and right knee. Dr. Smuglin found that the plaintiff had limitations in range of motion at that time of the cervical spine and lumbosacral spine. She also mentioned that MRIs taken at that time showed disc herniations at C2-3, C3-4, C4-5, L4-5, L5-S1.

In his examination before trial, taken on November 11, 2011, Mr. Kelly, age 46, testified that he works as a sales representative for Touch Tone Health, a Medicare HMO. He testified that after the accident the police arrived at the scene and he told them that he was waiting at a stop sign when the defendant's vehicle turned into his vehicle hitting his vehicle on the driver's side. An ambulance arrived on the scene but he didn't believe at that time that he was injured so he declined to go to the emergency room by ambulance. He claims that he injured his neck, left shoulder, back, lower back, left ankle and right and left knees. He also testified that he was involved in three prior accidents. In 1996 or 1997 he had a work related motor vehicle accident in Brooklyn. At that time a Range Rover hit his vehicle head on causing injuries to his head, neck, back, left shoulder and left ankle. He stated that he had arthroscopic surgery on his left shoulder after that accident for a torn rotator cuff. He also testified that he had another accident in 2000 when he was rear-ended by a Mr. Softie truck on the Long Island Expressway. He testified he injured his right knee, shoulders and lower back in that accident. He also had an accident in March 2007 in Manhattan in which he was not injured. In June 2007 he also had an accident in Brooklyn in which his vehicle was hit in the rear by a drunk driver. He stated that he injured his right knee, right shoulder, lower back and neck. After that accident he underwent arthroscopic surgery to repair a torn meniscus in the right knee. He had another accident on January 16, 2008 when his vehicle was rear-ended on the eastbound Belt Parkway. He was not injured in that accident. He also stated that he had an accident subsequent to the subject accident which occurred in October 2009 when his vehicle was rear ended on Brooklyn when he was stopped at a red light. He was not injured in that accident.

With respect to the subject accident, he stated that he first sought treatment the following day with Dr. Khandros at Lynbrook Medical. At that time he complained of pain to his neck, back, lower back, right knee and shoulders. He then went for MRIs and began a course of physical therapy at Lynbrook Medical which lasted approximately six months. In also was examined by Dr. Lanzone an orthopedic surgeon who performed arthroscopic surgery on his left shoulder in February 2011. He had a prior arthroscopic surgery in the left shoulder in 1997. Subsequent to the arthroscopic surgery, he started physical therapy again at Lynbrook which lasted approximately four months. He stated that he still has pain in his left shoulder, neck, lower back and knees. He stated that within the first 18 months following the accident he did not miss any time from work.

Defendant's counsel contends that the affirmed medical report of Dr. Katz as well as the transcript of plaintiff's examination before trial in which he states that he missed no time from work prior to his arthroscopic surgery 18 months after the accident, as well as the evidence submitted regarding the injuries the plaintiff sustained in three prior accidents are sufficient to establish, prima facie, that the plaintiff has not sustained, as a result of the subject accident, 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, Leonard S. Wetzlar, Esq., submits his own affirmation as well as the affirmations of radiologist Dr. Steve Losik, radiologist Dr. Paruchuri, certified medical records of Dr. Hutter regarding the plaintiff's arthroscopic surgery of the left shoulder in September 1996, the affirmation of Dr. Lanzone, the plaintiff's orthopedic surgeon regarding his surgery of February 2011, the affirmation of Dr. Richard Parker, a treating orthopedist, and the affirmation of Dr. Khandros who examined the plaintiff immediately following the accident and most recently on June 19, 2012 and the affirmation of plaintiff, Radcliff Kelly.

