

Fabara v Illescas

2013 NY Slip Op 30016(U)

January 7, 2013

Supreme Court, Queens County

Docket Number: 15407/2010

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

MANUEL FABARA, Index No.: 15407/2010
Plaintiff, Motion Date: 11/30/12
- against - Motion No.: 43
Motion Seq.: 1
LUIS A. ILLESCAS and KATT CORPORATION,

Defendants.

- - - - - x

The following papers numbered 1 to 12 were read on this motion by defendants, LUIS A. ILLESCAS and KATT CORPORATION, for an order pursuant to CPLR 3212 granting defendants summary judgment and dismissing the complaint of MANUEL FABARA on the ground that said 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 - 5
Affirmation in Opposition-Affidavits-Exhibits.....6 - 10
Reply Affirmation.....11 - 12

This is a personal injury action in which plaintiff, Manuel Fabara, seeks to recover damages for injuries he sustained as a result of a motor vehicle accident that occurred on November 6, 2009 on Broadway at or about its intersection with 47th Street, Queens County, New York. At the time of the accident, the plaintiff was riding his bicycle on Broadway, approximately 75 yards east of the intersection with 47th Street when he was struck by the defendants' taxicab trying to pull into a parking space owned by Katt Corporation and operated by the defendant Luis A. Illescas. At the time of the accident defendant Illescas was driving his vehicle in the scope of his employment with defendant Katt Corporation.

The plaintiff commenced this action by filing a summons and complaint on June 16, 2010. Issue was joined by service of defendants' verified answer dated September 28, 2010. Plaintiff filed a Note of issue and certificate of Readiness on May 17, 2012. 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, Matthew Lyons, Esq; a copy of the pleadings; plaintiff's verified bill of particulars; the affirmed medical report of radiologist, Dr. Mark J Decker; the affirmed medical report of orthopedist, Dr. Christopher J. Cassels, and a copy of the transcript of the examination before trial of Manuel Fabara.

In his verified Bill of Particulars, plaintiff, age 27, states that as a result of the accident he sustained, inter alia, a tear of the supraspinatus tendon, tear of the labrum and tear of the subscapularis tendon of the left shoulder, herniation of the lumbar spine at L4-5 and L5-S1, bulging disc of the cervical spine at C6-7, tear of the anterior cruciate ligament and tear of the collateral ligament of the left knee; tear of the medial meniscus of the right knee. Plaintiff states that he was confined to bed at home for two weeks and confined to his home for three months as a result of his injuries.

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.

Dr. Mark J. Decker, a spine radiologist, reviewed the MRI of the plaintiff's cervical spine taken on December 5, 2009. In his affirmed report Dr. Decker states that he found no abnormality at C2-3, no herniation at C5-6 and C6-7 and broad bulges at C3-4 and C4-5. He states that the findings are all longstanding and not causally related to the date of the accident of 11/06/2009. He also reviewed the MRI of the plaintiff's lumbar spine taken on December 5, 2009 and found degenerative disc disease at L4-5 and

L5-S1. He found broad bulges at L5-S1, L4-L5, L3-L4 and no evidence of herniation at L4-L5. He states that the findings are degenerative in nature and not causally related to the subject accident. In his report regarding his review of the MRI of the plaintiff's left knee, taken on December 6, 2009, Dr. Decker states that the posterior cruciate ligament is intact, the anterior cruciate ligament demonstrates degeneration and no tear and there were no tears of the lateral or medial meniscus. He states that any findings are longstanding and not related to the subject accident. With respect to the MRI of the right knee, he states that there were no tears or fractures and only diffuse anterior cruciate ligament degeneration not related to the subject accident. As to the MRI of the plaintiff's left shoulder, Dr. Decker found AC joint arthropathy and fraying of the infraspinatus with tendinopathy of the supraspinatus. He states that there were no tears or fractures and that the findings are long-standing and degenerative in nature and not related to the subject accident.

Dr. Christopher J. Cassels, a board certified orthopedic surgeon retained by the defendants, examined Mr. Fabara on October 12, 2011. The plaintiff presented with pain in his neck, right shoulder, left shoulder, low back, left knee and right knee. He noted that the plaintiff did not return to work and was confined to his home for three months following the accident. Dr. Cassels performed objective and quantified range of motion tests and found that there were no significant limitations of range of motion of the cervical spine, right shoulder, lumbar spine and right knee. During the left knee examination, the plaintiff complained severely of back discomfort and knee discomfort. With respect to the left knee and left shoulder, Dr. Cassels states that he could not obtain reliable results because the plaintiff refused to cooperate, and intentionally attempted to influence the test results. He states that the plaintiff exhibited findings consistent with symptom magnification.

In his analysis, Dr. Cassels states that based upon his review of the plaintiff's medical records and his clinical examination, the plaintiff did not sustain any significant or permanent injury to any of the parts of his body complained of. Based on his review of the records he states that the plaintiff did not complain of pain to his knees or shoulders at any time until two months following the accident when he saw Dr. Hausknecht. Dr. Cassels states that there were no significant abnormal objective findings only findings consistent with system magnification and no objective findings to substantiate the plaintiff's subjective complaints. He states that in his opinion, the plaintiff has no functional disability, no permanency, and is

fully functional to perform all normal daily activities including working without restrictions.

