

**Stevens v Balletta**

2015 NY Slip Op 30716(U)

April 27, 2015

Supreme Court, Queens County

Docket Number: 250/2012

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**

- - - - - x

ROBERT STEVENS,  
Plaintiff,  
- against -

Index No.: 250/2012  
Motion Date: 03/27/15  
Motion Nos.: 121 and 122

SERGIO ADRIAN BALLETTA, ANUPAM BISWAS  
and JIT TAXI, INC.,  
Defendants.

Motion Seq.: 3 and 4

- - - - - x

The following papers numbered 1 to 18 were read on this motion by defendants, Anupam Biswas and Jit Taxi, Inc, and the separate motion of defendant Sergio Adrian Balletta both 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:

Papers  
Numbered

Balletta Notice of Motion-Affidavits-Exhibits-Memo.....	1 - 5
Biswas Notion of Motion-Affidavits-Exhibits.....	6 - 10
Affirmation in Opposition-Affidavits-Exhibits.....	11 - 15
Balletta Reply Affirmation.....	16 - 18

This is a personal injury action in which plaintiff, Robert Stevens, seeks to recover damages for injuries he allegedly sustained on January 10, 2010, in a multi-vehicle chain reaction accident. Plaintiff alleges that he was injured when his vehicle, the lead vehicle in the chain, was struck in the rear by the vehicle owned and operated by defendant, Sergio Adrian Balletta, in the westbound lanes of the Grand Central Parkway about 1000 feet east of the 31<sup>st</sup> Street exit, Queens County, New York. Plaintiff alleges that as a result of the collision he sustained bulging discs of the cervical and lumbar spines.

The plaintiff commenced this action by filing a summons and complaint on January 5, 2012. Issue was joined by service of the defendant Biswas' verified answer dated February 1, 2012 and defendant Balletta's verified answer dated December 11, 2012. A Note of Issue was filed by the plaintiff on October 10, 2014. The matter is presently on the calendar in the Trial Scheduling Part on May 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, defendants submit affirmations from counsel, Thomas Torto, Esq., and Katie A. Walsh, 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. Igor Rubinshteyn; the affirmed medical report of board certified neurologist, Dr. Uriel Davis; and a copy of the transcript of the examination before trial of the plaintiff, Robert Stevens, taken on August 7, 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. Igor Rubinshteyn, an orthopedist retained by the defendants, examined the plaintiff on September 11, 2014. The plaintiff told the examining physician that he was involved in a motor vehicle accident on January 8, 2010 when his vehicle was struck in the rear. The plaintiff reported injuries to his head, neck, mid-back, lower back, bilateral shoulders, and bilateral hips. Plaintiff was seen in the emergency room two days after the reported accident. He told the doctor that he was involved in a prior motor vehicle accident many years ago with injuries to his neck and back. The plaintiff presented with pain in the neck, mid-back, lower back, bilateral shoulders, and bilateral hips.

Dr. Rubinshteyn performed objective range of motion testing with the assistance of a goniometer which revealed no limitations of range of motion of the cervical spine and lumbar spine. His

diagnosis was cervical spine sprain, resolved, and lumbar spine sprain, resolved. He states that there is no causally related orthopedic disability or permanency in regards to the cervical or lumbar spines. He states that the plaintiff has the pre-existing conditions of cervical and lumbar spine degenerative changes.

Dr. Uriel Davis, a neurologist retained by the defendants, examined the plaintiff on September 19, 2014. At the time of the examination the plaintiff reported that he was a full time student at the time of the examination but he has not returned to school since the accident. The plaintiff told the doctor that he was involved in a prior motor vehicle accident in the mid-late 1990s sustaining injuries to his neck and back with no residuals. He presented with pain in his neck and lower back. Range of motion testing measured by a goniometer showed no loss of range of motion of the cervical spine and no loss of range of motion of the lumbar spine. The doctor's impression and diagnosis was cervical sprain and strain resolved, and lumbar sprain and strain resolved. His conclusion, based upon the findings of his examination is that there is no accident related disability or permanency. He states that the plaintiff can return to school and perform his regular activities of daily living without any restrictions.

