

Griffith v Moya

2014 NY Slip Op 30066(U)

January 9, 2014

Supreme Court, Queens County

Docket Number: 20917/2012

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

CHRISTOPHER P. GRIFFITH and SALEMA
PARKER GRIFFITH,

Index No.: 20917/2012

Motion Date: 12/13/13

Plaintiffs,

Motion No.: 37

- against -

Motion Seq.: 1

NEY MOYA d/b/a ECUA TOWNCAR and CARLOS
W. MARTINEZ,

Defendants.

- - - - - x

The following papers numbered 1 to 17 were read on this motion by defendants NEY MOYA d/b/a ECUA TOWNCAR and CARLOS W. MARTINEZ, for an order pursuant to CPLR 3212 granting the defendants summary judgment and dismissing the complaint of plaintiff, CHRISTOPHER P. GRIFFITH, 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 - 7
Affirmation in Opposition-Affidavits.....	8 - 14
Reply Affirmation.....	15 - 17

This is a personal injury action in which plaintiff, Christopher P. Griffith seeks to recover damages for injuries he allegedly sustained on November 15, 2011, at approximately 7:00 a.m., when his vehicle was involved in a collision with the vehicle owned by Ney Moya d/b/a EcuA Towncar and operated by defendant, Carlos W. Martinez. The accident took place on the southbound side of the Van Wyck Expressway at or near its intersection with Hillside Avenue, Queens County, New York. Plaintiffs commenced the instant action by filing a summons and complaint on October 10, 2012. Issue was joined by service of defendants' verified answer dated January 9, 2013.

In October 2013 the plaintiffs moved for an order pursuant to CPLR 3212(b), granting partial summary judgment on the issue of liability and setting this matter down for a trial on damages only. Plaintiffs' contended that the accident was caused solely by the negligence of the defendant driver in that his vehicle was traveling too closely and that the driver failed to safely stop his vehicle prior to rear-ending the plaintiff's vehicle. By decision and order dated November 8, 2013, this court denied the motion based upon the testimony of the defendant, stating that he was required to stop suddenly behind the plaintiff's car and that his car was pushed into the plaintiff's vehicle by a third vehicle behind his. The court held that there were questions of fact as to the cause of the accident including whether a third vehicle pushed the defendant's vehicle into the plaintiffs' vehicle.

Defendants Ney Moya d/b/a Ecuia Towncar and Carlos W. Martinez, now move for an order pursuant to CPLR 3212 dismissing the complaint of plaintiff, Christopher P. Griffith 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.

In support of the motion, the defendants submit an affirmation from counsel, Cynthia Hung, 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. Jean-Robert Desrouleaux, a board certified neurologist; the affirmed medical report of Dr. Ronald A. Paynter, board certified in emergency medicine, and the affirmed radiological report of Dr. Audrey Eisenstadt.

In his verified bill of particulars, the plaintiff, age 37, states that as a result of the accident, he sustained inter alia, disc bulges at L3-4, L5-6 and L5-S1. The plaintiff contends that he sustained a serious injury as defined in Insurance Law §5102(d).

Plaintiff, Christopher P. Griffith was deposed on August 2, 2013. With regard to the accident of November 15, 2011 he stated that he was driving a 2001 Nissan Maxima at approximately 7:00 a.m.. He was coming from his house and going to pick up a co-worker on his way to work. He worked at Foster Garvis & Garvis, a debt collector law firm in Commack, Long Island. As he was proceeding southbound in the left lane of the Van Wyck Expressway between Hillside and Jamaica Avenue he observed a car in front of him swerve to get over to the middle lane. After the car swerved he observed that there were two cars stopped in front of him

which had just been involved in an accident in which one car had rear-ended the other. He immediately pumped his brakes to stop his vehicle and was able to stop his vehicle one half car length before the car in front of him. After being fully stopped for five seconds his vehicle was struck in the rear with a heavy impact by the vehicle operated by defendant Carlos Martinez. As a result of the impact the front of his vehicle was propelled into the concrete divider. When the police came to the scene he told them that he stopped to avoid a car accident in front of him and was rear-ended. He left the scene in an ambulance and was taken to the emergency room at Jamaica Hospital where he was treated for pain to his neck and released. One week later he began treatments with Dr. Weissberg, an orthopedic specialist in Huntington, New York. At the time the plaintiff went to Dr. Weissberg he was experiencing pain to his lower back and right knee. He was referred for an MRI of his back. He then began a six month course of physical therapy with Lisa Goldberg in Commack and a course of chiropractic treatment with Dr. Scaturro due to pain to his lower back. He stated that he lost two days from his job as a result of his injuries. He stated that he presently works for the Department of Sanitation. He states that he currently experiences pain in the lower back two or three times per month.

