

MD Hossain v Chona Tr.
2015 NY Slip Op 30471(U)
March 31, 2015
Sup Ct, Queens County
Docket Number: 17020/2011
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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MD HOSSAIN, Index No.: 17020/2011
Plaintiff, Motion Date: 02/09/15
- against - Motion No.: 49

CHONA TRANSIT and SERGEY CHERESHANSKY, Motion Seq.: 4
Defendants.

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

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

This is a personal injury action in which plaintiff, MD Hossain, seeks to recover damages for injuries he allegedly sustained on April 16, 2011 when his vehicle collided with the vehicle owned by defendant, Chona Transit, and operated by defendant, Sergey Chereshansky, at the intersection of 6th Avenue and West 26th Street, New York County, New York. Plaintiff alleges that as a result of the collision he sustained disc bulging to the cervical and lumbar spines.

The plaintiff commenced this action by filing a summons and complaint on July 19, 2011. Issue was joined by service of the defendants' verified answer dated February 2, 2012. A Note of Issue was filed by the plaintiff on December 4, 2013. However, the Note of Issue was vacated by Justice Schulman in the Trial Scheduling Part on March 12, 2015.

Defendants now move for an order pursuant to CPLR 3212(b), granting summary judgment and dismissing the plaintiff's complaint on the ground that the plaintiff did not suffer a serious injury as defined by Insurance Law § 5102. In support of the motion, defendant submits an affirmation from counsel, Michael Manning, Esq; a copy of the pleadings; a copy of plaintiff's verified bill of particulars; the affirmed medical report of neurologist, Dr. Naunihal Sachdev Singh; the affirmed radiology report of Dr. A. Robert Tantleff; and a copy of the transcript of the examination before trial of the plaintiff, MD Hossain, taken on January 24, 2014.

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 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.

Dr. Singh, a neurologist retained by the defendants, examined the plaintiff, a taxi driver, on April 11, 2014. The plaintiff told Dr. Singh that his vehicle was struck on the front driver's side. He stated he injured his neck and back at the time of the impact and was taken by ambulance to the emergency room at Bellevue Hospital. He was treated at the emergency room and released the same day. He then underwent physical therapy over the course of four months. He states that he sometimes gets pain in his neck and tightness in his back. The plaintiff told Dr. Singh that he missed 2 - 3 weeks from work as a result of his injuries. Dr. Singh performed objective range of motion testing with the assistance of a goniometer which revealed no limitations of range of motion of the plaintiff's cervical spine, thoracic spine, and lumbar spine. His impression was "alleged injuries to the cervical, thoracic and lumbar spine - resolved" and "alleged headaches - resolved." Dr. Singh states that there is no medical necessity for further treatment, diagnostic testing or follow up. He states that the plaintiff has no neurological disability and is not disabled from working or from activities of daily living.

Dr. Tantleff, a radiologist, reviewed the MRI films taken of the plaintiff's cervical and lumbar spines. With respect to the cervical spine he finds no evidence of disc bulge, protrusion or herniation and no findings related to the incident of April 16,

2011. With respect to the lumbar spine he finds a disc herniation at L4-5 and L5-S1. However, he states that the findings are consistent with longstanding discogenic change and longstanding degenerative disease. He states that the changes to the lumbar spine are unrelated to the incident in question as there are no markers of acute or recent injury.

In his examination before trial, Mr. Hossain, age 35, states that he is a self-employed taxi driver. He was involved in a motor vehicle accident on April 16, 2011. He was operating his taxi cab in Manhattan. As he was making a left turn at the intersection of West 26th And 6th Avenue, his vehicle was struck by another yellow taxi cab operated by defendant Sergey Chereshansky. When the police arrived at the scene, he told them he hurt his neck and back. He was taken from the scene to the emergency room at Bellevue Hospital where he was treated and discharged the same day. Four days after he returned home, he began a course of physical therapy at a medical facility on Roosevelt Avenue. He was treated three or four days a week for a period of four months. Other than periodically seeing his primary care physician, he did not receive any other treatment for injuries sustained in the accident after that time. He stated that he missed approximately two weeks from work following the accident. The plaintiff also states that at the present time he sometimes feels pain in his back.

Defendant's counsel contends that the medical reports of Drs. Singh and Tantleff, as well as plaintiff's deposition testimony in which he stated that he returned to work as a taxi driver two weeks following the accident, 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.

Defendant also moves for an order extending the time to move for summary judgment. Defendant claims that he was late in filing the motion because the plaintiff's Note of Issue was filed while discovery was still outstanding. Defendant submits he made a motion to strike the Note of Issue because the plaintiff failed to appear for an IME when he was directed to. The plaintiff's IME was not completed until April 11, 2014 and the instant motion was filed four months thereafter on August 11, 2014.

