

Hernandez v Azam

2013 NY Slip Op 30252(U)

January 31, 2013

Supreme Court, Queens County

Docket Number: 28230/2010

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

JOHNNY HERNANDEZ, Index No.: 28230/2010
Plaintiff, Motion Date: 01/17/13
- against - Motion No.: 12
Motion Seq.: 1

NAVEED AZAM,
Defendant.

- - - - - x

The following papers numbered 1 to 12 were read on this motion by defendant, NAVEED AZAM, for an order pursuant to CPLR 3212 granting defendant summary judgment and dismissing the complaint of JOHNNY HERNANDEZ 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, Johnny Hernandez, seeks to recover damages for injuries he sustained as a result of a motor vehicle accident that occurred on January 3, 2010 on West 17th Street and 6th Avenue, New York County, New York. At the time of the accident, the plaintiff was a pedestrian walking on Sixth Avenue who was struck by the livery cab owned and operated by the defendant who was making a left turn onto 17th Street.

The plaintiff commenced this action by filing a summons and complaint on November 9, 2010. Issue was joined by service of defendant's verified answer dated February 4, 2011. A note of

issue was filed by the plaintiff on March 9, 2012. The matter is on the calendar in the Trial Scheduling Part for April 4, 2013. 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, Bonnie S. Kurtz, Esq; a copy of the pleadings; plaintiff's verified bill of particulars; the affirmed medical report of board certified orthopedist, Dr. Robert Israel; a copy of the transcript of the examinations before trial of the plaintiff and the defendant as well as a signed statement of Naveed Azam.

In his verified Bill of Particulars, plaintiff states that he sustained, inter alia, disc bulges at L4-5 and L5-S1. 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. Robert Israel, a board certified orthopedic surgeon retained by the defendant, examined Mr. Hernandez on August 16, 2011. The plaintiff, age 26, stated that when he was struck by the defendant's vehicle he injured his lower back, right knee and right arm. At the time of the examination the plaintiff complained of pain to the lower back, right knee and right arm. Dr. Israel 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, lumbar spine, right knee or right arm. His impression was resolved sprain of the lumbar spine, resolved sprain of the right knee and resolved sprain of the right arm. Dr. Israel states, "based on my examination from an orthopedic point-of-view, the plaintiff has no disability as a result of the accident of record."

In his examination before trial, taken on July 7, 2011, plaintiff testified that on the night of the accident he was walking to the subway after completing his shift as a busboy. He was walking north on Sixth Avenue crossing at the intersection of

17th Street when he was struck by the defendant's vehicle which was making a left turn onto 17th Street. He testified that he felt the impact on his right leg and he also immediately felt pain to his back. He left the scene in an ambulance and was transported to the emergency room at St. Vincent's Medical Care Center. After being given x-rays he was treated and released the same day. On January 15, 2011, one week after the accident, he sought treatment with Dr. Hoffman, a chiropractor recommended by his attorney. He stated that he treated with Dr. Hoffman for pain to his neck, back and knee for 13 months finishing in March 2011. He stated that he was also referred for injections to help alleviate the pain in his back. He stated that he stopped going to physical therapy when he was told that the treatments would temporarily alleviate the pain but would not permanently improve his condition. With regard to work, he testified that as a result of the accident he missed three days of employment and then returned to the same job working the same number of hours. He stated however, that his back pain has not improved and he still needs to take Tylenol or Advil which he purchases over the counter.

Defendant's counsel contends that the medical report of Dr. Israel together with the plaintiff's testimony that he returned to work full time, three days after the accident, is 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.

In opposition, plaintiff's attorney Michael T. Kusz, Esq., submits his own affirmation as well as the affidavit of the plaintiff dated December 19, 2012, the affirmation of Dr. Stephen Wilson, the plaintiff's records from Alignment Chiropractic, P.C., the affirmation of Dr. Arden M. Kaisman, and a copy of the plaintiff's bill of particulars.

Dr. Wilson first examined the plaintiff on January 15, 2010, one week post accident. Plaintiff told Dr. Wilson that he was a pedestrian struck by a Lincoln Town Car on January 3, 2010. He told the doctor that he was struck on his right side, thrown in the air, and then fell to the ground in a seated position. He reported injuries to his lower back as well as his neck, upper back, mid back, right leg right knee and right thigh. At the time of this initial evaluation, Mr.

Hernandez complained of constant back pain. Upon an objective and comparative evaluation of the plaintiff's range of motion, Dr. Wilson found that the plaintiff revealed significant limitations of range of motion of the lumbar spine and cervical spine. He was then advised to commence physical therapy. Dr. Wilson subsequently administered trigger point injections to the plaintiff's back for relief of pain. A subsequent MRI conducted by radiologist, Dr. Steven Brownstein revealed diffuse bulging discs at L4-L5 and L5-S1. Dr. Wilson states that plaintiff underwent physical therapy under his care beginning on January 11, 2010 and continuing for a course of approximately 160 visits through March 16, 2012. Dr. Wilson states that at that time he determined that any further physical therapy and chiropractic treatment would be merely palliative in nature.

Dr. Wilson stated he recently examined Mr. Hernandez for a follow-up consultation on July 27, 2012. Plaintiff continued to complain of constant lower back pain, neck pain and right knee pain. Objective range of motion testing revealed that plaintiff still had significant limitations of range of motion of the lumbar spine and cervical spine. Dr. Wilson opines that the injuries sustained by the plaintiff resulted from the automobile accident in question and are serious and significant and resulted in a permanent consequential limitation of use and significant limitation of the plaintiff's lumbar spine. He states three years after the accident the conditions have become chronic and permanent in nature.

The plaintiff also submits the affirmation of radiologist, Dr. Steven Brownstein who states that the MRI studies of the plaintiff's lumbar spine taken on February 26, 2010 show diffuse bulging at the L4-L5 and L5-S1 discs.

Dr. Kaisman states in his affirmed report that he treated plaintiff several times for pain by administering lumbar epidural steroid injections. Dr. Kaisman also conducted a physical examination of plaintiff on November 29, 2012 at which time he found that the plaintiff had significant restrictions of range of motion of the lumbar spine. He states that the plaintiff's injuries were causally related to the subject accident and resulted in a permanent consequential limitation and a significant limitation of use of plaintiff's lumbar spine.

Plaintiff states in his affidavit that after the accident he was treated by Dr. Zane Hoffman, Dr. Stephen

Wilson, and by Dr. Arden Kaisman, a pain management specialist. He states that he is still in constant pain and severely limited in his ability to do many basic daily tasks as well as recreational activities that he previously did on a regular basis.

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 defendant, including the affirmed medical report of Dr. Israel was sufficient for defendant to meet its 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 affidavits of Drs. Wilson, Brownstein, and Kaisman attesting to the fact that the plaintiff had sustained significant limitations in range of motion of the cervical spine and lumbar spine 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]).

In addition, Dr. Wilson adequately explained the gap in the plaintiff's treatment by stating that in his opinion 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 defendants' motion for an order granting summary judgment dismissing plaintiff's complaint is denied.

Dated: January 31, 2013
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.