

Kone v Gueye

2013 NY Slip Op 33739(U)

March 27, 2013

Sup Ct, Bronx County

Docket Number: 303848/2009

Judge: Lizbeth Gonzalez

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This opinion is uncorrected and not selected for official publication.

PART

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF BRONX:

Case Disposed	<input type="checkbox"/>
Settle Order	<input type="checkbox"/>
Schedule Appearance	<input type="checkbox"/>

KONE, YAYA

Index No. 0303848/2009

-against-

Hon. _____

GUEYE, BADARA

Justice.

The following papers numbered 1 to _____ Read on this motion, **SUMMARY JUDGMENT DEFENDANT**
 Noticed on **April 23 2012** and duly submitted as No. _____ on the Motion Calendar of _____

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this

Defendant's motion for summary judgment is decided in accordance with the annexed Decision and Order dated 3-27-13

Motion is Respectfully Referred to:
 Justice: _____
 Dated: _____

Dated: 3/27/13

Hon. *LG*, J.S.C.

HON. LIZBETH GONZÁLEZ

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 10

-----X

Yaya Kone,

Plaintiff,

DECISION and ORDER
Index No. 303848/2009

-against-

Badara Gueye, et al.,

Defendants.

-----X

Recitation of the papers considered in reviewing the underlying motion for summary judgment as required by CPLR § 2219(a):

Notice of Motion and annexed Exhibits and Affidavits.....	1
Affirmation in Opposition and annexed Exhibits.....	2
Reply Affirmation.....	3

Plaintiff Yaya Kone (“Kone”) alleges that he sustained a serious injury as a result of a four car accident that occurred on August 3, 2008 when his vehicle was rear-ended by defendants’ vehicles. Defendants Badara Gueye and Hillside Leasing Inc. (hereinafter defendants), move for summary judgment pursuant to CPLR 3212 on threshold grounds pursuant to Insurance Law § 5102(d). Co-defendant Ibrahima Amar submits an affirmation in support of defendants’ motion.

According to the plaintiff on the day of the accident he was transported by ambulance to the emergency room of St. Luke Hospital where he complained of pain to his neck and back. Plaintiff was released the same day. On August 13, 2008, plaintiff visited Dr. Dina Nelson where he received medical treatment and therapy for approximately six (6) months.

DISCUSSION

Summary judgment is a drastic remedy that a court should employ only in the absence of triable issues of fact. (*Andre v Pomeroy*, 35 NY 2d 361 [1974].) Insurance Law § 5102(d) sets forth the serious injury threshold:

a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a nonpermanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment.

The proponent of a motion for summary judgment must present evidence sufficient to show that no material issues of fact exist with regard to the threshold issue. (*Bray v Rosas* 29 AD3d 422 [1st Dept 2006]; *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Medical Center*, 64 NY2d 851 [1985].) Here, the burden rests on the defendant to establish by the submission of proof in admissible form that plaintiff did not suffer a serious injury. When a defendant's motion is sufficient to raise the issue as to whether a serious injury has been sustained by the plaintiff, the burden shifts to the plaintiff to produce prima facie evidence in admissible form to support the claim of serious injury. (*Perez v Rodriguez*, 25 AD3d 506 [1st Dept 2006]; *Licari v Elliot*, 57 NY2d 230 [1982]; *Kone v Senatore*, 65 NY2d 1017[1985].) Objective proof of the nature and degree of a

plaintiff's injury is required to satisfy the statutory threshold for serious injury. (*Cortez v Manhattan Bible Church*, 14 AD3d 466 [1st Dept 2005].)

The bill of particulars sets forth the plaintiff's injuries as follows:

Posterior disc herniation at C2-C3, C3-C4, C4-C5, C5-C6 and C6-C7 impinging upon the thecal sac Posterior disc herniation at L4-L5 and L5-S1 impinging upon the thecal sac lumbar radiculopathy . . . Cervical and lumbar sprain and strain. . . .