In his examination before trial, held on August 23, 2011, the plaintiff stated that while he was riding his bicycle on Broadway, between 47th and 48th Streets, he was struck by the taxicab operated by the defendant. At the moment of contact the bicycle flew and he landed on the ground. He left the scene in an ambulance and was transported to the emergency room at Elmhurst Hospital where he had complaints of pain to his neck and back. After x-rays were taken he was treated and discharged the same day. A few days later he saw his primary physician, Dr. Chasky, at which time he had additional complaints of pain to his left knee and left shoulder. He was then referred by his attorney to Dr. Lambert at HealthMakers who sent him for MRIs and also commenced physical therapy, chiropractic and acupuncture treatment sessions. He went for treatments at a rate of three or four times per week for five months. He stated that he also was seen by a specialist for injuries to his shoulder and knee but he never underwent any surgical procedures. He stated that he was not employed at the time of the accident but he went back to work in February 2010 and at the time of the deposition was employed as a doorman. He stated that he still had pain in his knees, left shoulder, back, and neck.

Defendant's counsel contends that the medical reports of Drs. Decker and Cassels together with the copies of plaintiff's medical records from his treating physicians 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 Richard Gutierrez, Esq., submits his own affirmation as well as the affirmed medical report of Dr. James from HealthMakers, the affirmed report of Dr. Tyorkin, the affirmed report of Dr. Hausknecht, and the plaintiff's affidavit dated November 16, 2012.

The plaintiff was initially examined by Dr. Harold James at HealthMakers on November 23, 2009, two weeks after his accident. In his affirmed report Dr. James states that plaintiff's had complaints of pain in his neck, left

shoulder, lower back, left hip and left knee. At that time an examination revealed restricted range of motion of the neck and back. Dr. James sated that there was a causal relationship between the plaintiff's symptoms and the accident of November 6, 2009. The plaintiff was referred for MRIs and physical therapy. He subsequently received physical therapy and acupuncture treatments with Dr. James and chiropractic treatments with Dr. Lambert.

The plaintiff was examined by neurologist, Dr. Hausknecht, who states in his affirmed report that he examined the plaintiff on January 4, 2010. On that date the plaintiff exhibited loss of range of motion of the cervical spine and thoracolumbar spine. After reviewing the MRIs he found that the plaintiff had cervical disc bulge and disc herniations at L4-5 and L5-S1, as well as tears of the ACL and LCL of the left knee and tears in the left shoulder. Dr Hausknecht examined the plaintiff again on September 27, 2012. His objective and quantified range of motion testing revealed significant limitations of range of motion of the cervical spine, thoracic and lumbar spine. Dr. Hausknecht stated that in his opinion the plaintiff's injuries were related to the subject accident and, based upon the duration of his symptoms, he sustained a permanent partial limitation and a permanent consequential limitation of use of his cervical and lumbosacral spine.

Dr. Tyorkin a board certified orthopedist examined the plaintiff on November 7, 2012. His objective range of motion testing showed restricted range of motion of the cervical spine, left shoulder, lumbar spine, left hip, left knee and right knee. He states that the plaintiff sustained a permanent partial impairment of the cervical spine, lumbar spine, left shoulder, right knee and left knee. He states that the nature of his injuries are permanent.

In his affidavit, the plaintiff states that although his chief complaint at the hospital was pain in his lower back, the pain in his neck, shoulder, hip and knees developed over the following days. He states that he underwent a course of physical therapy from November 2009 through April 4, 2012 when he had to stop attending because his no-fault benefits were terminated and he could not afford to pay out of pocket. He states that he continues to have pain in his neck, lower back, left shoulder, left hip and left knee which interferes with his ability to perform his daily activities.

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. Decker and Cassels were sufficient for defendants 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]).

Although Dr. Cassels stated that the limitations to the plaintiff's left shoulder and left knee may be due to "symptom magnification" he sufficiently explained the basis for his conclusion that the limitations that were noted were, in fact, self-limited (cf. Reitz v Seagate Trucking, Inc., 71 AD3d 975 [2d Dept. 2010]).

However, this Court finds that the plaintiff raised triable issues of fact by submitting the affidavits of Drs. James, Hausknecht, and Tyorkin attesting to the fact that the plaintiff had sustained significant limitations in range of motion of the cervical spine, lumbar spine, left shoulder, right knee and left knee, 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]). 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 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]).

Further, plaintiff's treating doctors' findings that his injuries were traumatic and causally related to the subject accident are sufficient to implicitly address the defendants' contention that the injuries were degenerative (see Khaimov v Armanious, 85 AD3d 978 [2d Dept. 2011]; Fraser-Baptiste v New York City Tr. Auth., 81 AD3d 878 [2d Dept 2011]; Harris v Boudart, 70 AD3d 643[2d Dept 2010]).

In addition, the plaintiff adequately explained the gap in his treatment by submitting his own affidavit stating that no-fault had stopped his benefits and he could no longer afford to pay for treatment out of pocket Abdelaziz v Fazel, 78 AD3d 1086 [2d Dept. 2010]; Tai Ho Kang v Young Sun Cho, 74 AD3d 1328 [2d Dept. 2010]; Domanas v Delgado Travel Agency, Inc., 56 AD3d 717 [2d Dept. 2008]).

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

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

Dated: January 7, 2013
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.