

Almeida v Ben Gor Taxi Inc.

2013 NY Slip Op 30251(U)

February 4, 2013

Supreme Court, Queens County

Docket Number: 16089/11

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

GASTAO G. ALMEIDA, Index No.: 16089/11
Plaintiff, Motion Date: 01/23/13
- against - Motion No.: 5
BEN GOR TAXI INC., and MD ANWAR Motion Seq.: 2
HOSSAIN,

Defendants.

- - - - - x

The following papers numbered 1 to 15 were read on this motion by defendants, BEN GOR TAXI INC. and MD ANWAR HOSSAIN, for an order pursuant to CPLR 3212 granting defendants summary judgment and dismissing the complaint of GASTAO G. ALMEIDA 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-Memo of Law.....	1 - 6
Affirmation in Opposition-Affidavits.....	7 - 12
Reply Affirmation.....	13 - 15

In this negligence action, plaintiff, Gastao G. Almeida, seeks to recover damages for personal injuries he sustained as a result of a motor vehicle accident that occurred on April 17, 2011, between the plaintiff's vehicle and the vehicle owned by defendant, Ben Gor Taxi Inc. and operated by defendant, Md Anwar Hossain. The accident took place on Queens Plaza North near its intersection with Queens Plaza East in Queens County, New York, when the defendants' vehicle struck plaintiff's vehicle in the rear. Plaintiff was allegedly injured as a result of the accident.

The plaintiff commenced this action by filing a summons and complaint on July 8, 2011. Issue was joined by service of defendants' verified answer dated August 10, 2011. Plaintiff's motion for partial summary judgment on the issue of liability was granted by this court by order dated January 12, 2012. 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, James E. Minogue, Esq; a copy of the pleadings; plaintiff's verified bill of particulars; the affirmed medical reports of radiologist, Dr. Jeffrey N. Lang and board certified orthopedist, Dr. Gregory Mantalbano; uncertified records from the emergency room of Mount Sinai of Queens Hospital; unaffirmed medical reports of Dr. Andranik Khatchatrian from 2007 which discuss the plaintiff's prior accident and injury to his left shoulder in 2004; and a copy of the transcript of the examination before trial of the plaintiff.

In his verified Bill of Particulars, plaintiff, age 72, states that he sustained, inter alia, disc herniations at C3-C4, C4-C5, C5-C6, C6-C7 and L4-L5; disc bulges at L2-L3, L3-L4 and L4-L5; complete tear of the rotator cuff of the left shoulder; arthroscopic surgery of the left shoulder on July 15, 2011 and; diskectomy on August 31, 2011.

Plaintiff contends that as a result of the subject accident 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. Gregory Mantalbano, a board certified orthopedic surgeon retained by the defendant, examined Mr. Almeida on April 13, 2012. He presented with pain to his left shoulder, neck and lower back. The doctor noted that the plaintiff was involved in a prior accident in 2004 when he slipped and fractured his left clavicle. The plaintiff explained to the doctor that as a result of the subject accident he injured his left leg, left shoulder,

lower back and neck. He told Dr. Mantalbano that he underwent surgery on the left shoulder on July 15, 2011.

Dr. Montalbano performed objective and quantified range of motion tests and found that there were no significant limitations of range of motion of the plaintiff's cervical spine and right shoulder. He did find limitations of range of motion of the lumbar/thoracic spine and the plaintiff's left shoulder. Dr. Montalbano states that it is his impression that as a result of the accident the plaintiff did not sustain anything more than cervical and lumbar strain/sprain and that plaintiff did not sustain a permanent injury to the cervical or lumbar spine. He opines that the disc bulging and herniations are chronic and degenerative consistent with plaintiff's age and history of diabetes and unrelated to the accident. With respect to the plaintiff's left shoulder, the doctor states that in his opinion the plaintiff did not sustain a permanent injury to the left shoulder as a result of the accident. He states that the plaintiff has a pre-existing condition of a chronic rotator cuff tear with prior surgery and degenerative joint disease which is unrelated to the accident in question. He states that there are no reported findings which would suggest a recent traumatic injury to the left shoulder. He states that the plaintiff had a pre-existing condition of a chronic retracted rotator cuff tear and degenerative labrum tearing with prior surgery which has failed and that in the subject accident he did not sustain any more than a sprain/strain injury to the left shoulder.

Radiologist, Dr. Lang states in his affirmed report that the MRI of the plaintiff's left shoulder showed evidence of prior rotator cuff surgery. He states that there was evidence of a complete tear of the infraspinatus and supraspinatus tendons. He states that the findings are chronic and pre-date the accident of April 17, 2011. His review of the MRI of the lumbosacral spine shows disc dessication and disc bulging at L2-L3, L3-L4 and L4-L5. He states, however, that the findings are chronic and degenerative and are also unrelated to the accident of April 17, 2011.

