

Butt v F.W. Transit Inc.
2013 NY Slip Op 30080(U)
January 16, 2013
Sup Ct, Queens County
Docket Number: 21065/2011
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

ZAHID BUTT, Index No.: 21065/2011
Plaintiff, Motion Date: 01/11/13
- against - Motion No.: 19
F.W. TRANSIT INC and BIDIBY YOUAN, Motion Seq.: 1
Defendants.

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The following papers numbered 1 to 17 were read on this motion by
defendants F.W. TRANSIT INC and BIDIBY YOUAN, for an order
pursuant to CPLR 3212 granting the defendants summary judgment
and dismissing the plaintiff's complaint on the ground that
plaintiff has not sustained a serious injury within the meaning
of Insurance Law §§ 5102 and 5104:

Papers Numbered

Notice of Motion-Affidavits-Exhibits.....1 - 7
Affirmation in Opposition-Affidavits-Memo of Law.....8 - 14
Reply Affirmation.....15 - 17

This is a personal injury action in which plaintiff, Zahid
Butt, age 40, seeks to recover damages for injuries he allegedly
sustained on April 7, 2011, as a result of a motor vehicle
accident that occurred when his vehicle was struck by the taxi
cab owned by F.W. Transit, Inc. and operated by defendant Bidiby
Youan. The accident took place on West 40th Street near its
intersection with 6th Avenue, New York County, New York.

Defendants F.W. TRANSIT INC and BIDIBY YOUAN, now move for
an order pursuant to CPLR 3212 dismissing the plaintiff's
complaint on the ground that the injuries claimed by the
plaintiff fail to satisfy the serious injury threshold
requirement of Section 5102(d) of the Insurance Law. In support
of the motion, the defendants submit an affirmation from counsel,
Thomas Torto, Esq; a copy of the pleadings; plaintiff's verified

bill of particulars; a copy of the transcript of plaintiff's examination before trial; a copy of the affirmed medical report of neurologist, Dr. Edward M. Weiland and the affirmed medical report of Dr. Salvatore Corso.

In his verified bill of particulars, the plaintiff states that as a result of the accident he sustained a disc herniation at T1-T12, a disc protrusion at C4-C5, an annular disc bulge at L4-L5. The plaintiff contends that he sustained a serious injury as defined in Insurance law §5102(d).

The plaintiff was seen for an independent orthopedic evaluation on May 24, 2012 by orthopedist, Dr. Corso, a physician retained by the defendant. At that time the plaintiff reported to Dr. Corso that he injured his neck, right hand, back and right leg. He presented with pain in his neck, right hand, back and right leg. Dr. Corso performed quantified and comparative range of motion tests. On examination he found no limitations of range of motion of the plaintiff's cervical spine, thoracolumbar spine and right knee. He did, however, report range of motion limitations of the right wrist. Dr. Corso's diagnosis was cervical and thoracolumbar sprain - resolved; status post right carpal tunnel syndrome; and right knee sprain - resolved. He states that based upon his examination there is no permanency as a result of the reported incident regarding the cervical, thoracic, lumbar spine or right knee. He does state, however, that the plaintiff remains with the symptoms noted on examination of the right wrist.

Dr. Weiland, a board certified neurologist, evaluated the plaintiff at the request of the defendants on May 17, 2012. Plaintiff told Dr. Weiland that on April 7, 2011 he was working as a limousine driver when his vehicle was impacted by a yellow taxi cab. He told Dr. Weiland that he was experiencing pain in his neck, mid-thoracic and lower back as well as in the right wrist. Plaintiff also stated that he did not lose any time from work due to the subject accident. Dr. Weiland performed quantified and comparative range of motion tests. He found no limitations of range of motion of the cervical spine and thoracic spine. The plaintiff complained of pain with light palpation of the right wrist. Dr. Weiland's diagnosis was cervical sprain/strain - resolved; thoracic sprain/strain - resolved; lumbosacral sprain/strain - resolved history of contusion and possible Carpal Tunnel Syndrome, right wrist - resolved and normal neurologic examination. Dr. Weiland states that based upon his evaluation, the plaintiff was not experiencing any neurological deficits at that time. He states that he found no primary neurologic disability and no neurologic residual or

permanency related to the injuries sustained in the subject accident.

Defendants' counsel contends that the affirmed medical reports of Drs. Weiland and Corso are sufficient to establish, prima facie, that the plaintiff has not sustained a permanent loss of a body organ, member, function or system; that he has not sustained a permanent consequential limitation of a body organ or member or a significant limitation of use of a body function or system. Counsel also contends that the plaintiff did not sustain a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff, for not less than 90 days during the immediate one hundred days following the occurrence, from performing substantially all of his usual daily activities.

