

Griffith v Bohl

2013 NY Slip Op 30973(U)

May 3, 2013

Sup Ct, Queens County

Docket Number: 17327/2011

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

JEAN E. GRIFFITH and BRIAN J.
HAZELWOOD,

Plaintiffs,

- against -

CHRISTOPH H. BOHL and JULIA
FLOCKERMANN,

Defendants.

- - - - - x

The following papers numbered 1 to 17 were read on this motion by defendants CHRISTOPH H. BOHL and JULIA FLOCKERMANN, for an order pursuant to CPLR 3212 granting the defendants summary judgment and dismissing the complaint of plaintiff BRIAN J. HAZELWOOD 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 plaintiffs, JEAN E. GRIFFITH and BRIAN J. HAZELWOOD seek to recover damages for injuries they each allegedly sustained on March 12, 2011 when their vehicle was involved in a collision with the vehicle owned by CHRISTOPH H. BOHL and operated by defendant JULIA FLOCKERMANN. The accident took place on York Avenue at the intersection with East 77th Street, New York County, New York.

Defendants CHRISTOPH H. BOHL and JULIA FLOCKERMANN, now move for an order pursuant to CPLR 3212 dismissing the complaint of plaintiff BRIAN J. HAZELWOOD on the ground that the injuries

claimed by said plaintiff fail to satisfy the serious injury threshold requirement of Section 5102(d) of the Insurance Law. The action commenced by plaintiff JEAN E. GRIFFITH was discontinued by stipulation of the parties dated January 9, 2012.

In support of the motion, the defendants submit an affirmation from counsel, Tracy Morgan, 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 Dr. Jimmy Lim 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 grade two MCL tear and a lateral meniscal tear of the left knee requiring arthroscopic surgery; a labral tear and tear of the supraspinatus tendon of the left shoulder requiring arthroscopic surgery; disc herniations at L4-5, C5-6, C6-7, C4-5, C7-T1; disc bulge at L3-4, L5-S1 and C3-4. Brian Hazelwood states in the bill of particulars that he was confined to his bed for two weeks following the accident and was confined to his home and totally incapacitated from employment for one month following the accident. The plaintiff contends that he sustained a serious injury as defined in Insurance Law §5102(d).

Plaintiff, Brian J. Hazelwood, age 42, was deposed on May 9, 2012. At the time of the accident he was employed with Rudin Management as a mail clerk. He stated that when the accident occurred he was a front seat passenger in a vehicle being operated by his mother, Jean Griffith. He was coming from his home in Queens and going to see his brother in the hospital in Manhattan. They were proceeding on York Avenue and stopped at a traffic light intending to make a left turn onto at 77th Street when their vehicle was struck in the rear by the defendants' vehicle. Plaintiff states that as a result of the impact his left knee struck the dashboard and his left shoulder snapped out of place. He and his mother were able to drive home after the accident but went to the emergency room at Queens General Hospital that evening where he complained of pain to his lower back, neck, left shoulder and left knee. He stated that a CT Scan was performed at the hospital after which he was told he had a tear in his left shoulder and left knee. In June 2012 he was admitted to Downtown Presbyterian Hospital where he was treated for a blood clot to the left knee. He testified that he was told by a physician that the blood clot was related to the accident. He also attended physical therapy sessions in Jamaica and was treated by a chiropractor for pain to his neck and back for six months following the accident. He stated that he stopped physical

therapy treatments when his no-fault insurance was terminated. He stated that one of the providers at the physical therapy facility recommended that he see an orthopedist, Dr. Dowd regarding surgery. He had arthroscopic surgery on his left shoulder on May 12, 2012. Following that surgery, Dr. Dowd performed arthroscopic surgery to repair of a meniscal tear of plaintiff's left knee. He stated that he was not bedridden after the accident or confined to his home although he did stay home for a week after the knee surgery. He lost a week from work as a result of the accident.

The plaintiff was seen for an independent orthopedic evaluation on June 7, 2012 by orthopedist, Dr. Corso, a physician retained by the defendant. At that time the plaintiff reported to Dr. Corso that he injured his left shoulder, left knee, neck and back in the accident of March 2011. Dr. Corso performed objective and comparative range of motion testing and found that the plaintiff had no limitations of range of motion of the cervical spine, left shoulder, thoracolumbar spine and left knee. He diagnosed the plaintiff as status post left shoulder arthroscopy, resolved; status post cervical and lumbar sprain, resolved; and status post left knee arthroscopy, resolved. He concludes that based on his objective physical evaluation, there is no evidence of an orthopedic disability.

Defendant also submits an affirmed "operative review" from Dr. Jimmy Lim with regards to the left knee surgery performed on May 12, 2011 and the left shoulder surgery performed on June 2, 2011. Dr Lim states that he reviewed operative photos and the operative reports prepared by Dr. Dowd and states that in his opinion the findings of tears of the left shoulder and tears in the lateral meniscus were degenerative in nature and not traumatic findings. He states that there was no visualized evidence of traumatic injuries.