Defendants contend that plaintiff's injuries do not meet the statutory definition of a serious injury. In support of their motion, defendants proffer the medical findings of Dr. Frank Segreto, Naunihal Sachdev and Sheldon P. Feit, the pleadings, the bill of particulars and plaintiff Kone's deposition testimony.

Dr. Frank Segreto, the defendants' orthopedist, reviewed the plaintiff's bill of particulars, police accident report, St. Luke's Roosevelt Hospital medical records, the narrative report of Dr. Dina Nelson, cervical and lumbar spine MRI reports, cervical x-ray report and progress notes from physical therapy. Dr. Segreto examined the plaintiff on August 15, 2011. During the examination, plaintiff complained of pain to his neck and back. Range of motion tests performed on the plaintiff's cervical and lumbar spine revealed no restrictions; and his Straight Leg Raising test was negative. Dr. Segreto opined that the plaintiff's cervical and lumbar strain had resolved; he demonstrates no disabilities; and he is able to perform all activities of daily living and continue working in his usual occupation without restriction. He found no permanent injuries as a result of the accident and that

plaintiff's prognosis is excellent for full recovery.

Dr. Naunihal Sachdev, the defendants' neurologist, reviewed the plaintiff's bill of particulars, police accident report, St. Luke's Roosevelt Hospital medical records, the narrative report of Dr. Dina Nelson, cervical and lumbar spine MRI reports, cervical x-ray report and progress notes from physical therapy. Dr. Sachdev examined the plaintiff on September 12, 2011. Dr. Sachdev noted in his report that during the examination plaintiff did not complain of pain. His neurological examination revealed no abnormalities. The report noted numeric range of motion findings concerning plaintiff Kone's shoulder, cervical and lumbar spine, compared the findings to normal ranges of motion and established that plaintiff had full range of motion in those regions. Dr. Sachdev opined that the plaintiff's cervical and lumbar sprain and strain had resolved, that there was no evidence of a neurological disability and that plaintiff was not disabled from working or from performing his normal daily activities.

Defendants also submitted the affirmed radiologist report of Dr. Sheldon P. Feit who reviewed plaintiff's x-rays of the cervical and lumbar spine and found no evidence of fracture or abnormalities as a result of the accident except for a mild dextroscoliosis in the lumbar region. His review of the MRI films of plaintiff's cervical and lumbar spine revealed that the disc bulges at numerous levels were the manifestations of degenerative disc diseases that were not posttraumatic.

Defendants also point to plaintiff's deposition transcript which demonstrates that

plaintiff has no current complaints of inability to perform his daily activities except for a complaint of difficulty breathing. He testified that as result of the accident there is no daily activity that was permanently or partially affected except for breathing problems (Kone's deposition transcript P. 81-82). Defendants have met their burden of proof through the submission of admissible evidence thus shifting the burden of proof to the plaintiff to support his claim of serious injury.

In opposition plaintiff submits plaintiff Kone's deposition transcript dated June 17, 2011, the unsworn treatment records of Dr. Dina Nelson and the affirmation of Dr. Thomas M. Kolb.

Dr. Thomas M. Kolb supervised plaintiff Kone's cervical and lumbar MRI studies performed on August 21 and 28, 2008 respectively. Plaintiff Kone's cervical spine MRI revealed disc herniation at C2-C3, C3-C4, C4-C5, C5-C6 and C6-C7 impinging upon the thecal sac. His lumbar spine MRI revealed Posterior disc herniation at L4-L5 and L5-S1 impinging upon the thecal sac.

