

Davis v JMA Taxi, Inc.
2014 NY Slip Op 32733(U)
October 15, 2014
Supreme Court, New York County
Docket Number: 151689/2012
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 5

-----X
SHAWN DAVIS and SHERRYLIN FORDE,

Plaintiffs,

-against-

DECISION/ORDER
Index No. 151689/2012
Seq. No. 002

JMA TAXI, INC., KINGSLEY E. AKWABOA,
THE CITY OF NEW YORK, THE NEW YORK CITY
DEPARTMENT OF TRANSPORTATION,
JEANNETTE SOUNDS, HONDA LEASE TRUST, INC.,
and SUNG W. SUN,

Defendants.

-----X
KATHRYN E. FREED, J.S.C.:

RECITATION, AS REQUIRED BY CPLR 2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION:

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIRMATION ANNEXED.....	1,2.(Exs. A-H)
NOTICE OF CROSS MOTION AND AFFIRMATION ATTACHED.....3,4.....
NOTICE OF CROSS MOTION AND AFFIRMATION ATTACHED.....	..5,6(Exs. A-D)
ANSWERING AFFIRMATION.....	...7..(Exs. A-K)
REPLY AFFIRMATION8.....
OTHER...(Memo of Law)9.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

In this personal injury action, defendants JMA Taxi, Inc. and Kingsley E. Akwaboia move, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against them on the ground that neither plaintiff Shawn Davis nor plaintiff Sherrylin Forde sustained a “serious injury” as defined by Insurance Law §5102(d). Defendants the City of New York (“the City”), The New York City Department of Transportation (“the DOT”), Jeannette Sounds, Honda Lease Trust, Inc. (“Honda”) and Sung W. Sun cross-move for summary judgment dismissing the

complaint and all cross claims against them on the same ground. Honda also cross-moves for summary judgment dismissing all cross claims against it by JMA and Akwaboa on the ground that the claims are barred by the Graves Amendment, 49 USCA § 30106. Plaintiffs oppose the motions. After oral argument and consideration of the parties' papers and the relevant statutes and case law, this Court **grants** the motion and cross motions only to the extent that plaintiffs' 90/180-day claim is dismissed, and the motion and cross motions are otherwise **denied**.

Factual and Procedural Background:

This case, arising from an automobile accident which occurred on March 8, 2011 on the northbound FDR Drive at East 6th Street in Manhattan, was commenced on April 10, 2012. Ex. A.¹ In their complaint, plaintiffs alleged that, at the time of the incident, Davis was driving a vehicle in which Forde was a passenger when it was involved in an accident with a vehicle owned by JMA and driven by Akwaboa, a vehicle owned by defendants the City and/or DOT and operated by defendant Sounds², and another vehicle owned by Honda and driven by Sun. Ex. A. As a result of the incident, plaintiffs each alleged that they sustained a "serious injury" as defined by Insurance Law §5102(d). Ex. A.

JMA and Akwaboa joined issue by service of their verified answer on May 30, 2012. Ex. A. Honda and Sun joined issue by service of their verified answer on June 14, 2012. Ex. A to Cross-Motion By Honda and Sun. The City's answer is not annexed as an exhibit to any of the

¹Unless otherwise noted, all references are to the exhibits annexed to the motion for summary judgment by JMA Taxi and Akwaboa.

²Although the notice of motion spells this defendant's name "Sounds", it is spelled "Saunds" in the complaint.

moving papers.

In plaintiffs' bill of particulars, plaintiff Davis alleges that, as a result of the alleged incident, he sustained a tear of the posterior horn of the medial meniscus and a tear and hematoma in the medial head of the gastronemius of his right knee; a tear of the anterior labrum of the right shoulder; and disc herniations at C2-C7, with impingement on the spinal cord at C3-C4; and a herniated disc at L5-S1. Ex. B, at par. 14. Plaintiff Forde alleges that she sustained a tear of the anterior labrum of the left shoulder and bulging discs at L3-L4, L4-L5, and L5-S1. Ex. B, at par. 14. Both Davis and Forde allege that they were confined to bed for an unspecified "period of months following the date of the accident." Ex. B, at par. 18. Plaintiffs both claim that, as a result of the alleged accident, they sustained

a permanent loss of use of a body organ, member, function or system; a permanent consequential limitation of use of a body organ or member; a significant limitation of use of a body function or system; and a medically determined injury o[r] impairment of a non-permanent nature which prevented him from performing substantially all of the material acts which constituted his [and her] usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence complained of.

Ex. B, at par. 11.