Defendants' counsel contends that the affirmed medical reports of Drs. Lim 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 who returned to work as a mail clerk one week after the accident 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, Stuart Sears Esq., submits his own affirmation as well as an affidavit from the plaintiff dated November 1, 2012; the affirmed medical report of Dr. Andrew Dowd and copies of plaintiff's hospital records from Queens Hospital Center and New York Downtown Hospital, operative records from Upper East Side Surgical, PLLC by Dr Andrew Dowd, medical records of Dr. Shiela Soman, Doshi Diagnostic Imaging Services as well as purported records of Wellness Center in Jamaica, Tahir Medical, Dr. Dublin, Physical Therapy, P.C., and LA Chiropractic. Dr. Dowd's own records were properly authenticated by him. However, the remaining medical and hospital records are not certified or authenticated and not in admissible form for purposes of this motion. Dr. Dowd's report, however, is admissible as it is properly affirmed and based upon his own examinations and surgical procedures.

Dr. Dowd states that the plaintiff was initially examined by him on May 2, 2011. On the date of the initial exam plaintiff complained of persistent and severe left shoulder and left knee pain. Dr. Dowd states that his examination revealed abnormal findings consistent with post-trauma. Plaintiff's MRIs revealed an MCL tear of the left knee and a torn rotator cuff of the left shoulder. He recommended arthroscopic left knee surgery and arthroscopic left shoulder surgery to alleviate the plaintiff's subjective physical complaints while restoring pre-accident function to his left knee and left shoulder. Dr. Dowd states that subsequent to his surgery plaintiff was taken to the New York Downtown Hospital for treatment of a superinfected Bakers Cyst in the left knee.

Dr. Dowd states that on February 25, 2013, he had the plaintiff undergo updated range of motion studies in relation to his left shoulder and left knee. His range of motion testing on that date revealed significant limitations of the left shoulder and left knee. Based upon his recent examination and his review of the plaintiff's medical records, Dr. Dowd opines that the plaintiff sustained a lateral meniscal tear of the left knee and labral tear of the left shoulder as a result of the motor vehicle accident of March 2011 and states that the injuries are consequential, significant and permanent in nature and causally related to the subject accident. In his opinion the plaintiff sustained consequential and significant loss of use of his left shoulder and left knee resulting from the subject accident. He also states that the plaintiff reached his maximum medical benefit from the surgeries and from his course of physical therapy and therefore further treatment was discontinued as any further treatment would only be palliative in nature. Dr Dowd also states that plaintiff is also subject to frequent exacerbations of symptoms as a result of chronic joint dysfunction that usually ensues.

In his affidavit, the plaintiff states that he was involved in a motor vehicle accident on March 12, 2011. At that time he states he was a front seat passenger in the vehicle being operated by his mother. He states that his mother's vehicle was heavily impacted from the rear while waiting for a red light in Manhattan. He state that he went to Queens General Hospital that evening where he was treated in the emergency room for pain to his head, neck, lower back, left shoulder and left knee. He then began a course of physical therapy with Dr. Sheila Soman. He was then referred to Dr. Dowd, an orthopedist who had MRI studies done which showed that the plaintiff sustained tears in his left shoulder and left knee. He underwent arthroscopic surgery of the left knee on May 12, 2011 and arthroscopic surgery of the left shoulder on June 2, 2011. He states that he received physical therapy for six months continuously and stopped when no fault discontinued payments. He states that he lost his job when he could no longer perform the physical tasks required. He states that he continues to be limited in the performance of his daily activities due to continuous pain in his left shoulder and left knee as well as his neck and lower back.

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 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 competent proof submitted by the defendant, including the affirmed medical reports of Drs. Lim and Corso, as well as the plaintiff's deposition testimony in which he stated that he returned to work one week following the accident, are sufficient to meet defendants' 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]; Carballo v Pacheco, 85 AD3d 703 [2d Dept. 2011]; Ranford v Tim's Tree & Lawn Serv., Inc., 71 AD3d 973 [2d Dept. 2010]).

However, this Court finds that the plaintiff raised triable issues of fact by submitting the affirmed medical report of plaintiff's treating physician, Dr. Dowd, attesting to the fact that the plaintiff had significant limitations in range of motion of the left shoulder 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]).

In addition, the plaintiff adequately explained the gap in his treatment by submitting his own affidavit, saying that no-fault had stopped his benefits and the affirmation of Dr. Dowd stating that any further treatments would be merely palliative in nature (see 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]; Black v Robinson, 305 AD2d 438 [2d Dept. 2003]).

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

ORDERED, that the defendants' motion for an order granting summary judgment dismissing the complaint of plaintiff BRIAN J. HAZELWOOD is denied.

Dated: May 3, 2013
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.