

Campbell v Khesin
2014 NY Slip Op 33552(U)
December 12, 2014
Supreme Court, Queens County
Docket Number: 1923/2013
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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NOEL CAMPBELL,

Plaintiff,

- against -

ALEXANDER KHESIN,

Defendant.

----- x

The following papers numbered 1 to 16 were read on this motion by defendant, Alexander Khesin, for an order pursuant to CPLR 3212 granting summary judgment in favor of the defendant and dismissing the plaintiff's complaint on the ground that the plaintiff, Noel Campbell, did not sustain a serious injury within the meaning of Insurance Law §§ 5102 and 5104:

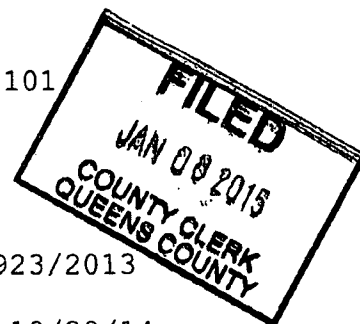
Papers
Numbered

Notice of Motion-Affidavits-Exhibits-Memorandum of Law...1 - 5
 Affirmation in Opposition-Affidavits-Exhibits.....6 - 11
 Reply Affirmation-Memorandum of Law.....12 - 16

This is a personal injury action in which plaintiff, Noel Campbell, seeks to recover damages for injuries he sustained as a result of a motor vehicle accident that occurred on December 1, 2011, on the eastbound lanes of the Grand Central Parkway, Queens County, New York. Plaintiff claims that he was a restrained passenger in a minivan, owned by Queens Center for Progress, when the minivan, which was proceeding in stop and go traffic, was struck in the rear by the vehicle owned and operated by defendant, Alexander Khesin.

The plaintiff commenced this action by filing a summons and complaint on January 30, 2013. Issue was joined by service of the

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defendant's verified answer dated March 8, 2013. The plaintiff filed a note of issue on February 8, 2014. The matter is presently on the calendar in the Trial Scheduling Part for February 9, 2015.

Defendant now moves for an order pursuant to CPLR 3212(b), granting summary judgment dismissing the plaintiff's complaint on the ground that plaintiff did not suffer a serious injury as defined by Insurance Law § 5102. In support of the motion, defendant submits an affirmation from counsel, William A. Fitzgerald, Esq; a copy of the pleadings; a copy of plaintiff's verified bill of particulars; a copy of the transcripts of the plaintiff's and defendant's examination before trial; photographs depicting minimal damage to the rear of the minivan and front of defendant's vehicle; records from the plaintiff's admission to the emergency room at Long Island Jewish Hospital; a medical report from plaintiff's treating physician, Dr. Marc Sherman; a report from plaintiff's urologist, Dr. Evan Eisenberg; an affirmed report from Dr. Davy at Lukev Interventional Pain Medicine; an affirmed report from defendant's retained orthopedic surgeon, Dr. Barry Katzman; and an affirmed medical report from defendant's retained orthopedist, Dr. Eric L. Freeman.

Plaintiff, age 57, contends that as a result of the accident he sustained, inter alia, bulging discs at T12-L1, L1-L2, L2-L3, L3-L4, L4-L5, L5-S1, a tear of the supraspianus muscle, a tear of the labrum and a tear of the rotator cuff of the left shoulder requiring arthroscopic surgery; a tear of the rotator cuff of the right shoulder requiring arthroscopic surgery; permanent significant scarring and disfigurement; and exacerbation of pre-existing degenerative changes.

Plaintiff asserts that he sustained a serious injury as defined in Insurance Law § 5102(d) in that he sustained a permanent loss of use of a body organ, member function or system; a permanent consequential limitation or use of a body organ or member; a significant limitation of use of a body function or system; significant disfigurement; and a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute his 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.

