

Soliman v Moustafa
2015 NY Slip Op 30758(U)
May 5, 2015
Supreme Court, Queens County
Docket Number: 4688/2012
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

ISHAK SOLIMAN and VIVIAN SOLIMAN, his
wife,

Index No.: 4688/2012

Plaintiffs,

Motion Date: 02/03/15

- against -

Motion No.: 115

Motion Seq.: 2

AHMED M. MOUSTAFA, a/k/a AHMED M.
MORSTATA and JOHN & JOANNE TRANS.,
INC.,

Defendants.

- - - - - x

The following papers numbered 1 to 14 were read on this motion by
defendants, AHMED M. MOUSTAFA, a/k/a AHMED M. MORSTATA and JOHN &
JOANNE TRANS., INC., for an order pursuant to CPLR 3212, granting
defendants summary judgment and dismissing the plaintiff's
complaint on the ground that plaintiff, ISHAK SOLIMAN, 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

This is a personal injury action in which plaintiff, ISHAK
SOLIMAN, seeks to recover damages for injuries he allegedly
sustained on August 31, 2010, when his vehicle collided with the
vehicle owned by defendant JOHN & JOANNE TRANS., INC., and
operated by defendant AHMED M. MOUSTAFA, a/k/a AHMED M. MORSTATA
(Morstata), at the intersection of West 12th Street and 11th
Avenue, New York County, New York. Each driver told the
responding police officer at the scene that the other driver

entered the intersection against a red light. Plaintiff alleges that as a result of the collision he sustained injuries to his cervical and lumbar spines.

The plaintiff commenced this action by filing a summons and complaint on March 5, 2012. Issue was joined by service of the defendants' verified answer dated April 11, 2012. A Note of Issue was filed by the plaintiff on July 1, 2014. The matter is presently on the calendar in the Trial Scheduling Part on June 9, 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, Cynthia Hung, Esq; a copy of the pleadings; a copy of plaintiff's verified bill of particulars; the affirmed medical report of board certified neurologist, Dr. Edward M. Weiland; the affirmed radiological report of Dr. Audrey Eisenstadt; and a copy of the transcript of the examination before trial of the plaintiff, Ishak Soliman, taken on March 6, 2014.

Plaintiff contends that as a result of the accident he sustained, inter alia, herniated discs in the cervical and lumbar spines. Plaintiff asserts, therefore, 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. Audrey Eisenstadt, a radiologist retained by the defendants, reviewed the MRI films of the plaintiff's cervical and lumbar spine taken on September 4, 2010, four days following the accident of August 31, 2010. In her report, dated October 22, 2014, Dr. Eisenstadt states that she observed disc degeneration at C3-C4 through C5-6 and disc bulging throughout the cervical spine from C3-4 through C7-T1. She also observed a disc herniation at C5-6. She also observed disc degeneration and disc bulging in the lumbar spine. There were no disc herniations observed in the lumbar spine. She states that in her opinion disc bulging is not a traumatic process and it is degeneratively

induced. She also states that because of the extensive disc degeneration she believes that the disc herniation at C5-6 is also degenerative in etiology. With respect to the lumbar spine she states that there is no evidence of any acute or recent posttraumatic changes seen causally related to the incident of August 31, 2010.

Dr. Edward M. Weiland, a neurologist retained by the defendants, examined the plaintiff on May 8, 2014. The plaintiff presented with neck pain radiating to both shoulders, as well as lower back pain radiating to the buttock and thigh regions. Dr. Weiland performed objective range of motion testing with the assistance of a goniometer which revealed no limitations of range of motion of the cervical spine, thoracic spine, and lumbar spine. He states that he found no evidence of any lateralizing neurological deficits at the present time. He states that he finds no neurologic disability at the present time and no findings of any neurologic residual or permanency based upon the physical examination.

In his examination before trial, the plaintiff, a physician, age 51, states that he was operating his motor vehicle in Manhattan when it was struck broadside on the passenger side by a yellow taxicab at the intersection of West 12th Street and 11th Avenue. He states that while crossing the intersection the traffic light was green in his favor. The following day he sought medical treatment from Dr. Sandoval, his family doctor. Two days after the accident he was referred for MRIs of his neck and back. He stated that he was told that the MRIs showed disc herniations in the lumbar and cervical spines. He then began a course of physical therapy and chiropractic care with chiropractor, Dr. Taffuri. He continued physical therapy for three to six months. He was also seen by two neurologists, Dr. Rosenbaum and Dr. Yazgi a neurosurgeon, Dr. Peterson and an orthopedic spine surgeon, Dr. Meese, who recommended a diskectomy. He stated that he declined surgery, pain management injections and narcotic medicine. He states that he still suffers from neck pain, stiffness, numbness and weakness in both arms and consistent pain in the lumbar spine.