Defendants JMA and Akwaboa now move, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims asserted against them on the ground that neither plaintiff sustained a "serious injury" as defined by Insurance Law section 5102(d). The City and Sounds, as well as Honda and Sun, cross-move for the same relief based on the arguments and evidence submitted by JMA and Akwaboa. Honda also cross moves for summary judgment dismissing the cross claims asserted against it by JMA and Akwaboa on the ground that the claims

against it are barred by the Graves Amendment, 49 USCA § 30106.

The Parties' Contentions:

In support of their motion for summary judgment, JMA and Akwaboa argue that neither plaintiff sustained a "serious injury" within the meaning of Insurance Law § 5102(d). Specifically, they assert that plaintiffs failed to establish that they sustained a permanent injury or significant limitation as a result of the alleged accident. Further, JMA and Akwaboa assert that plaintiff's failed to establish that, as a result of the alleged accident, they were unable to perform substantially all of their usual activities for 90 out of the 180 days following the alleged incident.

The City and Sounds adopt the arguments and evidence submitted by JMA and Akwaboa in support of their cross motion for summary judgment.

In support of that branch of their cross motion seeking summary judgment dismissing the complaint and all cross claims based on plaintiffs' failure to establish that they sustained a "serious injury", Honda and Sun also adopt the arguments and evidence submitted by JMA and Akwaboa. Honda also seeks summary judgment dismissing the cross claims against it by JMA and Akwaboa on the ground that it cannot be held liable herein because it was merely lessor of the vehicle driven by Sun and is thus protected by the Graves Amendment, 49 USCA § 30106.³

In opposition to the motions by JMA, Akwaboa, Honda, and Sun, plaintiffs argue that JMA and Akwaboa's own examining orthopedist, Dr. Gregory Montalbano, and radiologist, Dr. Audrey Eisenstadt, confirmed they each sustained a "serious injury." Plaintiffs also assert that Dr.

³All parties except JMA and Akwaboa have discontinued their claims against Honda. Ex. D to Honda and Sun's Cross Motion.

Montalbano's opinions must be disregarded since he misstated what their normal range of motion was supposed to have been and failed to compare their ranges of motion with normal ranges of motion. Further, plaintiffs argue that JMA and Akwaboa failed to establish that they were entitled to summary judgment dismissing plaintiffs' claim that they were unable to perform substantially all of their usual activities for 90 out of the 180 days following the alleged accident.

Dr. Timur Hanan, a specialist in physical medicine and rehabilitation, submits affidavits in opposition to the motions for summary judgment, dated June 30, 2014, in which he sets forth, inter alia, specific limitations of range of motion he observed upon examining plaintiffs. Ex. C and Ex. G to Plaintiff's Aff. In Opp. He also states that he reviewed the affirmed MRI reports of radiologists Dr. Jacob Lichy and Dr. Thomas Kolb regarding MRIs taken of plaintiff Davis (Exs. D and E to Plaintiff's Aff. In Opp.) as well as the affirmed MRI reports of Dr. Lichy regarding MRIs taken of plaintiff Forde (Ex. H to Plaintiff's Aff. In Opp.), and finds that both plaintiffs sustained continuing, quantified and permanent losses of mobility which are attributable to the alleged accident. He further opines, within a reasonable degree of medical certainty, that prior to the date of the accident, Davis and Forde were asymptomatic and thus, any preexisting conditions they had were exacerbated by the alleged accident. Ex. C and G, respectively, to Plaintiff's Aff. In Opp. Dr. Hanan also opines in a certified report dated May 31, 2014 that plaintiff Forde's injuries were causally related to the alleged accident. Ex. G to Plaintiff's Aff. In Opp.

In a reply affirmation in further support of their motion, JMA and Akwaboa argue that plaintiffs cannot establish that they each sustained a "serious injury" because there was a gap in, or cessation of, their treatment. They also assert that the conclusory affidavits submitted by Dr. Hanan fail to defeat their entitlement to summary judgment. Further, JMA and Akwaboa maintain that Dr.

Hannan failed to address the fact that plaintiffs had pre-existing degenerative conditions and that there is no objective medical evidence that plaintiffs sustained trauma. Additionally, JMA and Akwaboa assert that Dr. Hanan's opinions are inadmissible hearsay because he did not review the actual MRI films.

Conclusions of Law:

Motions For Summary Judgment

"The proponent of a summary judgment motion must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v. Waisman*, 39 A.D.3d 303, 306 (1st Dept. 2007), citing *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). In moving for summary judgment in a "serious injury" case such as this, the defendant(s) has the initial burden of presenting competent evidence establishing that the plaintiff has not sustained a "serious injury." See *Spencer v Golden Eagle, Inc.*, 82 AD3d 589, 590 (1st Dept 2011); *Rodriguez v Goldstein*, 18 AD2d 396, 397 (1st Dept 1992). Once the proponent has proffered evidence establishing a prima facie showing, the burden then shifts to the opposing party to present evidence in admissible form raising a triable issue of fact. See *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1989).