In his examination before trial taken on October 10, 2013, the plaintiff, Mr. Campbell, testified that he is employed by Queens Center for Progress in Bellerose, Queens and at Eihab in Jamaica Queens as a child care worker for physically disabled individuals. He missed four days from work from Queens Center

immediately following the accident and a month from Eihab. He had surgery for each shoulder, one in December 2012 and the other in February 2013. On the date of the accident he was a passenger in a Toyota Sienna Minivan owned by Queens Center for Progress. He was seated in the last row in the rear of the vehicle. The vehicle was being operated by another employee. As a result of the impact to the rear of the vehicle he felt pain to his neck, back, and both shoulders. He left the scene in another company van and was taken to the emergency room at Long Island Jewish Hospital where he was treated and released after 90 minutes. A few days later he sought treatment with Dr. Basileo, his family physician for pain to his neck, back and shoulders. He then began a regular course of physical therapy at Lukev Interventional Pain Medicine in Hempstead.

Dr. Eric L. Freeman, an orthopedist retained by the defendant, examined the plaintiff on May 12, 2014. Plaintiff reported to him that he was a passenger in a minivan that was rear ended on December 1, 2011. He told Dr. Freeman that he underwent arthroscopic surgery by Dr. Berkowitz on his right shoulder and left shoulder. His chief complaint on the day of the examination was bilateral shoulder pain and back pain. Dr. Freeman tested the plaintiff's range of motion with a goniometer and found that the plaintiff had no limitations of range of motion of the cervical spine, lumbar spine, and bilateral shoulders. He states that based on the history as provided by the plaintiff, the medical records provided for his review and the physical examination, "the plaintiff had an excellent recuperation from the alleged incident of December 1, 2011." Dr. Freeman states that he found no orthopedic residua in any capacity and no evidence of permanency. He states that the plaintiff is able to perform full activities of daily living and work status without restriction

The plaintiff was also examined by Dr. Katzman, an orthopedic surgeon retained by the defendant. He examined the plaintiff on May 9, 2012. The plaintiff told Dr. Katzman that he injured his back, right shoulder and left shoulder as a result of the accident. At the time of the examination he stated that his neck was okay and his low back hurt "a little." He stated that his shoulders hurt, but are better. He has numbness and tingling in the right upper shoulder. He told Dr. Katzman that he missed a couple off days of work after the accident and was presently working full duty. Physical range of motion testing showed full range of motion of the cervical spine, full range of motion of the thoracolumbar spine, and full range of motion of the right and left shoulders. Dr. Katzman concludes that the plaintiff does not have a causally related injury.

Defendant's counsel contends that the medical reports of Drs. Katzman and Freeman together with the plaintiff's testimony at his examination before trial that he only missed a few days of work following the accident and the reports of his own treating physicians are sufficient to demonstrate that the plaintiff has not sustained a permanent consequential limitation or use of a body organ or member; a significant limitation of use of a body function or system; or a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute his 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.

In opposition, plaintiff's attorney, Kara L. Campbell, Esq., submits her own affirmation as well as the initial medical evaluation of Dr. Davy at Lukev Interventional Pain Medicine; the defendant's report from Dr. Katzman, the MRI report of the left shoulder from Dr. Novick; the MRI report from Dr. Rubin regarding the plaintiff's right shoulder; Dr. Himelfarb's radiological report regarding the MRI of plaintiff's cervical spine and lumbar spine; the affirmation of Dr. Berkowitz regarding the arthroscopic surgery of the plaintiff's shoulders; the certified medical records from Lukev Interventional Pain Medicine; an affidavit from the plaintiff; and the plaintiff's testimony from his examination before trial.

In his affidavit, dated September 26, 2014, the plaintiff states that at the time of the accident he was a rear seated seat-belted passenger in his employer's van when it was heavily impacted on the Grand Central Parkway by the defendant's vehicle. As a result of the impact he experienced pain to his neck, back and both shoulders. He remained out of work for 5 days after the accident. He was subsequently treated by Dr. Basileo, Dr. Berkowitz, and Dr. Bursztyn. He received MRIs of his shoulders, neck, and back and received physical therapy treatment. On December 5, 2012 he underwent arthroscopic surgery of the right shoulder, and on February 20, 2013 he underwent arthroscopic surgery of the left shoulder. Dr. Berkowitz performed both surgeries. He states that despite the surgeries he continues to experience daily pain and difficulty using his shoulders. He also continues to suffer from pain in his back and neck.

