Ramirez v Miah
2015 NY Slip Op 30107(U)
January 13, 2015
Supreme Court, Queens County
Docket Number: 2623/2013
Judge: Robert J. McDonald

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

- x

JAMIE RAMIREZ,

Plaintiff,

- against -

MODOBBIR MIAH and PSILOS CAB CORP.,

Defendants.

- x

Index No.: 2623/2013

Motion Date: 12/19/14

Motion No.: 106

Motion Seq.: 2

The following papers numbered 1 to 14 were read on this motion by defendants, Modobbir Miah and Psilos Cab Corp., for an order pursuant to CPLR 3212 granting defendants summary judgment and dismissing the plaintiff's complaint on the ground that the plaintiff, Jamie Ramirez, did not sustain a serious injury within the meaning of Insurance Law §§ 5102 and 5104:

	Papers Numbered
Notice of Motion-Affidavits-Exhibits-Memo of Law	1 - 5
Affirmation in Opposition-Affidavits-Exhibits	6 - 11
Reply Affirmation	12 - 14

In this negligence action, the plaintiff, Jaime Ramirez, seeks to recover damages for personal injuries he allegedly sustained as a result of a motor vehicle accident that occurred at approximately 5:15 a.m. on April 2, 2011, between the plaintiff's vehicle and the vehicle owned by Psilos Cab Corp., and operated by defendant Modobbir Miah. The accident took place on the southbound West Side Highway (also known as 12th Avenue) at or near its intersection with West 54th Street in Manhattan, New York. At the time of the accident, plaintiff, Jaime Ramirez, alleges that he was at a complete stop waiting at a red traffic signal when his vehicle was struck in the rear by the taxi cab operated by defendant Modobbir Miah. The plaintiff allegedly sustained serious injuries as a result of the impact.

The plaintiff commenced this action by filing a summons and complaint on February 8, 2013. Issue was joined by service of defendants' verified answer dated April 2, 2013. A Note of Issue was filed by the plaintiff on June 12, 2014. Plaintiff's motion for an order pursuant to CPLR 3212(b), granting partial summary judgment on the issue of liability was denied by this Court by decision and order dated March 11, 2014. This matter is presently on the calendar of the Trial Scheduling Part on May 4, 2015.

Defendants 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, Sean C. Burke, Esq; a copy of the pleadings; a copy of plaintiff's verified bill of particulars; the affirmed medical report of board certified orthopedic surgeon, Dr. J. Serge Parisien; the affirmed medical report of board certified neurologist, Dr. Jean-Robert Desrouleaux; and a copy of the transcript of the plaintiff's examination before trial.

Plaintiff contends that as a result of the accident he sustained, inter alia, bulging discs at C2-3, C5-6, C6-7, C7-T1, T12-L1, L1-2, L2-3 and L3-4; as well as herniated discs at C3-4, C4-5 and L4-5. 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; 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 her 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.

Dr. J. Serge Parisien, an orthopedist retained by the defendants, examined the plaintiff on February 17, 2014. Plaintiff reported to Dr. Parisien that he was the driver involved in a motor vehicle accident on April 12, 2011 at which time he sustained injuries to his neck and back. He presented with pain to his lumbar spine. Dr. Parisien performed objective gonioscopic range of motion testing which revealed no limitations of range of motion of the cervical spine, thoracic spine, and lumbosacral spine. His diagnosis was resolved strain/sprain of the cervical, thoracic and lumbosacral spine. Dr. Parisien states that the plaintiff has no evidence of disability.

Defendant also submits an affirmed report from the defendant's retained neurologist, Dr. Desrouleaux, who examined he plaintiff on February 17, 2014. At that time he found the plaintiff had normal range of motion of the cervical, thoracic and lumbar spines. He found that there is currently no neurologic disability due to the accident in question.

In his examination before trial taken on December 4, 2013, the plaintiff, Jamie Ramirez, age 48, testified that he was involved in a motor vehicle accident on April 2, 2011 at 5:00 a.m. He was operating an SUV owned by his employer, Broadview Networks. He stated that he is employed as a field technician for the telecommunications company. He was operating his vehicle southbound on 12th Avenue in Manhattan and was stopped at a red traffic signal at the intersection of 54th Street when his vehicle was struck in the rear by the taxi cab operated by the defendant. Immediately upon impact he felt pain to his lower back, shoulders and neck. He declined medical assistance at the scene and drove his vehicle to his sister's house after which he left the same day for a planned one week vacation in Puerto Rico. He first sought medical treatment on April 28, 2011 after he returned from his trip. He began a course of physical therapy at DHD Medical located at 48 East 43rd Street in Manhattan which lasted for seven months until his payments were terminated by no-fault. He received treatments two or three times per month for pain to his lower back, shoulder, and neck. He also was under the care of Dr. Rayfman a pain management specialist who administered epidural injections to the plaintiff's lumbar spine and cervical spine. He stated that he had no further treatment after March 2012. He also testified that he did not miss any time from work due to the accident. He stated that he still suffers from pain to his lower back and neck and shoulder area on a daily basis.

