

Ktaia v Dabigouna Sama, Sonia Weiss and Soned Corp.

2014 NY Slip Op 33318(U)

February 19, 2014

Supreme Court, Bronx County

Docket Number: 308895/2011

Judge: Lucindo Suarez

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 19

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ALSAYED KTAIA,

Plaintiff,

- against -

DABIGOUNA SAMA, SONIA WEISS and SONED
CORP.,

Defendant.
-----X

DECISION AND ORDER

Index No. 308895/2011

PRESENT: Hon. Lucindo Suarez

Upon defendants' notice of motion dated November 4, 2013 and the affirmation, affirmed reports and exhibits submitted in support thereof; plaintiff's affirmation in opposition dated December 23, 2013 and the affirmation and exhibits annexed thereto; defendants' reply affirmation dated February 6, 2014; and due deliberation; the court finds:

Plaintiff commenced this action to recover damages for personal injuries sustained in a motor vehicle accident that occurred on November 13, 2010 in Long Island City, Queens County. Defendants now move pursuant to CPLR 3212 for summary judgment on the ground that plaintiff did not sustain a "serious injury," as the phrase is defined in Insurance Law § 5102.¹ Plaintiff alleges in his verified bill of particulars to have sustained disc bulges and herniations of the cervical and lumbar spine with radiculopathy; tendinosis/tendinopathy and effusion of the left shoulder; effusion and subluxation of the left knee; and sprains and strains. He was confined to his bed and home for two days, and he has been incapacitated from his job from the date of the accident. Plaintiff claims his injuries constitute a permanent loss of use of a body organ, member, function or system; a permanent consequential

¹ Plaintiff's action against defendant Sonia Weiss has been dismissed.

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 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 or impairment ("90/180").

In support of the application, defendants submit affirmed reports from orthopedic surgeon Lisa Nason, M.D. and neurologist Daniel Feuer, M.D. Dr. Nason found full ranges of motion in all areas tested and normal or negative results for all tests administered during her examination of plaintiff on August 26, 2013. She opined that plaintiff's sprains and contusions had resolved. Dr. Feuer examined plaintiff on August 29, 2013 and found full ranges of motion of the cervical spine and restrictions of the lumbar spine "secondary to body habitus." He found no objective evidence of a neurological disability and opined that plaintiff could engage in full active employment without any restrictions.

Defendants have demonstrated that plaintiff did not suffer a serious injury within the meaning of the Insurance Law. *See Frias v. Son Tien Liu*, 107 A.D.3d 589, 967 N.Y.S.2d 382 (1st Dep't 2013); *Haniff v. Khan*, 101 A.D.3d 643, 958 N.Y.S.2d 89 (1st Dep't 2012). Although defendants' experts did not address plaintiff's condition during the statutory period, *see Robinson v. Joseph*, 99 A.D.3d 568, 952 N.Y.S.2d 187 (1st Dep't 2012), plaintiff's bill of particulars concerning his home confinement refutes his 90/180 claim. *See Bravo v. Martinez*, 105 A.D.3d 458, 963 N.Y.S.2d 82 (1st Dep't 2013). Moreover, a claimed inability to work is not dispositive of the existence of the claim. *See Rosa-Diaz v. Maria Auto Corp.*, 79 A.D.3d 463, 913 N.Y.S.2d 51 (1st Dep't 2010).

Plaintiff in opposition submits an affirmation from treating physician Ayman Hadhoud, M.D. and his records; plaintiff's deposition transcript; emergency room records from New York Hospital Queens; four MRI reports from Stand-Up MRI of East Elmhurst, P.C.; records from Ajoy K. Sinha,

M.D.; and a report from Joseph C. Cole, M.D. Contrary to plaintiff's assertion, defendants' experts were not required to review and address the positive diagnostic findings in plaintiff's medical records. *See Robinson v. Joseph*, 99 A.D.3d 568, 952 N.Y.S.2d 187 (1st Dep't 2012). The emergency room records, Dr. Sinha's records, and the MRI reports are not admissible as they are not certified or affirmed, and defendants' experts did not expressly rely on or attach those records to their reports. *See Malupa v. Oppong*, 106 A.D.3d 538, 966 N.Y.S.2d 9 (1st Dep't 2013); *Hernandez v. Almanzar*, 32 A.D.3d 360, 821 N.Y.S.2d 30 (1st Dep't 2006). Dr. Hadhoud reporting finding contemporaneous and persisting range of motion limitations in all areas during his examinations and opined that plaintiff's injuries were causally related to the accident. He treated plaintiff for over one year until plaintiff's no fault benefits ceased. Dr. Cole examined plaintiff on May 17, 2011 on behalf of State Farm Insurance Company and determined that plaintiff's injuries had not yet resolved. Plaintiff's deposition testimony reveals that he never suffered an injury to his neck, back, left shoulder or left knee prior to the accident. Dr. Hadhoud's stated that plaintiff was "totally disabled," and he permitted plaintiff to resume limited, sedentary work eleven months after the accident. Plaintiff had been self-employed fixing dental equipment but he testified that his injuries have affected his ability to work using fine tools.

Plaintiff's submissions fail to demonstrate that he suffered a "permanent loss of use" of any body part. *See Oberly v. Bangs Ambulance Inc.*, 96 N.Y.2d 295, 751 N.E.2d 457, 727 N.Y.S.2d 378 (2001). Similarly, Dr. Hadhoud's statement that plaintiff was "totally disabled" is too general to support a 90/180 claim. *See Winters v. Cruz*, 90 A.D.3d 412, 933 N.Y.S.2d 551 (1st Dep't 2011). Plaintiff's testimony that he experiences difficulty walking long distances or traversing stairs does not establish that he was prevented from performing substantially all his daily activities. *See Gibbs v. Hee Hong*, 63 A.D.3d 559, 881 N.Y.S.2d 415 (1st Dep't 2009). However, the submissions are sufficient to raise a triable issue of fact as to whether plaintiff suffered a "permanent consequential" or a

“significant limitation of use” of his cervical and lumbar spine, left knee and left shoulder. *See Kim v. Gomez*, 105 A.D.3d 415, 962 N.Y.S.2d 127 (1st Dep’t 2013).

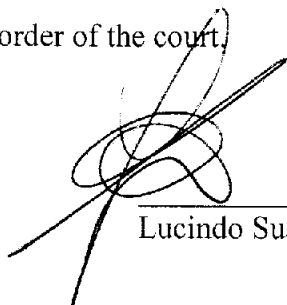
Accordingly, it is

ORDERED, that defendants’ motion for summary judgment dismissing plaintiff’s complaint is granted to the extent of dismissing plaintiff’s claim of serious injury in the categories of permanent loss of use of a body organ, member, function or system and 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 or impairment; and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of defendants Dabigouna Sama and Soned Corp. dismissing plaintiff’s complaint of serious injury in the categories of permanent loss of use of a body organ, member, function or system and 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 or impairment.

This constitutes the decision and order of the court.

Dated: February 19, 2014



Lucindo Suarez, J.S.C.