

**Rahman v Brahimaj**

2014 NY Slip Op 30067(U)

January 13, 2014

Supreme Court, Queens County

Docket Number: 27472/2011

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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H.M. ZIAUR RAHMAN, Index No.: 27472/2011  
Plaintiff, Motion Date: 12/13/13  
- against - Motion No.: 81  
ADAM BRAHIMAJ, ANDRES GALAN, RUTH Motion Seq.: 3  
CRESPO, CARYN LEVINE SEVER and MICHAEL  
PAUL SEVER,

Defendants.

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The following papers numbered 1 to 27 were read on this motion by defendant ADAM BRAHIMAJ and the respective cross-motions of defendants ANDRES GALAN and RUTH CRESPO and defendants CARYN L. SEVER and MICHAEL SEVER for an order pursuant to CPLR 3212 granting the defendants summary judgment and dismissing the complaint of plaintiff, H.M. ZIAUR RAHMAN, on the ground that said plaintiff has not sustained a serious injury within the meaning of Insurance Law §§ 5102 and 5104:

Papers Numbered

Brahimaj Notice of Motion-Affidavits-Exhibits.....1 - 7  
Galan/Crespo Cross-Motion-Affidavits-Exhibits.....8 - 12  
Sever Cross-Motion-Affidavits-Exhibits.....13 - 16  
Rahman Affirmation in Opposition-Affidavits.....17 - 21  
Galan/Crespo Reply Affirmation.....22 - 24  
Brahimaj Reply Affirmation.....25 - 27

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This is a personal injury action in which plaintiff, H.M. Ziaur Rahman, seeks to recover damages for injuries he allegedly sustained on December 17, 2010, at approximately 11:30 p.m., when his vehicle was allegedly struck in the rear. The accident took place inside the Eastbound Queens Midtown Tunnel near Second Avenue, in New York County, New York. Plaintiff, a cab driver, alleges that as a result of the accident he sustained herniated

and bulging discs of the cervical and lumbar spines as well as rotator cuff strain of the right shoulder. Plaintiff commenced the instant action by filing a summons and complaint on December 7, 2011. Issue was joined by service of defendants Galan and Crespo's verified answer with cross-claims dated February 21, 2012, by service of defendant Brahimaj's verified answer with cross-claims dated March 20, 2012, and by service of defendant Sever's verified answer with cross-claims dated March 14, 2012. Plaintiff filed a Note of Issue on March 28, 2013 and the matter is scheduled for trial in the Trial Scheduling Part on April 8, 2013.

Defendant Adam Brahimaj, now moves for an order pursuant to CPLR 3212 dismissing the complaint of plaintiff, H. M. Ziaur Rahman, 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. Defendants Galan and Crespo and defendants Caryn Sever and Michael Sever, cross-move for summary judgment dismissing the plaintiff's complaint on the same grounds and adopt the arguments put forth by Brahimaj.

In support of the motion, defendant submits a copy of the pleadings; plaintiff's verified bill of particulars; a copy of the transcript of plaintiff's examination before trial; and a copy of the affirmed medical report of board certified orthopedic surgeon, Dr. Marvin Winell.

In his verified bill of particulars, the plaintiff, age 33 states that as a result of the accident, he sustained inter alia, disc herniations of the cervical spine at C4-C5 and C6-C7; bulging discs at C5-C6 and L4-L5; and internal derangement and rotator cuff strain of the right shoulder. The plaintiff contends that he sustained a serious injury as defined in Insurance Law §5102(d).

Plaintiff, H. M. Ziaur Rahman, was deposed on April 1, 2013. He stated that he works as a taxi cab driver and is employed by Woodside Management. With regard to the accident of December 17, 2010, he stated that he was driving a passenger from Manhattan to Queens going through the Midtown Tunnel. When he was halfway through the tunnel, the vehicle in front of his suddenly slowed down causing him to slow down. His vehicle was then struck in the rear as part of a four-car chain reaction accident. He stated that he felt three impacts to his vehicle. He left the scene in his own vehicle, parked it by the taxi garage and called a friend to pick him up. He returned to work three or four days later. Approximately a week after the accident he was referred by his attorney to Dr. Chubangbang on Roosevelt Avenue. At that time he

had complaints of pain in his neck, right shoulder, and back. He began a course of physical therapy, treating three times a week until October 2011. He also received injections for pain. He then left the country and went to Dhaka, Bangladesh, where he continued treatments for his neck and lower back at S.P. Specialized Hospital until he returned to the United States in February 2013. He did not work in Bangladesh. He had MRIs taken in Queens before he left. As of the time of the deposition he was still receiving treatments with Dr. Chubangbang. He stated that he was involved in a another accident in December 2010, however, he had no medical treatment as a result of that accident. He stated that he still feels pain when walking, running, or heavy lifting.