In order to recover for non-economic loss, *i.e.*, pain and suffering, in a case involving personal injuries arising from an automobile accident, a plaintiff must establish a "serious injury" as defined by Insurance Law § 5102(d). See *Perl v Maher*, 18 NY3d 208, 215 (2011). That section defines "serious injury" as (1) death; (2) dismemberment; (3) significant disfigurement; (4) fracture; (5) loss of a fetus; (6) permanent loss of use of a body organ, member, function or system; (7)

permanent consequential limitation of use of a body organ or member; (8) significant limitation of use of a body function or system; or (9) a medically determined injury or impairment of a non-permanent 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 ninety days during the one hundred eighty days immediately following the occurrence of the injury ("the 90/180 category"). Plaintiffs claim "serious injury" pursuant to categories six, seven, eight and nine above. Ex. B, at par. 11.

Here, defendants initially met their prima facie burden of establishing that neither plaintiff sustained a "serious injury" under categories six, seven or eight by submitting the affirmed reports of their expert radiologist, Dr. Eisenstadt, and expert orthopedist, Dr. Montalbano, who stated in affirmed reports that plaintiffs' injuries were longstanding and degenerative in nature and thus not caused by the alleged accident. Exs. C, D, E, and F. *See Boone v Elizabeth Taxi, Inc.*, 117 AD3d 515 (1st Dept 2014); *Rickert v Diaz*, 112 AD3d 451 (1st Dept 2013).

Additionally, defendants established their entitlement to summary judgment pursuant to the 90/180 day category by submitting plaintiffs' bill of particulars, in which they alleged that they were confined to bed and home "for [an unspecified] period of months following the date of the accident." Ex. B. Since the bill of particulars failed to plead that plaintiffs were impaired from performing their usual and customary period for 90 out of the 180 days following the alleged incident, this Court need not consider the claim. *See Long v Taida Orchards, Inc.*, 117 AD3d 624 (1st Dept 2014).

In any event, plaintiff Davis admitted at his deposition that no doctor had told him that he had to refrain from working for a certain amount of time as a result of the accident. Ex. G, at 101.

He further conceded that, since the accident, he had looked for work involving physical labor and believed he may not have obtained the employment he applied for due to his criminal record. Ex. G, at 105-106. Further, he admitted that he applied for a gym membership after the accident. Ex. G, at 107-108. Additionally, although Forde testified at her deposition that she could not engage in certain activities since the accident (Ex. H, at 45-55), she did not state that a doctor had instructed her not to participate in such activities. *See Blake v Portexit Corp.*, 69 AD3d 426 (1st Dept 2010). Moreover, since Forde admitted at her deposition that she had never been employed (Ex. H, at 23), this Court is of course unable to determine whether the accident impaired her ability to work.

In opposition, as noted above, plaintiff submits the affirmations of Dr. Hanan (Exs. C and G to Plaintiffs' Aff. In Opp.), who states, inter alia, that he examined plaintiffs and reviewed the affirmed MRI reports of Dr. Lichy and Dr. Kolb regarding MRIs taken of plaintiff Davis (Exs. D and E to Plaintiff's Aff. In Opp.) as well as the affirmed MRI reports of Dr. Lichy regarding MRIs taken of plaintiff Forde (Ex. H to Plaintiff's Aff. In Opp.), and found that both plaintiffs sustained continuing, quantified and permanent losses of mobility which are attributable to the alleged accident. Since Dr. Hanan set forth the required proof of plaintiffs' limitations (*see Pietropinto v Benjamin*, 104 AD3d 617 [1st Dept 2013]), his affirmations, read with the MRI reports of Dr. Lichy and Dr. Kolb, raise issues of fact regarding whether each plaintiff sustained a "serious injury" as defined by Insurance Law § 5102(d). Notably, Dr. Hanan addresses the pre-existing degenerative changes described by Dr. Montalbano and Dr. Eisenstadt by stating that, since such pre-existing conditions were asymptomatic prior to the accident, they were exacerbated or aggravated by the occurrence. Ex. C to Plaintiff's Aff. In Opp., at par. 22; Ex. G

to Plaintiff's Aff. In Opp., at par. 19. *See Colon v Bernabe*, 65 AD3d 969 (1st Dept 2009).

Given these divergent expert opinions, plaintiffs have raised triable issues of fact as to their claimed injuries under the "permanent loss of use", "permanent consequential limitation of use", and "significant limitation of use" categories of Insurance Law § 5102(d). *See Boateng v Ye Yiyen*, 119 AD3d 424 (1st Dept 2014); *Diaz v Guzman*, 115 AD3d 448 (1st Dept 2014).