In opposition, plaintiff's attorney, Serge Pierre, Esq., submits his own affirmation as well as the affidavit of chiropractor, Mark S. Snyder, Esq., the affirmation of radiologist, Dr. Robert Scott Schepp; unaffirmed records of Dr. Elcock of ELC chiropractic; uncertified hospital records form the plaintiff's emergency room admission at Bellevue Hospital; medical affirmations from Dr. Lam Cu Quan of Sunnyview Medical PC; and the affidavit of the plaintiff. The plaintiff has not opposed the defendants' application to extend the time to move for summary judgment.

In his affidavit, Mr. Hossain states that on April 20, 2011, he first sought treatment at ELC Chiropractic, P.C where he met with Dr. Elcock and Dr. Quan. He underwent physical therapy four times per week for four months. He stopped treating on November 10, 2011 when his no-fault benefits were terminated and he could no longer afford to pay for treatments out-of-pocket. He was also informed by Dr. Elcock that he reached maximum improvement from his chiropractic care. He states that during the course of his treatment he was referred for MRIs of his neck and back, which, he was told, revealed disc bulges and herniations. On November 3, 2014, he was re-evaluated by chiropractor, Dr. Mark Snyder. He states that presently he still experiences pain in his neck and lower back.

The plaintiff was initially evaluated by Dr. Quan of Sunnyview Medical on April 21, 2011. In his affirmed report, Dr. Quan states that at the initial examination the plaintiff complained of pain to his head, cervical, thoracic, and lumbar spines. He states that he believed based upon his initial examination that the plaintiff's pain to his back and neck was caused by the motor vehicle accident in question. He recommended at that time that the plaintiff begin a course of physical therapy.

Dr. Mark Snyder, a chiropractor, reevaluated the plaintiff on November 3, 2014. At that time the plaintiff still had complaints of intermittent neck and back pain. Range of motion testing at that time using a Dual Inclinator showed that the plaintiff has significantly reduced range of motion of the cervical spine and thoracolumbar spine. He states that more than three years after the accident the plaintiff continues to demonstrate persistence of pain despite rehabilitative measures. He states that in his opinion the plaintiff's injuries, including bulging discs of the cervical and lumbar spines are permanent and significant, not subject to resolution without surgical

intervention, and are causally related to the subject accident.

Dr. Robert Schepp, a radiologist who performed the MRIs on the plaintiff's cervical and lumbar spines submits an affirmation stating that his review of the MRI films revealed bulging discs in the plaintiff's cervical and lumbar spines.

CPLR 3212 (a) provides that a motion for summary judgment may not be made more than 120 days after the filing of the note of issue "except with leave of court on good cause shown." Unless good cause is shown for the delay, an untimely motion for summary judgment must be denied outright (see Miceli v State Farm Mut. Auto. Ins. Co., 3 NY3d 725 [2004]; Brill v City of New York, 2 NY3d 648[2004]; Derby v Bitan, 89 AD3d 891 [2d Dept. 2011]). The Court finds that defendant has presented good cause for the delay in filing the late summary judgment motion. It is undisputed that at the time of the filing of the Note of Issue significant discovery remained outstanding and plaintiff did not appear for his independent medical examination until April 2014. The defendant made the instant motion shortly after the receipt of the doctor's IME report. The Court finds therefore that defendant has provided good cause (see Kunz v Gleeson, 9 AD3d 480 [2d Dept 2004]).

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]).

Upon review and consideration of the defendants' motion, plaintiff's affirmation in opposition, and defendants' reply thereto, this Court finds that the proof submitted by the defendants, including the affirmed medical report of Drs. Singh and Tantleff, together with the plaintiff's testimony at his examination before trial that she only missed two weeks of work immediately following the accident, are sufficient to meet defendants' 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. Quan, Schepp, and Snyder attesting to the fact that the plaintiff sustained 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 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 he 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]).

In addition, the plaintiff adequately explained the gap in the his treatment by stating that he had been advised that he had reached the point of maximum medical improvement and because no-fault terminated his benefits and he could not afford to pay for continued treatment out-of-pocket (see Abdelaziz v Fazel, 78 AD3d 1086 [2d Dept. 2010]; Tai Ho Kang v Young Sun Cho, 74 AD3d 1328 [2d Dept. 2010]; Gaviria v Alvarado, 65 AD3d 567 [2d Dept. 2009]; Bonilla v Tortori, 62 AD3d 637 [2d Dept. 2009]).

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

ORDERED, that the defendants' motion for an order granting summary judgment dismissing the plaintiff's complaint is denied.

Dated: March 31, 2015
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.