Dr. Dina Nelson examined the plaintiff on August 13, 2008, September 17, 2008, October 8, 2008, January 28, 2009, and April 4, 2012. During his initial visit, plaintiff Kone complained of headaches, neck and back pain and numbness in the right leg. His Straight Leg Raising test yielded a positive result. Dr. Nelson noted that plaintiff did not tolerate range of motion tests on his cervical and lumbar spine; he found spasm and tenderness in those regions. He referred the plaintiff for weekly therapy three times per week and for x-ray

and MRI studies. He found plaintiff temporarily disabled as a result of the accident. Dr. Nelson's impression of plaintiff's examination was cervical and lumbar sprain/strain and headaches. At a follow-up evaluation conducted on September 17, 2008 Dr. Nelson noted that plaintiff had improvement with therapy but still complains of pain to his lower back. He found that plaintiff exhibited mild spasm in his cervical spine and extreme tenderness in his lumbar spine (right muscle). Dr. Nelson reports that there was a "limited neurological exam due to plaintiff's cooperation." He instructed plaintiff to continue with physical therapy three times a week and found that plaintiff's disability to be total. In the report dated October 8, 2008 Dr. Nelson indicates that plaintiff's neck improved but he continues to complain of pain to his lower back. Dr. Nelson found that there is a limited¹ range of motion in plaintiff's cervical spine and mild tenderness. His report indicates that there is poor tolerance to palpation on plaintiff's lower lumbar spine. He instructed plaintiff to continue therapy three times a week. He again found plaintiff to be totally disabled. Plaintiff was again examined on January 28, 2009. Dr. Nelson's report indicates that plaintiff has no complaint of pain. Upon examination, Dr. Nelson found no tenderness in the cervical and lumbar areas and the straight leg test was negative. He found that plaintiff was no longer disabled and able to return to work. He directed plaintiff to undergo "symptomatic care" and "return only on an as-needed basis."

Dr. Nelson's last examination of the plaintiff was on April 4, 2012. He notes that

¹Dr. Nelson does not indicate the numeric percentage for the range of motion test or the instrumentality used to determine the restriction.

plaintiff continues to complain of pain to the lower back and neck. Dr. Nelson found the presence of tenderness with a decreased range of motion of plaintiff's spine. The straight leg testing was positive on the right lumbar area. He described the limitations of motion of plaintiff's cervical and lumbar spine which was measured by a goniometer as follows:

Range of motion (Cervical Spine Region)		
	Normal	Examination
flexion	50 degrees	50 degrees
extension	60 degrees	45 degrees
left rotation	80 degrees	60 degrees
right rotation	80 degrees	60 degrees
lt. lat. flex.	45 degrees	30 degrees
rt. lat. flex	45 degrees	30 degrees

Range of motion (Lumbar Spine Region)		
	Normal	Examination
flexion	90 degrees	65 degrees
extension	30 degrees	15 degrees
lt. lat. flex.	25 degrees	20 degrees
rt. lat. flex	25 degrees	15 degrees

Dr. Nelson concluded that plaintiff's injuries to his back and neck as reflected on the MRI are permanent, causally related to the accident and that his future prognosis for full recovery is guarded. He found that plaintiff is unable to resume his normal level of function and is partially disabled.

Defendants argue that Dr. Nelson's treatment records are inadmissible because they are unsworn and that Dr. Nelson fails to submit an affidavit or affirmation in plaintiff's support. This Court disagrees since Dr. Nelson's reports including the treatment records were referred to by the defendants' examining physicians and are therefore properly before

the Court. (*Lazarus v Perez*, 73 AD3d 528 [1st Dept 2010].)

Defendants next argue that plaintiff fails to explain the gap in treatment from the time he was last treated by Dr. Nelson on January 28, 2009 and his examination on April 4, 2012. Plaintiff's counsel references Dr. Nelson's April 4, 2012 medical report in arguing that plaintiff did not continue with his medical treatment because he "had reached maximal medical improvement through physical therapy, rather than continuing with ineffective treatment."