However, since defendants demonstrated that plaintiffs did not satisfy the 90/180-day category set forth in Insurance Law § 5102(d), and plaintiffs did not present any evidence sufficient to raise an issue of fact as to this category, their 90/180-day claims are dismissed. *See Diaz v Guzman, supra; Arenas v Guaman*, 98 AD3d 461 (1st Dept 2012).

Although defendants claim that plaintiffs cannot prevail on their claims of "serious injury" due to gaps in their treatment, plaintiffs explained that they did not obtain further treatment from 2011-2014 because they had exhausted their no-fault benefits. Ex. H, at 27; Ex. C to Plaintiff's Aff. In Opp., at par. 57. Since plaintiffs posited at least "some reasonable explanation" for the gaps in their treatment, their claims are not subject to dismissal on this ground. *Windham v New York City Trans. Auth.*, 115 AD3d 597, 599 (1st Dept 2014), citing *Ramkumar v Grand Style Transp. Enters. Inc.*, 22 NY3d 905, 907 (2013).

Honda's Cross Motion To Dismiss Cross Claims By JMA and Akwaboa

Honda argues that, because it was the lessor of the vehicle driven by Sun, the claims against it by JMA and Akwaboa must be dismissed pursuant to the Graves Amendment, 49 USC § 20106. That section provides, in pertinent part, that:

[a]n owner of a motor vehicle that rents or leases the vehicle to a person (or an affiliate of the owner) shall not be liable under the law of any State or political subdivision thereof, by reason of being the owner of the vehicle (or an affiliate of the owner), for harm to persons or property that results or arises out of the use, operation, or possession of the vehicle during the period of the rental lease, if

(1) the owner (or an affiliate of the owner) is engaged in the trade or business of renting or leasing motor vehicles; and

(2) there is no negligence or criminal wrongdoing on the part of the owner (or an affiliate of the owner).

49 USC § 20106(a).

In support of its cross motion, Honda submits the affidavit of Dorthea Montoya, Manager of Corporate Operations Compliance for American Honda Finance Corporation, who attests to the fact that Honda was the lessor of the vehicle driven by Sun. Ex. C to Honda and Sun's Cross Motion. However, since the affidavit, which was executed in California, lacks a certificate of conformity, it is not in admissible form and cannot be considered in support of a motion for summary judgment. *See* CPLR 2309 (c); *Green v Fairway Operating Corp.*, 72 AD3d 613 (1st Dept 2010). Further, since the affidavit does not establish that Honda was free of negligence, it does not entitle Honda to summary judgment under the Graves Amendment. *Cf.*, *Bravo v Vargas*, 113 AD3d 579 (2d Dept 2014).

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the motion by defendants JMA Taxi, Inc. and Kingsley E. Akwaboa seeking summary judgment dismissing the complaint and all cross claims asserted against them

on the grounds that each plaintiff did not sustain a “serious injury” within the meaning of Insurance Law § 5102(d) is granted only to the extent that the 90/180-day claim is dismissed, and the motion is otherwise denied; and it is further,

ORDERED that the cross motion by defendants the City of New York, The New York City Department of Transportation and Jeannette Sounds seeking summary judgment dismissing the complaint and all cross claims asserted against them on the grounds that each plaintiff did not sustain a “serious injury” within the meaning of Insurance Law § 5102(d) is granted only to the extent that the 90/180-day claim is dismissed, and the motion is otherwise denied is denied; and it is further,

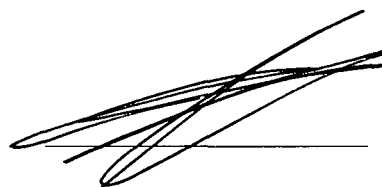
ORDERED that the branch of the cross motion by defendants Honda Lease Trust, Inc. and Sung W. Sun seeking summary judgment dismissing the complaint and all cross claims asserted against them on the grounds that each plaintiff did not sustain a “serious injury” within the meaning of Insurance Law § 5102(d), is granted only to the extent that the 90/180-day claim is dismissed, and that branch of the motion is otherwise denied; and it is further,

ORDERED that the branch of the cross motion by Honda Lease Trust, Inc. seeking summary judgment dismissing all cross claims asserted against it by defendants JMA Taxi, Inc. and Kingsley E. Akwaboa based on the Graves Amendment is denied; and it is further,

ORDERED that this constitutes the decision and order of the Court.

DATED: October 15, 2014

ENTER:

A handwritten signature in black ink, consisting of several overlapping, fluid strokes that form a cursive-like shape. The signature is positioned above a horizontal line.

Hon. Kathryn E. Freed,
J.S.C.