

Rodriguez v Joshua Taxi Inc.
2013 NY Slip Op 31469(U)
July 2, 2013
Supreme Court, Queens County
Docket Number: 16091/2011
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

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DAVID RODRIGUEZ, Index No.: 16091/2011
Plaintiffs, Motion Date: 05/30/13
- against - Motion Cal No: 147

JOSHUA TAXI INC. and GEON IL KIM, Motion Seq.: 3
Defendants.

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The following papers numbered 1 to 14 were read on this motion by
defendants JOSHUA TAXI INC. and GEON IL KIM, for an order,
pursuant to CPLR 3212, granting the defendants summary judgment
and dismissing the complaint of plaintiff, DAVID RODRIGUEZ, on
the ground that said plaintiff has not sustained 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 - 11
Reply Affirmation.....12 - 14

In this action for negligence, the plaintiff seeks to
recover damages for personal injuries he allegedly sustained as a
result of a motor vehicle accident that occurred on December 17,
2010, on Sixth Avenue near the intersection with West 18th Street,
New York County, New York. At the time of the accident plaintiff,
age 26, was making deliveries on his bicycle when he collided
with the mirror of the defendants' taxi cab causing him to be
pushed into a parked vehicle. Plaintiff claims that he was
sideswiped by the taxi operated by Geon Il Kim.

This action was commenced by the plaintiff by the service of
a summons and complaint dated July 8, 2011. Issue was joined by
service of defendants' verified answer dated July 27, 2011. A
note of issue was filed on October 3, 2012. By order dated

January 7, 2013, this Court granted the plaintiff's motion to strike the answer of the defendants on the issue of liability for failure to appear numerous times for a court ordered deposition. This matter is presently on the calendar of the Trial Scheduling Part on August 6, 2013 for a trial on damages only.

Defendants 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, Matthew Lyons, Esq; a copy of the pleadings; plaintiffs' verified bill of particulars; a copy of the plaintiff's record of surgical operation from the New Horizon Surgical Center; the affirmed radiological reports from Dr. Jeffrey N. Lang concerning the MRIs of the plaintiff's left shoulder, cervical spine and lumbosacral spine; the affirmed orthopedic report from defendant's retained orthopedist, Dr. Christopher J. Cassels; a copy of the police accident report; a copy of the emergency room records from Elmhurst Hospital Center; a copy of the plaintiff's treatment records from Central Park Physical Medicine; a copy of the transcript of the plaintiff's examination before trial; and a copy of the plaintiff's written claim for workers' compensation.

In his verified bill of particulars, the plaintiff alleges that as a result of the collision he sustained a partial cuff tear and labral tear of the left shoulder requiring arthroscopic surgery as well as a herniated discs of the cervical and lumbosacral spine. The plaintiff contends that he sustained a serious injury as defined in Insurance law §5102(d).

An MRI was conducted on the plaintiff's left shoulder on February 23, 2011. Defendants' retained radiologist, Dr. Lang reviewed the MRI study and found that there were no tears to the rotator cuff of the left shoulder, no post traumatic findings secondary to the accident of December 17, 2010, and only degenerative changes of the acromioclavicular joint. The MRI of plaintiff's cervical and lumbosacral spine was taken on February 21, 2011. Dr. Lang found that the discs of the cervical spine appeared to be all normal and there were no post-traumatic findings secondary to the subject accident. He did state that there was a bulging disc at L5-S1 but stated that this was not a post-traumatic finding, but rather, the disc dessication indicates that the bulge predates the accident.

Plaintiff was examined on March 19, 2012 by Dr. Christopher J. Cassels, an orthopedist retained by the defendants. Dr. Cassels states that plaintiff has not returned to work since the

accident. Dr. Cassels' range of motion testing showed that the plaintiff's range of motion of the cervical spine, left shoulder and lumbar spine were all within the normal limits. He states that it is his firm medical opinion that the plaintiff did not sustain a permanent or significant injury to the left shoulder, cervical or lumbar spine and no objective evidence of permanent disability. He states that plaintiff has no functional disability, no permanency and is fully functional to perform all normal daily activities including work without restrictions.

In his examination before trial taken on December 14, 2011, plaintiff testified that at the time of the accident he was employed by Hollywood Diner in Manhattan as a bicycle delivery person. He was traveling by bicycle on Sixth Avenue coming from the diner while making a delivery. As he entered the intersection at 18th Street the mirror of the defendants' taxi cab struck him and the bicycle causing him to fall off the bike and strike the pavement. When the police and an ambulance came to the scene plaintiff told the EMTs that he had pain in his shoulder, neck and back. He left the scene and walked back to the diner. After work he went by train to the emergency room at Elmhurst Hospital in Queens where he was given pain medication and released. One week later he began physical therapy treatments at Central Park Physical Medicine. He was treated there three times per week until May 2011 when he was referred to orthopedist, Dr. Seldes who performed arthroscopic surgery to repair a tear in his left shoulder. After his surgery he continued physical therapy with Dr. Sanchez in Queens. He stated that he did not return to work after the accident. He stated that he stayed in bed two or three months after the accident. His verified bill of particulars states that he was confined to bed for 12 weeks following the accident and was unable to work for 12 weeks as a result of the accident.

Defendants' counsel contends that the affirmed medical reports of Drs. Lang and Cassels are sufficient to establish, prima facie, that plaintiff has not sustained a permanent loss of a body organ, member, function or system; that she 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 him from performing substantially all of her usual daily activities for not less than 90 days during the immediate one hundred days following the occurrence.