In opposition, plaintiff's attorney, Andrew B. Siegel, Esq., submits his own affirmation as well as an affidavit from the plaintiff dated November 1, 2012; the affirmed medical report of Dr. Ignatius Daniel Roger; the affirmed medical report of Dr. Sohal; and an affirmed report from radiologist, Dr. Myrna Nussbaum.

Dr. Nussbaum reviewed the plaintiff's MRI images of the lumbar spine performed on November 20, 2012. She found a left paracentral disc herniation at the T11-T12 level and an annular bulge at L4-L5. The MRI images of the cervical spine indicated a disc protrusion at C4-C5.

Dr. Sohal states that he examined the plaintiff on April 13, 2011, one week post-accident. At that time the plaintiff had pain in the neck, lower back, right hand and wrist. Dr. Sohal found diminished range of motion of the cervical spine, lumbar spine and pain in the right and left wrists. He also treated the plaintiff on May 9, 2011, June 6, 2011, June 16, 2011, August 3, 2011, November 10, 2011, May 4, 2012 and July 11, 2012, August 10, 2012, August 22, 2012, October 10, 2012. During this time the plaintiff continued with physical therapy and continued to have pain in the injured areas. He also diagnosed the plaintiff with carpal tunnel disorder and referred him to a hand surgeon. The plaintiff underwent right wrist surgery on August 16, 2012. At the plaintiff's most recent medical examination of October, 2012, Dr. Sohal found that the plaintiff was partially disabled with respect to his right wrist and permanently partially disabled with respect to his neck and low back. He stated that the injuries are causally related to the accident of April 7, 2011. He concludes that the plaintiff sustained a consequential limitation of the use of a body organ and/or member and a significant limitation of use of a body function and system.

Dr. Roger first treated the plaintiff for injuries sustained in the subject accident on December 28, 2011 with respect to the complaints of pain in his wrists. He diagnosed the plaintiff with carpal tunnel syndrome. He performed surgery on the plaintiff's right wrist on August 16, 2012. He states that the carpal tunnel syndrome is causally related to the subject accident. Dr. Roger also states that when last seen on October 10, 2012, the range of motion the plaintiff's right wrist was significantly limited.

In his affidavit, the plaintiff states that he was involved in a motor vehicle accident on April 7, 2011 when his vehicle was cut off by a yellow taxi cab. He states that he felt pain almost immediately in his neck, upper and lower back and right wrist and hand. He states that his wrist was bent as he was gripping the steering wheel when his body was thrown forward upon impact. He sought treatment with Drs. Sohal and Gupta. Dr. Roger performed surgery on his wrist. He states that he is still under the care of Drs. Sohal and Roger. He states that he still continues to experience pain in his low back, right shoulder right hand right leg neck and middle back. He has pain in his right hand on a daily basis.

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 defendant failed to make a prima facie showing that the plaintiff Zahid Butt 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]). The affirmed medical report of the defendant's examining orthopedist, Dr. Salvatore Corso, relied on by the defendants, clearly set forth that upon his examination of the defendant on May 24, 2012, he found significant limitations in the ranges of motion of the defendant's right wrist. He found 66% reduction in ulnar deviation, 40% in volar flexion and 15% in dorsiflexion. Therefore, Dr. Corso's report is insufficient to eliminate all triable issues of fact (see Artis v Lucas, 2011 NY Slip Op 03983[2d Dept. 2011]; Borras v Lewis, 79 AD3d 1084 [2d Dept. 2010]; Smith v Hartman, 73 AD3d 736; Leopold v New York City Tr. Auth., 72 AD3d 906 [2d Dept. 2020]; Catalan v G & A Processing, Inc., 71 AD3d 1071[2d Dept. 2010]; Croyle v Monroe Woodbury Cent. School Dist., 71 AD3d 944 [2d Dept. 2010]; Kim v Orourke, 70 AD3d 995 [2d Dept. 2010]; Kjono v Fenning, 69 AD3d 581[2d Dept. 2010]; Loor v Lozado, 66 AD3d 847 [2d Dept. 2009]; Powell v Prego, 59 AD3d 417 [2d Dept. 2009]; Buono v. Sarnes, 66 AD3d 809[2d Dept. 2009]; Bagot v Singh, 59 AD3d 368 [2nd Dept. 2009]).

Thus, the defendant failed to make a prima facie showing of entitlement to judgment as a matter of law, that plaintiff had not had sustained serious injuries within the meaning of Insurance Law § 5102(d), tendering sufficient evidence to demonstrate the absence of any material issues of fact(see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851[1985]; Reynolds v Wai Sang Leung, 78 AD3d 919 [2d Dept. 2010]).

In any event, even had the defendant made a sufficient prima facie case, this Court finds that the plaintiff raised triable issues of fact by submitting the affirmed medical report of plaintiff's treating physicians, Drs. Roger, Sohal and Nussbaum, attesting to the fact that the plaintiff had significant limitations in range of motion of the spine and right wrist 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]).

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 16, 2013
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.