The plaintiff was seen for an independent medical evaluation on May 30, 2013 by orthopedic surgeon, Dr. Marvin Winell, a physician retained by the defendants. At that time the plaintiff reported to Dr. Winell that he was involved in a motor vehicle accident in December 2010 at which time he injured his neck, lower back, and right shoulder. Dr. Winell tested the plaintiff's range of motion using an orthopedic goniometer and found that the plaintiff had no limitations of range of motion of the cervical spine, lumbar spine, and bilateral shoulders. Based upon his examination, he states that his impression is "resolved sprain/strain of the cervical spine, resolved sprain/strain of the lumbosacral spine, and resolved sprain/strain of the right shoulder." He states that there is no causally related orthopedic disability resulting from the subject accident.

Defendants' counsel contends that the affirmed medical report of Dr. Winell is sufficient to establish, prima facie, that the plaintiff has not sustained a permanent loss of a body organ, member, function or system and 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 four 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, H. Bruce Fischer, Esq., submits his own affirmation as well as the affirmation of Dr. Dante Chubangbang, the affidavit of chiropractor, Dr. Richard E. Amato, the affirmation of radiologist, Dr. Daniel Beyda, and the affirmation of radiologist, Dr. Dennis Rossi.

The reports of physiatrist, Dr. Chubangbang, indicate that the plaintiff was first examined by him at the Hope Physical Medicine and Rehabilitation P.C. on December 23, 2010, one week after the accident. At that time the plaintiff complained of stiffness in the neck, upper back, arms and hands due to his automobile accident of December 17, 2010. His physical examination at that time revealed significant limitations of range of motion of the cervical spine and lumbar spine. Dr. Chubangbang stated that the symptoms and injuries were directly caused by the accident of December 2010 and he recommended that the plaintiff commence a course of physical therapy three times per week. Dr. Chubangbang evaluated the plaintiff again on January 22, 2011, at which time the plaintiff still had stiffness and pain in the neck, upper back, arms, hands and right shoulder. The doctor states that the plaintiff was in severe pain with significant objectively measured limitations of range of motion of the cervical spine, lumbar spine and bilateral shoulders. The plaintiff's last visit with Dr. Chubangbang before he left the country was in May 2011 when the plaintiff, upon examination still exhibited significant limitations of range of motion. Dr. Chubangbang states that the plaintiff's injuries are causally related to the subject accident.

On October 29, 2013, the plaintiff was examined by chiropractor, Richard E. Amato. Dr. Amato states that he reviewed the affirmed medical reports of Drs. Rossi, Beyda and Chubangbang. Dr. Amato found that the plaintiff complained of intermittent neck pain, intermittent lower back pain, numbness and tingling of the lower extremities. He performed range of motion testing using a goniometer and found that the plaintiff still displayed significant limitations of range of motion of the cervical spine up to 97 per cent, and limitations of the lumbar spine, up to 96 per cent. Based upon his examination he states that he found objective evidence of a permanent partial disability resulting from the accident. The Doctor states that the plaintiff still suffers from back pain which has been consistent since December 2010. He states that the plaintiff has sustained a significant loss of his body function and as a result the accident and has a poor prognosis due to the injuries sustained in the subject accident. He states that the injuries and restrictions in range of motion are post-traumatic in nature, not degenerative, and are causally related to his motor vehicle accident of December 17, 2010.

Dr. Beyda states in his affirmed report that he interpreted the MRI of plaintiff's lumbar spine taken March 8, 2011. He states that the MRI shows a central disc bulge L4-L5. Dr. Rossi states in his affirmed report that he interpreted the MRI of the plaintiff's cervical spine which revealed disc herniations at C4-

C5 and C6-C7 and a bulging disc at C5-C6.

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 report of Dr. Winell, as well as the plaintiff's deposition testimony, in which he stated that he returned to work four or five 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 reports of plaintiff's treating physician, Dr. Chubangbang, as well as Dr. Amato and Drs. Beyda and Rossi 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]).

In addition, the plaintiff adequately explained that there was no gap in treatment as he underwent treatment during the time period he was in Bangladesh and resumed treatment with Dr. Chubangbang through the time of the deposition.

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

ORDERED, that the defendants' motion and cross-motions for an order granting summary judgment dismissing the complaint of plaintiff H.M. ZIAUR RAHMAN are denied.

Dated: January 13, 2014  
Long Island City, N.Y.

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**ROBERT J. MCDONALD**  
**J.S.C.**