

Masi v Klara & Simon Cab Corp.
2014 NY Slip Op 31927(U)
July 21, 2014
Supreme Court, New York County
Docket Number: 102934/11
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. ARLENE P. BLUTH
HON. ARLENE P. BLUTH

PRESENT: _____
Justice

PART **22**

Masi

INDEX NO. 102934/11

-v-

MOTION DATE _____

Klava + Simon Cab Co. et al.

MOTION SEQ. NO. 04

The following papers, numbered 1 to 3, were read on this motion to/for SJ

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1

Answering Affidavits — Exhibits _____ | No(s). 2

Replying Affidavits _____ | No(s). 3

Upon the foregoing papers, it is ordered that this motion is consolidation for JT deposition with seq 03 and

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER

FILED

JUL 25 2014

COUNTY CLERK'S OFFICE
NEW YORK

J.S.C.

HON. ARLENE P. BLUTH

NON-FINAL DISPOSITION

- 1. CHECK ONE: CASE DISPOSED
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 7/21/14

SUPREME COURT OF THE STATE OF NY
COUNTY OF NEW YORK: PART 22
Garibaldi Masi,

Index No.: 102934/11
Motion Seq: 03 and 04

Plaintiff,

-against-

Klara & Simon Cab Corp., Mohamad Eldabah,
and Maurizio Errico,

Defendants.

DECISION/ORDER

HON. ARLENE P. BLUTH, JSC

Motion sequences 03 and 04 are consolidated for joint disposition.

The branch of Errico’s motion (03) seeking summary judgment dismissing the complaint as against him on the grounds that he was a stopped vehicle hit in the rear and cannot be liable for the happening of the accident, is granted without opposition. The motion of defendants Klara & Simon Cab Corp. and Eldabah (04) for summary judgment or summary judgment dismissing this action on the grounds that plaintiff did not sustain a “serious injury” within the meaning of Insurance Law §5012(d) is granted only to the extent that the 90/180-day claim is dismissed but otherwise denied.

FILED

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NEW YORK

In this action, plaintiff alleges that on October 19, 2010 he sustained personal injuries when he was a passenger in a taxi owned by Klara & Simon Cab Corp. and operated by Eldabah which hit the vehicle owned and operated by Errico in the rear while it was stopped at a light.

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 [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 [1st Dept 2000]). Where there is objective

proof of injury, the defendant may meet his or her burden upon the submission of expert affidavits indicating that plaintiff's injury was caused by a pre-existing condition and not the accident (*Farrington v Go On Time Car Serv.*, 76 AD3d 818 [1st Dept 2010], citing *Pommells v Perez*, 4 NY3d 566 [2005]). 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*, 2009 NY Slip Op 43 [1st Dept]). 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 or her initial burden, the plaintiff must then demonstrate a triable issue of fact as to whether he or she 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 quantitative 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]). Further, where the defendant has established a pre-existing condition, the plaintiff's expert must address causation (see *Valentin v Pomilla*, 59 AD3d 184 [1st Dept 2009]; *Style v Joseph*, 32 AD3d 212, 214 [1st Dept 2006]).

In his verified bill of particulars, plaintiff claims cervical and lumbar disc bulges and derangement of the right knee.

Defendants' showing

Defendants met their prima facie burden of showing that plaintiff did not sustain a serious injury by submitting the affirmed report of Dr. Nason, an orthopedist, who stated that after examining plaintiff, she found, inter alia, a full range of motion in plaintiff's cervical and lumbar spine and right knee, that any alleged injury had resolved, and that he could perform all activities without restriction.

Defendants also submitted the affirmed report of Dr. April, a neurologist, who stated that after examining plaintiff, and measuring the range of motion in his cervical and lumbar spine (normal in both areas), plaintiff had no objective neurological permanency or disability relating the subject accident. Additionally, defendants submitted the affirmed report of Dr. Springer, a radiologist, who read the MRIs of plaintiff's cervical and lumbar spine taken approximately 3 months after the accident; he found degenerative, not traumatic changes.

Finally, in her affirmation in support, defendants' attorney cited to plaintiff's bill of particulars wherein he stated that he was confined to his bed for one day and to his home for several days after the accident. Based on the foregoing, defendants made a prima facie showing; the burden shifts to plaintiff to oppose the motion.

Plaintiff's showing

In opposition, plaintiff submits the affirmation of Dr. Damien, a radiologist, who affirms the contents of plaintiff's lumbar and cervical MRIs in which he saw disc bulges. However, it is well-settled that herniations and bulges are not, in and of themselves, evidence of serious injury without competent objective evidence of the physical limitations resulting from the injury, and their duration (*Hospedales v "John Doe"*, 79 AD3d 536 [1st Dept 2010]). However, Dr.

Goldenberg, plaintiff's treating physiatrist, provides this competent evidence.

In her affirmation, EMG nerve conduction report and exam notes, Dr. Goldenberg states, inter alia, that she reviewed Dr. Damien's affirmed MRI reports, measured continuing, quantified range of motion limitations in plaintiff's cervical and lumbar spine on May 24, 2013, found that plaintiff has sustained a permanent loss of mobility, and opined that plaintiff's limitations are causally related to the subject accident; this provides the requisite proof of limitations (*Pietropinto v Benjamin*, 104 AD3d 617 [1st Dept 2013]). Dr. Goldenberg's report, read together with Dr. Damien's reports, raise a triable factual question sufficient to defeat summary judgment. Significantly, Dr. Goldenberg addresses the pre-existing degenerative changes described by Dr. Springer by noting they are "medically irrelevant" because plaintiff was asymptomatic prior to the trauma, and because the accident may have exacerbated his degenerative condition. Thus, plaintiff raised a triable issue of fact as to his claimed spinal injuries, and the jury must decide which expert(s) to believe. *See Diaz v Guzman*, __ NYS2d __ 2014 WL 861809 (1st Dept 2014)]. However, because defendants demonstrated that plaintiff did not satisfy the 90/180-category of serious injury and plaintiff did not present any evidence sufficient to raise an issue of fact as to that category, his 90/180-day claim is dismissed. *See Arena v Guaman*, 98 AD3d 461, 949 NYS2d 688 (1st Dept 2012).

Accordingly, it is

ORDERED that the branch of Errico's motion (seq 03) seeking summary judgment dismissing the complaint as against him on the grounds that his stopped vehicle was hit in the rear and cannot be liable for the happening of the accident, is granted without opposition; the complaint is dismissed as against defendant Errico and the Clerk is directed to remove his name from the caption; and it is further

ORDERED that the motion of defendants Klara & Simon Cab Corp. and Eldabah (seq 04) for summary judgment or summary judgment dismissing this action on the grounds that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law §5012(d) is granted only to the extent that the 90/180-day claim is dismissed, but otherwise denied.

This is the Decision and Order of the Court.

Dated: July 21, 2014
New York, New York



ARLENE P. BLUTH, JSC

HON. ARLENE P. BLUTH

FILED

JUL 25 2014

COUNTY CLERK'S OFFICE
NEW YORK