

Torres v Etilee Taxi, Inc.
2014 NY Slip Op 31904(U)
July 21, 2014
Supreme Court, New York County
Docket Number: 15964/12
Judge: Arlene P. Bluth
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 22

----- X
Ruben Torres,

Plaintiff,

- against-

Etilee Taxi, Inc., Prince O. Ohanmu, George & Haroula
Taxi, Inc. and Kamal Ahmed Milon a/k/a
Milon Kamal Ahmed,

Defendants.

----- X

DECISION AND ORDER

Index No. 15964/12
Motion Seq 01 and 02

HON. ARLENE P. BLUTH, JSC

The motion (seq 01) by defendants George & Haroula Taxi, Inc. (G&H) and Kamal Ahmed Milon a/k/a Milon Kamal Ahmed’s for summary judgment dismissing this action on the grounds that plaintiff did not sustain a “serious injury” within the meaning of Insurance Law §5012(d), and the motion by defendants Etilee Taxi, Inc. and Prince O. Ohanmu (seq 02) for the same relief are both granted, and the action is dismissed. The branch of the motion (seq 01) seeking summary judgment on the grounds that G&H and Milon are not liable for the happening of the accident is denied as moot.

In this action, plaintiff was a passenger in a taxi owned by defendant G&H and driven by defendant Ahmed which was hit in the rear by a taxi owned by defendant Etilee and driven by defendant Ohanmu.

Serious Injury

To prevail on a motion for summary judgment the defendant has the initial burden to present competent evidence showing that the plaintiff has not suffered a “serious injury” (*see Rodriguez v Goldstein*, 182 AD2d 396 [1st Dept 1992]). Such evidence includes “affidavits or

(

affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (*Shinn v Catanzaro*, 1 AD3d 195, 197 [1st Dept 2003], quoting *Grossman v Wright*, 268 AD2d 79, 84 [2d Dept 2000]). In order to establish prima facie entitlement to summary judgment under the 90/180 category of the statute, a "defendant must provide medical evidence of the absence of injury precluding 90 days of normal activity during the first 180 days following the accident" (*Elias v Mahlah*, 58 AD3d 434 [1st Dept 2009]). However, a defendant can establish prima facie entitlement to summary judgment on this category without medical evidence by citing other evidence, such as the plaintiff's own deposition testimony or records demonstrating that plaintiff was not prevented from performing all of the substantial activities constituting customary daily activities for the prescribed period (*id.*).

Once the defendant meets his initial burden, the plaintiff must then demonstrate a triable issue of fact as to whether he sustained a serious injury (*see Shinn*, 1 AD3d at 197). A plaintiff's expert may provide a qualitative assessment that has an objective basis and compares plaintiff's limitations with normal function in the context of the limb or body system's use and purpose, or a qualitative assessment that assigns a numeric percentage to plaintiff's loss of range of motion (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350-351 [2002]).

In his verified bill of particulars (exh H to moving papers, ¶ 11), plaintiff claims that he suffered injuries to his lumbar and cervical spine, right shoulder and TMJ dysfunction as a result of the subject accident.

Defendants have satisfied their prima facie showing by offering the affirmed reports of Dr. Shannon, a neurologist (exh I), who stated that he examined plaintiff and that he had a

normal neurological exam with full ranges of motion in his cervical and lumbar spine; and of Dr. Nason, an orthopedist (exh J), who also found that plaintiff had full ranges of motion in his cervical and lumbar spine, as well as in his right shoulder. Additionally, defendant submitted the affirmed report of a dentist, Dr. Shatzkamer (exh K) who examined plaintiff and stated that he had “no clinically-apparent injury whatsoever to any aspect of the dental complex, the mouth, the teeth, the jaw, the bony facial structures....”, that all these areas appeared normal, and all muscle palpation “produced no wince and no reaction of pain.” Defendants also submitted the affirmed reports of Dr. Decker, a radiologist (exh L), who read the MRIs of plaintiff’s cervical and lumbar spine which were both taken approximately 2 months after the accident. Dr. Decker stated that the cervical and lumbar MRIs both showed diffuse, long-standing degenerative changes including bulges but no herniations. Finally, defendants met their initial burden with respect to plaintiff’s 90/180-day claim by submitting plaintiff’s deposition testimony that he confined to bed and home for only 4 days after the accident. Therefore, the burden shifts to plaintiff to raise a triable factual question.

In opposition, plaintiff submits the affirmed report of his treating physiatrist, Dr. Goldenberg (exh C to opp), who first examined plaintiff approximately one month after the accident (on March 14, 2012) at which time she measured significant deficits in the range of motion of plaintiff’s cervical and lumbar spine and right shoulder, as well as several other positive findings. She examined plaintiff most recently on July 22, 2013 when she measured limitations in the same three areas, ranging from 7-47%, which she causally related to the accident. However, Dr. Goldenberg does not address the degenerative changes that Dr. Decker mentioned in his reports. In their replies, defendants correctly point out that Dr. Goldenberg’s

failure to address Dr. Decker's findings that plaintiff's lumbar and cervical abnormalities are due to degenerative changes, and not causally related to the subject accident, renders her opinion speculative, and fails to raise an issue of fact as to causation. *See Malupa v Oppong*, 106 AD3d 538, 966 NYS2d 9 (1st Dept 2013) (action dismissed when plaintiff's treating physician did not address the degenerative conditions found by defendants' expert).

Plaintiff also submits the affirmed report of Dr. Mondshine (exh D), a dentist, who first examined plaintiff one month after the subject accident, and then again on February 18, 2013, when he measured "a vertical opening of 36 mm, with 4mm lateral movements to the right and left". Significantly, Dr. Mondshine did not indicate what would be considered normal values for the mandibular opening, lateral excursion or protrusive movement he reported on page 3. Nor did he describe the objective medical tests he used to measure the alleged restrictions. Therefore, Dr. Mondshine's report failed to raise an issue of fact. *See Colon v Vincent Plumbing and Mechanical, Co.*, 85 AD3d 541, 925 NYS2d 458 (1st Dept 2011).

Finally, plaintiff did not oppose the branch of defendants' motions seeking dismissal of his 90/180-day claim. Thus, plaintiff failed to submit any evidence that raises a triable issue of fact sufficient to defeat summary judgment.

Accordingly, it is

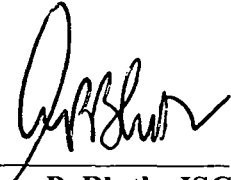
ORDERED that the motion (seq 01) by defendants George & Haroula Taxi, Inc. (G&H) and Kamal Ahmed Milon a/k/a Milon Kamal Ahmed's for summary judgment dismissing this action on the grounds that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5012(d), and the motion by defendants Etilee Taxi, Inc. and Prince O. Ohanmu

(seq 02) for the same relief are both granted, and the action is dismissed.

The branch of the motion (seq 01) seeking summary judgment on the grounds that G&H and Milon were not liable for the happening of the accident is denied as moot.

This is the Decision and Order of the Court.

Dated: New York, NY
July 21, 2014



Hon. Arlene P. Bluth, JSC

HON. ARLENE P. BLUTH