In opposition, plaintiff's attorney, Ian Asch, Esq., submits his own affirmation; the affirmed medical report of Dr. Joyce Goldenberg; the affirmed medical report of orthopedic surgeon,

Dr. Seldes; the affirmed medical report of Dr. Augustin Sanchez; the affirmed medical reports of radiologist Dr. Thomas Kolb and radiologist, Dr. Jacob Lichy; and a copy of the transcript of the plaintiff's examination before trial.

Dr. Joyce Goldenberg, a board certified physiatrist, employed at Central Park Physical Medicine, states that she first examined plaintiff on December 22, 2010, a week after the accident. At that time he presented with pain in his neck, left shoulder and lower back. On examination he exhibited significant loss of range of motion of the cervical spine, lumbar spine and left shoulder. After reviewing the plaintiff's MRIs, Dr. Goldenberg diagnosed the plaintiff with a partial rotator cuff tear, cervical herniation at C6-C7 and herniations at L3 through S1. She states that the limitations of range of motion of the left shoulder, cervical spine and lumbosacral spine are directly and causally related to the accident of December 17, 2010. She states that the injuries to the plaintiff's left shoulder, are significant and constitute significant limitations of use of a body system or function.

Dr. Seldes, a board certified orthopedic surgeon, first examined the plaintiff on March 14, 2011 and found that plaintiff had restrictions of range of motion of the left shoulder. He performed arthroscopic surgery on May 23, 2011 which surgery revealed a rotator cuff tear and labral tear. He reexamined the plaintiff on March 20, 2013 at which time he still showed significant loss of range of motion of the left shoulder. Dr. Seldes states that the injury to plaintiff's left shoulder is causally related to the subject accident, that he did not evidence degenerative disease, and that all of his injuries were consistent with recent traumatic injury. He states that the plaintiff's injuries and limited mobility of the left shoulder constitute a significant and permanent limitation of use of the left shoulder.

Dr. Sanchez, first examined the plaintiff on June 8, 2011 following his surgery. His examination showed pain and restricted range of motion and pain to the plaintiff's cervical spine, lumbosacral spine and left shoulder. He reexamined the plaintiff on March 18, 2013 and found that plaintiff still had restricted range of motion of the cervical spine, lumbosacral spine and left shoulder. He states that plaintiff's injuries are a direct result of the injuries plaintiff sustained in the subject accident and that his injuries are permanent and constitute significant limitations of use of a body system or function.

Dr. Thomas Kolb, a radiologist, reviewed the MRI films taken of the plaintiff's left shoulder on February 23, 2011. At that time he diagnosed the plaintiff with a partial rotator cuff tear, a tear of the anterior genoid labrum and joint effusion. He states that he did not find evidence of degenerative disease.

Dr. Lichy reviewed the MRI films of the plaintiff's cervical spine and lumbosacral spine. He diagnosed the plaintiff with herniations of the ZC6-C7 disc and herniations of the discs at L3 through S1.

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]).

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, although Dr. Cassels' report indicates that plaintiff's range of motion of the cervical and lumbar spines and left shoulder are within normal limits, the plaintiff's bill of particulars clearly sets forth that the plaintiff was confined to his home for 12 weeks following the accident and unable to return to work since the accident. The plaintiff also testified at his examination before trial that he has been unable to return to work since the accident. Dr. Cassels states in his report that the plaintiff reported to him he could not return to work. However, Dr. Cassels did not relate his findings to the 90/180 category of serious injury for the period of time immediately following the subject accident. Thus, the defendant's motion papers failed to adequately address the plaintiff's claim, which was set forth in the bill of particulars, that he sustained a

medically-determined injury or impairment of a nonpermanent nature which prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than 90 days during the 180 days immediately following the subject accident (see Trivedi v Vural, 90 AD3d 1031 [2d Dept. 2011]; Reynolds v Wai Sang Leung, 78 AD3d 919 [2d Dept. 2010]; Udochi v H & S Car Rental Inc., 76 AD3d 1011 [2d Dept. 2010]; Strilcic v Paroly, 75 AD3d 542 [2d Dept. 2010]; Bright v Moussa, 72 AD3d 859 [2d Dept. 2010]; Encarnacion v Smith, 70 AD3d 628 [2d Dept. 2010]; Negassi v Royle, 65 AD3d 1311 [2d Dept. 2009]; Alvarez v Dematas, 65 AD3d 598 [2d Dept. 2009]). Therefore, Dr. Cassels' report is insufficient to eliminate all triable issues of fact. As such, 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, this Court finds that the plaintiff raised triable issues of fact by submitting the affirmed medical reports of Drs. Goldenberg, Seldes, Sanchez, Kolb and Lichy, attesting to the fact that the plaintiff sustained injuries to his left shoulder, cervical spine and lumbar spine as a result of the accident and finding that the plaintiff had significant limitations in range of motion of his left shoulder, 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 Perl v Meher, 18 NY3d 208 [2011]; David v Caceres, 96 AD3d 990 [2d Dept. 2012]; Martin v Portexit Corp., 98 AD3d 63[1st Dept. 2012]; Ortiz v Zorbas, 62 AD3d 770 [2d Dept. 2009]; Azor v Torado, 59 ADd 367 [2d Dept. 2009]). As a result this court finds that the plaintiff submitted competent medical evidence raising a triable issue of fact as to whether the alleged injuries to the cervical and lumbar regions of his spine and left shoulder constituted serious injuries under the permanent consequential limitation of use and significant limitation of use categories of Insurance Law § 5102 (d) (see Khavosov v Castillo, 81 AD3d 903[2d Dept. 2011]; Mahmood v Vicks, 81 AD3d 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 the complaint of plaintiff DAVID RODRIGUEZ is denied.

Dated: July 2, 2013
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.