Dr. Davy initially examined the plaintiff on December 12, 2011, eleven days after the accident. In his initial report dated December 12, 2011 Dr. Davey states that the

plaintiff lost a few days from work. Dr. Davy's initial physical examination showed a decreased range of motion in the right and left shoulder and pain in the lumbosacral spine and neck. At that time he found that plaintiff had clinical signs and symptoms consistent with cervical and lumbar post-traumatic disc pathology, facet arthropathy, bilateral shoulder pain, and a possible rotator cuff tear as a direct result of the subject motor vehicle accident. He stated that the plaintiff had a marked partial disability at the time of the initial examination causally related to the subject accident.

The plaintiff's MRI of his right shoulder as interpreted by Dr. Rubin, prior to surgery, showed a partial tear of the supraspinatus tendon. The MRI study of the right shoulder as interpreted by Dr. Novick indicates that there is an intrasubstance partial thickness tendon tearing of the supraspinatus tendon. The MRI of the cervical spine reported on by Dr. Himelfarb showed a posterior disc bulge at C3-4, C5-6, C6-C7 and C7-T1 encroaching on the thecal sac. Dr. Himelfarb's review of the MRI of plaintiff's lumbar spine showed disc bulges at L5-S1 and L1-2 through L4-5 levels and T12-L1.

Dr. Berkowitz, plaintiff's surgeon reexamined the plaintiff on February 14, 2014 at which time he found that the defendant still showed decreased range of motion of the right and left shoulders. He states that based upon the plaintiff's history, his examinations, and his surgical procedures, it is his opinion that Mr. Campbell suffered a significant limitation of use of both of his shoulders as a direct result of the motor vehicle accident of December 1, 2011. He states that the MRI confirmed rotator cuff tears and bilateral impingement syndrome were the source of his bilateral shoulder pain and limitations.

Dr. McGee also submits a report from September 2014, showing that the plaintiff still suffered from significantly decreased range of motion of the lumbosacral spine and shoulders.

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 a 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 defendant's 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 proof submitted by the defendant, including the affirmed medical reports of Drs. Katzman and Freeman together with the plaintiff's testimony at his examination before trial that he only missed a few days of work immediately following the accident are sufficient to meet defendant's 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]).

However, this Court finds that the plaintiff raised triable issues of fact by submitting the affirmed medical reports of Drs. Davy, Berkowitz and McGee attesting to the fact that the plaintiff sustained rotator cuff tears in the right and left shoulder requiring arthroscopic surgery as well as bulging discs in the lumbar and cervical spine as a result of the accident and finding that the plaintiff had significant limitations in range of motion of his cervical and lumbar spines and bilateral shoulders 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]; David v Caceres, 96 AD3d 990 [2d Dept. 2012]; Martin v Portexit Corp., 98 AD3d 63 [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 she sustained a serious injury under the permanent consequential and/or the significant

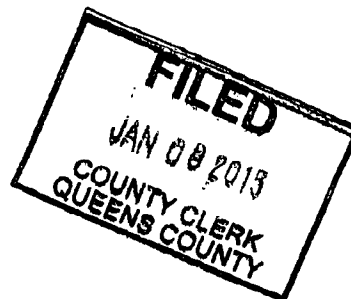
limitation of use categories of Insurance Law § 5102(d) as a result of the subject accident (see Khavosov v Castillo, 81 AD3d 903[2d Dept. 2011]; Mahmood v Vicks, 81 AD3d 606 [2d Dept. 2011]; Compass v GAE Transp., Inc., 79 AD3d 1091[2d Dept. 2010]; Evans v Pitt, 77 AD3d 611 [2d Dept. 2010]; Tai Ho Kang v Young Sun Cho, 74 AD3d 1328 743 [2d Dept. 2010]).

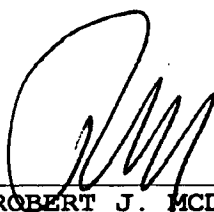
Accordingly, for the reasons set forth above, it is hereby,

ORDERED, that the motion by defendant, ALEXANDER KHESIN, for an order granting summary judgment dismissing the complaint of plaintiff, NOEL CAMPBELL, is denied.

This matter remains on the calendar in the Trial Scheduling Part for **February 9, 2015**.

Dated: December 12, 2014
Long Island City, N.Y.





ROBERT J. MCDONALD
J.S.C.