Defendant's counsel contends that the medical reports of Drs. Weiland and Eisenstadt 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, Rachael Nass, Esq., submits her own affirmation, as well as the affidavit of chiropractor, Dr. Vincent Taffuri and his office records; the affirmed radiological reports of board certified radiologist Dr. Athas; an affidavit from board certified neurologist, Dr. Yazgi; the affirmation of board certified orthopedic surgeon Dr. Michael A. Meese; an affidavit from the plaintiff dated January 16, 2015; and a copy of the police accident report.

In his affidavit, the plaintiff states that following the accident of August 31, 2010 he saw Dr. Sandoval his primary care physician who examined him and referred him for MRI studies of the cervical and lumbar spines. Dr. Sandoval told him that the MRI showed bulges and herniations of the neck and back. On November 23, 2010 he sought treatment with Dr. Vincent Taffuri, a chiropractor, due to pain in the neck and back. He underwent physical therapy with Dr. Taffuri until April 2011. He also underwent additional MRIs on March 13, 2011. When his insurance was terminated in April 2011 he treated himself three times per week. On May 12, 2011 he saw Dr. Yazgi due to headaches, neck pain, and low back pain. On March 22, 2013 he had a third set of MRIs. He saw Dr. Peterson an orthopedic surgeon who recommended a diskectomy and spinal fusion. He has declined surgery because he also suffers from atrial fibrillation and cannot discontinue prescribed blood thinners. He states that he has curtailed his practice due to his injuries and can no longer play soccer, engage in yard work, bike ride, hunt and wrestle with his children. On December 27, 2014 he had a fourth set of MRIs. He saw Dr. Meese on January 7, 2015 for a follow up appointment.

Dr. Taffuri, a chiropractor submits an affidavit stating that he first examined the plaintiff on November 23, 2010, three months following the subject accident. Dr. Taffuri's office records contain a narrative report from November 23, 2010. In his report he state that plaintiff was involved in a prior accident in 1994 in which eh sustained multiple herniations of the cervical spine but was asymptomatic prior to the accident. Dr Taffuri's physical examination after the accident showed that plaintiff had pain in the neck and lower back which the doctor ascribed to the accident. He recommended a course of physical therapy.

Dr. Athas, a radiologist, read the films taken of the plaintiff's cervical and lumbar spines on April 13, 2011 and March 22, 2013. He found disc herniations and disc bulges in the cervical and lumbar spines.

Dr. Yazgi, a neurologist submits reports indicating that he treated the plaintiff beginning on May 11, 2011 through January 16, 2015. He conducted range of motion testing and states in his report of January 16, 2015, that the injuries sustained by the plaintiff are causally related to the subject accident and are permanent in nature.

Dr. Meese, a board certified orthopedic surgeon examined the plaintiff on January 13, 2015 in which he found that the plaintiff had sustained limitations of range of motion of the cervical spine. He states that the injuries sustained in the accident are permanent in nature and there is no further treatment that can relieve the symptoms.

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 competent proof submitted by the defendants, including the affirmed medical reports of Drs. Wieland and Eisenstadt, as well as the plaintiff's deposition testimony in which he stated that he returned to work as a practicing physician two days after 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]; Carballo v Pacheco, 85 AD3d 703 [2d Dept. 2011]; Ranford v Tim's Tree & Lawn Serv., Inc., 71 AD3d 973 [2d Dept. 2010]).

However, this Court finds that in opposition, the plaintiff raised triable issues of fact by submitting the affirmed medical report of plaintiff's treating physicians, Dr. Taffuri, Dr Meese, Dr Yazgi, and Dr Athas, attesting to the fact that the plaintiff had limitations in range of motion of the lumbar spine and cervical spine 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]; Rosa v Mejia, 95 AD3d 402 [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 Khaimov v Armanious, 85 AD3d 978 [2d Dept. 2011]; Jilani v. Palmer, 83 AD3d 786 [2d Dept. 2011]; Khavosov v Castillo, 81 AD3d 903 [2d Dept. 2011]; Mahmood v Vicks, 81 ADd 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 [2d Dept. 2010]).

Further, the findings of plaintiff's treating physicians that the plaintiff's injuries are traumatic and are causally related to the subject collision expressly addressed and rebutted the contention of the defendant's radiologist that the spinal injuries were degenerative in nature (see Jilani v. Palmer, 83 AD3d 786 [2d Dept. 2011]; Fraser-Baptiste v New York City Tr. Auth., 81 AD3d 878 [2d Dept. 2011]; Harris v Boudart, 70 AD3d 643 [2d Dept. 2010]).

In addition, the plaintiff adequately explained the gap in treatment by submitting his own affidavit stating that no-fault had stopped his benefits and he continued to self treat and see Drs. Yazgi, Peterson, Rosenbaum and Meese after that time.

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

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

Dated: May 5, 2015
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.