In his examination before trial taken on August 7, 2014, Mr. Stevens, age 44, testified that on the date of the accident he was driving a 2001 Nissan Maxima. He stated that as he was proceeding westbound on the Grand Central Parkway towards the Triborough Bridge his moving vehicle was struck in the rear by the vehicle operated by defendant Balletta. He then felt a second impact to the rear of his vehicle when the taxi cab operated by defendant Biswas struck the second vehicle. After speaking to the police at the scene he left in his vehicle and continued to the Bronx to pick up his girlfriend. Two days after the accident he sought medical attention at the emergency room of Albert Einstein Hospital due to pain in his back, neck, and head. He was treated and released the same day. Two weeks later he began physical therapy at Queens Chiropractic Service in Ridgewood, Queens, due to continued pain in his back neck and head. He treated there for about eight months. During that time he was referred to Dr. Ibrahim for pain management. He did not have any other medical treatment for this accident. He stated that he was involved in a prior motor vehicle accident more than 20 years ago where he also injured his neck and back. After the accident he was confined to his bed and to his home for two days. He states that as of the date of the deposition he still felt intermittent pain in his neck and head and daily pain to his back.

Defendant's counsel contends that the medical reports of Drs. Rubinshteyn and Davis 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, Andres J. Camacho, Esq., submits his own affirmation as well as the uncertified records from the plaintiff's emergency room admission at Weiler Hospital in the Bronx on January 10, 2010; unaffirmed physical therapy treatment records from Queens Chiropractic Associates; unaffirmed radiological reports from Dynamic Medical Imaging concerning the CT of the plaintiff's cervical spine and lumbar spine; unaffirmed ultrasound reports read by Dr. Perkins at Cambridge Medical, PC; an affirmed medical report from Dr. Ibrahim based upon his examination of the plaintiff on February 8, 2010.

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 reports of Drs. Rubinshteyn and Davis and the testimony of the plaintiff that he was only confined to his home and bed for two days 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]).

In opposition, the plaintiff failed to raise a question of fact. The unaffirmed emergency room records, unaffirmed chiropractic treatment records, unaffirmed radiological and unaffirmed ultrasound reports submitted by the plaintiff are not in admissible form and cannot be used as probative evidence in opposition to the motion for summary judgment (see Lazu v Harlem Group, Inc., 89 AD3d 435 [1<sup>st</sup> Dept. 2011] quoting Migliaccio v Maraca, 56 AD3d 393 [1<sup>st</sup> Dept. 2008] [statements and reports by the injured party's examining and treating physicians that are unsworn or not affirmed to be true under penalty of perjury do not meet the test of competent, admissible medical evidence sufficient to defeat a motion for summary judgment]). The only record submitted by the plaintiff which was affirmed was the examination record of Dr. Ibrahim from the plaintiff's pain management consultation of February 1, 2010. The copy of the record submitted is mostly illegible however. it appears that upon examination Dr. Ibrahim found right shoulder sprain, post traumatic headache, neck pain, thoracic pain, and back pain, He states that in his opinion the accident of January 8, 2010 was the competent cause of the impairment and disability shown by the plaintiff.

However, although the report of Dr. Ibrahim from February 1, 2010 is sufficient to show that the plaintiff sustained an injury contemporaneous to and causally related to the accident (see Perl v Meher, 18 NY3d 208 [2011]), the plaintiff failed to provide any evidence in admissible form that the defendant had any limitations of range of motion in a recent examination. Without a medical report in admissible form indicating the plaintiff's current physical condition, the plaintiff's submissions are 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]; Cornelius v Cintas Corp., 50 AD3d 1085 [2d

Dept. 2008]; Sullivan v Johnson, 40 AD3d 624 [2d Dept. 2007]; Barzey 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]).

Lastly, the plaintiff failed to submit competent medical evidence that the injuries allegedly sustained by him as a result of the subject accident rendered him unable to perform substantially all of his daily activities for not less than 90 days of the first 180 days following the accident. The plaintiff himself testified that he was not confined to his home for more than two days as a result of the accident (see Ayotte v Gervasio, 81 NY2d 1062 [1993]; Valera v Singh, 89 ADd 929 [2d Dept. 2011]; Lewars v Transit Facility Mgt. Corp., 84 AD3d 1176 [2d Dept. 2011]; Nieves v Michael, 73 AD3d 716 [2d Dept. 2010]; Joseph v A & H Livery, 58 AD3d 688 [2d Dept. 2009]).

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 defendants' respective motions for summary judgment are granted and the plaintiff's complaint as against defendants Sergio Adrian Balletta, Anupam Biswas, and Jit Taxi, Inc. is dismissed, and it is further,

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

Dated: April 27, 2015  
Long Island City, N.Y.

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**ROBERT J. MCDONALD**  
**J.S.C.**