Defendant's counsel contends that the medical reports of Drs. Desrouleaux and Parisien, together with the plaintiff's testimony at his examination before trial in which he testified that he did not miss any days from work as a result of the accident, is 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, Daniel J. Watts, Esq., submits his own affirmation as well as the medical affirmations of Dr. Delman of DHD Medical; the unaffirmed medical reports from Dr. Reyfman; the affirmation of radiologist, Dr. Ronald Wagner; and the affirmed and electronically signed medical report of Dr. Justin Mendoza, a pain management physician.

The plaintiff was first examined on April 28, 2011, three weeks following the accident by Dr. Delman at DHD Medical P.C. At the initial evaluation the plaintiff presented with complaints of neck and lower back pain. The initial physical examination revealed significant loss of range of motion of the cervical spine and lumbar spine. At that time Dr. Delman referred the plaintiff for an MRI of the cervical and lumbar spine. He stated that the plaintiff's injuries were causally related to the accident of April 2, 2011.

The MRI studies were conducted in May 2011. Radiologist Dr. Wagner, reported that the MRIs showed that the plaintiff sustained multiple disc bulges of the cervical and lumbar spines as well as disc herniations at C3-4, C4-5 and L4-5.

The plaintiff was also examined by Dr. Justin Mendoza, a pain management specialist on October 13, 2014. Dr. Mendoza states that the plaintiff complained of lower back pain and neck pain. Range of motion testing at that time revealed significant loss of range of motion of the cervical spine and lumbar spine. He states that there is a direct causal relationship between the accident and the plaintiff's current injuries. He states that the condition of plaintiff's cervical and lumbar spines will not improve. The report was affirmed under penalties of perjury and signed electronically. However because a medical report containing an electronic signature is not recognized as competent evidence by the Second Department, pursuant to CPLR 2106, this Court finds that Dr. Mendoza's report is inadmissible (see Vista Surgical Supplies, Inc. v. Travelers Ins. Co., 50 AD3d 778 [2d Dept. 2008]; D'Angelo v. Nykolyn, 2014 N.Y. Misc. LEXIS 4647 {Sup Ct. Suffolk Co. 2014]; Eill v Morck, 37 Misc 3d 1211(A)[Sup Ct Kings Co. 2012]; Rogy Med., P.C. v Mercury Cas. Co., 23 Misc 3d 132[A][App Term, 2d Dept 2009]).

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 defendants' 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 defendants, including the affirmed medical reports of Drs. Desrouleaux and Parisien, as well as the deposition testimony of the plaintiff, stating he did not miss any days from work as a result of the accident, are sufficient to meet its 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]).

In opposition, plaintiff failed to raise a triable issue of fact (see Zuckerman v City of New York, 49 NY2d 557, [1980]; Cohen v A One Prods., Inc., 34 AD3d 517 [2d Dept. 2006]). The affirmed contemporaneous report of Dr. Delman is sufficient to provide evidence in admissible form to show that soon after the accident the plaintiff sustained causally related injuries (see Perl v Meher, 18 NY3d 208 [2011]). However, plaintiff failed to provide any evidence in admissible form that the defendant had limitations of range of motion in a recent examination. As stated above, Dr. Mendoza's medical report was not properly subscribed. Without a medical report in admissible form indicating the plaintiff's current physical condition, the plaintiff's submissions were insufficient to raise a triable issue of fact as to whether the plaintiff sustained a serious injury (see Sham v. B&P Chimney Cleaning & Repair Co., Inc., 71 AD3d

978 [2d Dept. 2010][any projections of permanence have no probative value in the absence of a recent examination]; Harris v Ariel Transp. Corp., 55 AD3d 323[2d Dept. 2008]; Sullivan v Johnson, 40 AD3d 624 [2d Dept. 2007]; Barrzey v Clarke, 27 AD3d 600 [2d Dept. 2006]; Farozes v Kamran, 22 AD3d 458 [2d Dept. 2005][in order to raise a triable issue of fact the plaintiff was required to come forward with objective medical evidence, based upon a recent examination, to verify his subjective complaints of pain and limitation of motion]; Ali v Vasquez, 19 AD3d 520 [2d Dept. 2005]).

With respect to the 90/180 day category, the plaintiff failed to submit competent medical evidence that the injuries allegedly sustained in the subject accident rendered him unable to perform substantially all of his usual and customary daily activities for not less than 90 days of the first 180 days following the subject accident (see Nieves v Michael, 73 AD3d 716 [2d Dept. 2010]; Sainte-Aime v Ho, 274 AD2d 569 [2d Dept. 2000]). In this regard, plaintiff testified that he returned to work immediately following the accident without missing any days and resumed his usual duties (see Bleszcz v Hiscock, 69 AD3d 890 [2d Dept. 2010]). The plaintiff did not demonstrate that he has been curtailed from performing his activities to a great extent rather than some slight curtailment.

Accordingly, because the evidence relied upon by plaintiff is insufficient to create a triable issue of fact with respect to any of the statutory categories of serious injury and for the reasons set forth above, it is hereby,

ORDERED, that the defendant's motion for summary judgment is granted and the plaintiff's complaint against defendants Modobbir Miah and Psilos Cab Corp is dismissed, and it is further,

ORDERED, that the Clerk of Court is directed to enter judgment accordingly.

Dated: Long Island City, N.Y.
January 13, 2015

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ROBERT J. MCDONALD
J.S.C.