In his examination before trial, taken on February 17, 2012, plaintiff testified that he was not employed at the time of the accident and has not worked since 2005 when he was employed as a parking attendant. He stated that his vehicle was struck with a hard impact in the rear by the vehicle operated by the defendant. At the time of impact plaintiff hit his left knee under the dashboard panel. He was transported by ambulance to the emergency room at Mount Sinai Hospital in Queens County where he was treated and released the same day. Subsequently he sought

treatment with an orthopedist, Dr. Mian. He stated that Dr. Mian took x-rays and MRIs and recommended that he have surgery on his shoulder and back. Mr. Almeida began a course of physical therapy at Cornell Physical Therapy which ended in December 2011. He was treated for pain to his neck, lower back, left knee and left shoulder. He stated that Dr. Mian performed surgery on his left shoulder on July 15, 2011 at Beth Israel Hospital. Thereafter, he underwent a diskectomy at Lenox Hill Hospital also performed by Dr. Mian. He states that he still treats with Dr. Mian and sees him approximately every two months. He testified that he was confined to his house for two months immediately following the accident. He states that he still has pain on a daily basis in his neck, left shoulder, lower back and left knee as a result of the injuries sustained in the subject accident. He testified that he had a prior injury to his left shoulder in 2004 when he slipped and fell while employed as a parking attendant. He stated that he had an operation on his left shoulder after the slip and fall accident and he had no pain in that shoulder up until the time of the subject accident.

Defendant's counsel contends that the medical reports of Dr. Montalbano and Dr. Lang stating that the defendant's injuries were chronic and pre-dated the subject accident together with the plaintiff's testimony that he was only confined to his home for two months after the accident, are sufficient to demonstrate 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. Counsel argues that plaintiff's tear of the supraspinatus tendon of the left shoulder was documented by defendant's experts to have been pre-existing and not be caused by recent trauma and not causally related to the subject accident. In addition, counsel argues that his experts state that the pain to the defendant's back and neck are due to dessication and degeneration and are not associated with the subject accident.

In opposition, plaintiff's attorney William G. McCabe, Esq., submits his own affirmation as well as the affidavit of the plaintiff dated October 4, 2012, the affirmations and medical reports of Drs. Mian, Komerath, Rabinovici, Lubitz, Hu and Van de Walle and a copy of the plaintiff's bill of particulars.

Dr. Shahid Mian first examined the plaintiff for an orthopedic consultation on April 21, 2011 with respect to his accident of April 17, 2011. At that time the plaintiff's chief complaint was to his left shoulder and low back. On examination he found limitations of range of motion of the plaintiff's lumbar spine and left shoulder. His initial diagnosis was lower back syndrome and tear of the rotator cuff impingement syndrome of the left shoulder. Dr. Mian recommended that the plaintiff undergo a course of physical therapy. Thereafter, Dr. Mian treated the plaintiff on May 9, 2011, June 6, 2011, June 27, 2011 and performed arthroscopic surgery on the plaintiff's left shoulder on July 15, 2011. His post-operative diagnosis was complete tear of the rotator cuff. He continued treating the plaintiff on July 25, 2011, August 9, 2011 and operated on the defendant's back on August 31, 2011 at which time he performed a diskectomy for a herniated disk at the L4-L5 level. Dr. Mian re-examined the plaintiff on October 15, 2012 at which time the plaintiff still had pain in his left shoulder and lower back. Range of motion testing at that time revealed significant limitations of range of motion of the left shoulder and lower back. He states that the injuries to the plaintiff's left shoulder and lower back are permanent in nature and causally related to the accident of April 17, 2011.

Dr. Jay Komerath also examined the plaintiff beginning on April 27, 2011 through December 9, 2011. Dr. David Rabinovici, a neurologist, treated the plaintiff on May 31, 2011, June 30, 2011, July 26, 2011 and September 15, 2011.

Radiologist, Dr. Lubitz stated that his review of the left shoulder MRI showed a full thickness tear of the supraspinatus tendon and a tear of the anterior and posterior labrum. He stated in his opinion the injury was causally related to the accident of April , 2011. His review of the lumbar spine MRI showed disc bulges at L2-L3, L3-L4 and L4-L5 which he also attributed to be causally related to the subject accident.

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]).

As stated above, the affirmed medical report of the defendant's examining orthopedist, Dr. Montalbano, relied on by the defendant, clearly set forth that upon his examination of the defendant he found significant limitation in the range of motion of the defendant's left shoulder. Therefore, Dr. Montalbano's report is insufficient to eliminate all triable issues of fact (see Katanov v County of Nassau, 91 AD3d 723 [2d Dept. 2012]; Artis v Lucas, 84 AD3d 845 [2d Dept. 2011]; Borras v Lewis, 79 AD3d 1084 [2d Dept. 2010]; Smith v Hartman, 73 AD3d 736 [2d Dept. 2010]; 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]). While Dr. Montalbano explained that the plaintiff did not sustain an injury to his left shoulder and lumbar spine as a result of this accident and that both conditions were not trauma related but rather were due to a prior accident or were chronic or degenerative, he did not demonstrate that the limitations he noted were the result of the prior accident, rather than from exacerbations caused by the subject accident as alleged by the plaintiff in his bill of particulars (see Little v. Ajah, 97 AD3d 801 [2d Dept. 2012]; Edouazin v Champlain, 89 AD3d 892 [2d Dept. 2011]; Pero v Transervice Logistics, Inc., 83 AD3d 681 [2d Dept. 2011]; Washington v. Asdotel Enters., Inc., 66 AD3d 880 [2d Dept. 2009]). Thus, the defendant failed to make a prima facie showing of entitlement to judgment as a matter of law that plaintiff did not sustain a serious injury 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, this Court finds that the plaintiff raised triable issues of fact by submitting the affidavits of Drs. Mian and Lubitz attesting to the fact that the plaintiff had sustained significant limitations in range of motion of the left shoulder and lumbar spine both contemporaneous to the accident and in a recent examination, and concluding that the plaintiff's limitations were 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: February 4, 2013
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.