The plaintiff was seen for an independent medical evaluation on August 26, 2013 by neurologist, Dr. Jean-Robert Desrouleaux, a physician retained by the defendant. At that time the plaintiff reported to Dr. Desrouleaux that he injured his lower back in the accident of November 15, 2011 and he still complained of pain in the lumbar spine region. Dr. Desrouleaux tested the plaintiff's range of motion using a goniometer and found that the plaintiff had no limitations of range of motion of the lumbar spine and no reported complaints of pain and no reported feelings of tightness. The doctor's impression was stated to be, "alleged injury to the lumbar spine, resolved." He states no further neurological treatment is indicated and no permanence or residual effect is anticipated in the plaintiff's condition. He states that the plaintiff is able to function in his pre-accident capacity and carry out his work duties and day to day activities without neurological restriction.

Radiologist Dr. Audrey Eisenstadt reviewed the MRI studies of the plaintiff's lumbar spine. She states that she observed disc degeneration at L3-L4 disc level as well as bulging at the L3-4 and L4-5 intervertebral disc levels. She also observed a right foraminal L3-L4 disc herniation. She states that the MRI revealed degenerative disc disease that predated the accident of November 15, 2011. She states that the disc bulging and disc

herniation has no traumatic basis and is degenerative in origin.

Dr. Ronald A. Paynter, a specialist in emergency medicine, reviewed the plaintiff's emergency department records from Jamaica Hospital Medical Center. He states that the records reveal that the plaintiff did not sustain a significant injury as a result of the subject accident. Dr. Paynter states that immediately following the accident the plaintiff did not complain of back pain and he exhibited normal range of motion of the back. He states that the injuries delineated in the plaintiff's bill of particulars are unsupported by the plaintiff's own complaints to the EMS and emergency room staff and unsupported by their findings, examinations, and radiographic studies. Thus, Dr. Paynter concludes that the emergency room records he reviewed are inconsistent with the injuries alleged in the plaintiff's bill of particulars and show that the claimed injuries do not have an acute traumatic origin and so could not be causally related to the accident of November 15, 2011.

Defendants' counsel contends that the affirmed medical reports of Drs. Desrouleaux, Eisenstadt and Paynter 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 two days 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, Leslie Lopez Esq., submits her own affirmation as well as an affidavit from the plaintiff dated November 8, 2013 and the affirmed medical report of Dr. David J. Weissberg as well as a copy of the repair estimate from Geico Insurance Company showing the cost to repair the plaintiff's vehicle.

Dr. Weissberg states in his affirmation that based upon his clinical findings and diagnostic tests and MRIs, the plaintiff sustained MRI confirmed L3/4 disc bulging and facer hypertrophy with right foraminal herniation with compromise; MRI confirmed L4/5 disc bulge; MRI confirmed L5/S1 disc bulge and reduced range of motion of the back. He states that based upon objective tests that he administered, the plaintiff still has complaints of pain to the back and still presents himself with restricted range of motion of the lumbar spine. Dr. Weissberg states he began

treating the plaintiff on November 23, 2011, one week after the accident, until he reached maximum medical recovery. Dr. Weissberg also recently re-examined the plaintiff on November 5, 2013. His initial examination indicated a limitation of range of motion of the lumbar spine and his most recent examination showed a 33 percent limitation of range of motion of the lumbar spine. Dr. Weissberg states that there is presently a quantifiable limitation of motion of the lumbar spine. He states that in his opinion with a reasonable degree of medical certainty, plaintiff still suffers from the effects of the injuries he sustained in the accident of November 15, 2011 which includes a permanent injury with restricted movement of the lumbar spine.

In his affidavit dated November 8, 2013, the plaintiff states that he treated with Dr. Weissberg for nine months following the accident and still suffers from the effects of the injuries he sustained in the subject accident and has not been able to resume all of the same activities he engaged in prior to the accident.

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]).

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. Paynter, Eisenstadt and Desrouleaux as well as the plaintiff's deposition

testimony, in which he stated that he returned to work two days 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. Weissberg, attesting to the fact that the plaintiff had significant limitations in range of motion of the 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]; Rosa v Mejia, 95 AD3d 402 [1st Dept. 2012]; 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 Khaimov v Armanious, 85 AD3d 978 [2d Dept. 2011]; Jilani v. Palmer, 83 AD3d 786 [2d Dept. 2011]; 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 [2d Dept. 2010]).

Further, the findings of the plaintiff's doctor that the plaintiff's injuries were traumatic and were causally related to the subject collision implicitly addressed and rebutted the contention of the defendant's radiologist that the spinal injuries were degenerative in nature (see Fraser-Baptiste v New York City Tr. Auth., 81 AD3d 878 [2d Dept. 2011]; Harris v Boudart, 70 AD3d 643 [2d Dept. 2010]).

In addition, the plaintiff adequately explained the gap in his treatment by submitting the affirmation of Dr. Weissberg stating that plaintiff has reached maximum medical benefit from the treatment (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 CHRISTOPHER P. GRIFFITH is denied.

Dated: January 9, 2014
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.