Dr. Losik read the MRIs performed after the subject accident and noted that the plaintiff had C3-4 disc bulge, L4-5 disc bulge, and disc herniations at C4-5, C5-6, and L5-

S1. Dr Paruchuri noted a tear of the supraspiantus tendon of the left shoulder based on an MRI performed ion November 18, 2010. Dr Lanzone states that he performed arthroscopic surgery to repair the defendant's tear of the rotator cuff. He stated that he was aware that he plaintiff had prior arthroscopic surgery in 1996 but stated that based upon his review of the prior operative report and his observation during surgery, his opinion was that the current injuries to the left shoulder as well as his limitations of range of motion and pain were caused by the accident of August 2, 2009. His opinion was that plaintiff sustained a permanent, partially disabling injury to the left shoulder causally related to the accident of August 2, 2009.

Dr. Parker recently examined the plaintiff on July 20, 2012 and found limitations of range of motion of the left shoulder. He states that based on his examination as well as the review of the records of Dr. Lanzone and the records of plaintiff's prior surgery, that he believes that plaintiff sustained a permanent consequential limitation of use of the left shoulder and a significant limitation of use of the left shoulder causally related to the accident of August 2, 2009.

Dr. Khandros initially examined the plaintiff on August 4, 2009, at which time he complained of pain to the left shoulder, neck, left hand and arm and back, right shoulder and left knee. Her examination revealed significant limitations of range of motion of the lumbar spine, cervical spine, left shoulder and right shoulder. She recommended physical therapy at that time. After 20 months plaintiff discontinued physical therapy because he reached a plateau in which further treatment would not alter his physical condition. Dr. Khandros was aware of the plaintiff's prior history of accidents and prior injuries. She examined the plaintiff most recently on June 19, 2012 and states that he continued to have range of motion limitations of the lumbar spine and states that he has sustained permanent partial disabling injuries to the left shoulder, neck and lower back causally related to the accident of August 2, 2009.

Radcliff Kelly states in his affidavit dated August 14, 2012, that he injured his left shoulder, neck and lower back in the subject accident. He stated that his prior injuries to his left shoulder, neck and back had resolved prior to the subject accident. He stated that the subject accident reactivated the injuries to his neck, back and left shoulder.

On a motion for summary judgment, where the issue is whether the plaintiff has sustained a serious injury under the no-fault law, it is defendant's initial 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 report of Dr. Katz and the plaintiff's examination before trial in which he stated that he did not miss any time from work immediately following the accident, were sufficient to meet their 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 Drs. Losik, Lanzone, Parker and Khandros attesting to the fact that after a qualitative examination the plaintiff had substantiated injuries contemporaneous to the accident and had significant limitations in range of motion at a recent examination, and concluding that the plaintiff's limitations were significant and permanent and resulted from trauma causally related to the accident (see Perl v Meher, 18 NY3d 208 [2011]; Ortiz v Zorbas, 62 AD3d 770 [2d Dept. 2009]; Azor v Torado, 59 AD3d 367 [2d Dept. 2009]). As such, the plaintiff raised a triable issue of fact as to whether she 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 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]; Tai Ho Kang v Young Sun Cho, 74 AD3d 1328 743 [2d Dept. 2010]).

The defendant's treating doctors acknowledged and adequately addressed the significance of the fact that the plaintiff was involved in prior accidents and therefore, their conclusions that the plaintiff sustained significant limitations of a permanent nature as a result of the subject accident are not merely speculative (see Keum Lee Jeong v Imperial Contract Cleaning, Inc., 63 AD3d 795 [2d Dept. 2009]; cf. Yun v. Barber, 63 AD3d 1140 [2d Dept. 2009]; Joseph v A & H Livery, 58 AD3d 688 [2d Dept. 2009]).

In addition, Dr. Khandros adequately explained the gap in the plaintiff's treatment by stating that the plaintiff reached the point of maximum medical improvement (see Abdelaziz v Fazel, 78 AD3d 1086 [2d Dept. 2010]; Tai Ho Kang v Young Sun Cho, 74 AD3d 1328 [2d Dept. 2010]; Gaviria v Alvarado, 65 AD3d 567 [2d Dept. 2009]; Bonilla v Tortori, 62 AD3d 637 [2d Dept. 2009]).

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

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

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

ROBERT J. MCDONALD, J.S.C.