A recent examination that indicates significant limitations in the lumbar and cervical spine can be deemed sufficient to raise a triable issue of fact. (*Rosario v Universal Truck & Trailer Service*, 2AD3d 362 [1st Dept 2003].) The Court of Appeals has held nonetheless that certain factors such as a gap in treatment, an intervening medical problem, or a preexisting condition may override a plaintiff's objective medical proof of significant limitations and permit dismissal of the complaint. (*Pommels v Perez*, 4 NY3d 566 [2005]; *Ramkumar v Grand Style Transp. Enterprises Inc.* 94 AD3d 484 [1st Dept 2012].) In this case, there is a three-year gap in treatment running from approximately six months after the accident until the preparation of the medical report relied upon by plaintiff in opposition to the motion for summary judgment. While "the law surely does not require a record for needless treatment in order to survive summary judgment, where there has been a gap in treatment or cessation of treatment" a plaintiff must offer some reasonable explanation for the gap in treatment or cessation of treatment. (*Pommels v Perez*, 4 NY3d 566 [2005]; *Colon v Kempner*, 20 AD3d

372 [1st Dept 2005].) Here, the plaintiff fails to meet his burden. Dr. Nelson's 2009 and 2012 reports do not establish that plaintiff ceased medical treatment for three years as a result of reaching maximum benefit from therapy. After examining plaintiff in 2009, Dr. Nelson found that plaintiff was able to return to work and no longer disabled. Dr. Nelson noted that plaintiff did not complain of pain and presented no tenderness in his spine. The straight leg test was negative; Dr. Nelson indicated that plaintiff "feels good." Plaintiff's explanation for his cessation of treatment is thus unsupported by medical proof. Defendants' motion for summary judgment is therefore granted in part to the extent that the complaint is dismissed with respect to permanent loss of use, permanent consequential limitation and significant limitation of use categories of serious injury.

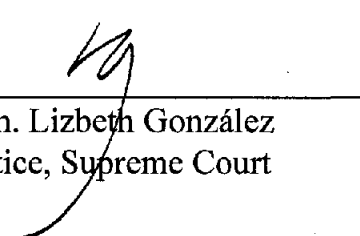
The plaintiff has raised an issue of fact under the 90/180 day category wherein serious injury is defined as a plaintiff's inability to perform "substantially all of the material acts which constitute[d][his] usual and customary activities" for not less than 90 of the 180 days immediately following the date of the accident. (Insurance Law § 5102[d].) To prevail under this category, a plaintiff must demonstrate through competent, objective proof that he sustained a "medically determined injury or impairment of a nonpermanent nature" (Insurance Law § 5102[d]) that would have caused the alleged limitations of plaintiff's daily activities and curtailment of the plaintiff's usual activities "to a great extent rather than some slight curtailment." (*Berk v Lopez*, 278 AD2d 156 [1st Dept 2000]; *Licari v Elliott*, 57 NY2d 230 [1982]. Defendants met their initial burden by submitting plaintiff's deposition

transcript wherein the plaintiff testified that subsequent to the accident he is able to perform his daily activity except for a breathing difficulty claim which is unsupported by medical evidence.

The Court's function in deciding a motion for summary judgment is issue finding rather than issue determination. (*Sanchez v National Railroad Passenger Corp.*, 92 AD3d 600 [1st Dept 2012].) Here, the Court finds that plaintiff raises a triable issue of fact by submitting the disability notices issued by his treating physician noting his inability to resume his job duties from August 3, 2008 until at least January 28, 2009. (*Escobar v Guzman*, 60 AD3d 421 [1st Dept 2009]; *Fuentes v Sanchez*, 91 AD3d 418 [1st Dept 2012].) Plaintiff also testified at his deposition that as a result of the accident, he was confined to home and unable to work for approximately six months (Kone transcript ¶ 52 and ¶ 75) because of the pain to his lower back, neck and arm (Kone transcript ¶ 145). That prong portion of defendants' motion for an order dismissing plaintiff's complaint regarding his 90/180 claim is accordingly denied.

This constitutes the decision and order of this Court.

Dated: Bronx, New York
March 27, 2013



Hon. Lizbeth González
Justice, Supreme Court