

Ali v Tilhoo
2015 NY Slip Op 31537(U)
July 29, 2015
Supreme Court, Queens County
Docket Number: 702787/2013
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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NISHAN ALI, Index No.: 702787/2013
Plaintiff, Motion Date: 5/29/15
- against - Motion No.: 4

Motion Seq.: 3

AVIN TILHOO, HARRYDATT TILHOO, RASHEED
SATTAR AND YASSIM SATTAR,
Defendants.

- - - - - x

The following papers numbered 1 to 10 read on this motion by defendants Rasheed Sattar and Yassim Sattar and on this cross-motion by defendants Avin Tilhoo and Harrydatt Tilhoo for an order pursuant to CPLR §3212 granting defendants summary judgment and dismissing plaintiff's complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102(d):

	Papers Numbered
Notice of Motion-Affirmation-Memo. of Law-Exhibits1 - 5
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Affirmation in Opposition-Exhibits.....	8 - 9
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In this action for negligence, plaintiff seeks to recover damages for personal injuries allegedly sustained as a result of a motor vehicle accident that occurred on May 14, 2013, on 97th Avenue at or around its intersection with 108th Street, Queens County, New York. Plaintiff alleges that he sustained injuries when the Sattar vehicle, in which he was a passenger, was struck by the Tilhoo vehicle. As a result of the accident, plaintiff allegedly sustained physical injuries including herniation at C5-

6; disc bulges at L4-5 and L5-S1; cervical sprain; bilateral shoulder sprain; lumbar sprain/derangement; bilateral carpal tunnel syndrome; radiculopathy at C4-5 and C5-6; and bilateral radiculopathy at L5-S1 and L4-5.

Plaintiff commenced this action by the filing of a summons and complaint on July 17, 2013. Issue was joined by defendants Avin Tilhoo and Harrydatt Tilhoo serving an answer with cross-claim dated August 7, 2013 and by defendants Rasheed Sattar and Yassim Sattar serving a verified answer with cross-claim dated August 12, 2013. All defendants now move for an order pursuant to CPLR §3212 dismissing plaintiff's complaint on the ground that the injuries claimed by the plaintiff fail to satisfy the serious injury threshold requirement of Insurance Law §5102(d).

In support of the motion and cross-motion, defendants submit two affirmations from counsel, a copy of the pleadings; plaintiff's verified bill of particulars; a copy of the transcript of plaintiff's examination before trial; and the affirmed medical report of Joseph P. Stubel, M.D. Plaintiff contends that he sustained a serious injury as defined in Insurance Law §5102(d).

On October 27, 2014, plaintiff underwent an independent orthopedic examination performed by Dr. Stubel. At the time of the examination, plaintiff explained that he injured his neck, back, and shoulders in the subject accident, he also had a contusion to his chest from the airbag, and he received physical therapy several times per week for about one year. He stated he missed about one week of school as a result of the accident. He presented with neck and back pain. Dr. Stubel conducted range of motion testing using a goniometer and found normal range of motion of the cervical spine, lumbar spine, right shoulder, and left shoulder. Dr. Stubel concludes that plaintiff has no disability and can perform his usual activities of daily living and his usual school work.

Defendants' counsel contends that the affirmed medical report of Dr. Stubel is sufficient to establish, prima facie, that plaintiff has not sustained a significant disfigurement; fracture; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of a body organ or member; or significant limitation of use of a body function or system. Counsel also contends that plaintiff, who returned to school approximately one week after the accident, did not sustain a medically determined injury or impairment of a nonpermanent nature which prevented him, for not less than ninety days during the immediate one hundred eighty days following the occurrence,

from performing substantially all of his usual daily activities.

In opposition, plaintiff submits a recent evaluation from his treating physician, Allan Hausknecht, M.D., records from Samuel Krivit, P.A. and Andrew Davy, M.D., and an affirmation from radiologist Daniel Schlusberg, M.D. The records from Samuel Krivit, P.A. and Andrew Davy, M.D. were not considered as they were unsworn and not affirmed, and thus, inadmissible medical evidence sufficient to defeat a summary judgment motion (see Malave v Basikov, 45 AD3d 539[2d Dept. 2007]; Patterson v N.Y. Alarm Response Corp., 45 AD3d 656 [2d Dept. 2007]).

In his report, Dr. Hausknecht states that he initially examined plaintiff on May 20, 2013 and recently re-examined him on May 1, 2015. He states that upon his initial examination and most recent examination, plaintiff had complaints of pain to his neck, lower back, right shoulder, and left shoulder. Dr. Hausknecht opines that the symptoms are causally related to the subject accident. On his initial examination, he found significant limitations of range of motion of plaintiff's cervical spine, right shoulder, left shoulder, and lumbar spine. Upon his recent examination, he found continued limitations of range of motion of plaintiff's lumbar spine and right shoulder. He concludes that plaintiff has sustained, as a result of the subject accident, a permanent injury to his lumbar spine, right shoulder, and cervical spine, and a significant limitation of use of the body function or system. After reviewing the MRIs of plaintiff's cervical spine and lumbar spine, Dr. Schlusberg found, inter alia, evidence of a central disc herniation at C5-6 and disc bulges at L4-5 and L5-S1.

Plaintiff also submitted an affidavit of merit dated May 1, 2015, stating that due to the heavy impact to the vehicle, his body whipped forward and his chest came into contact with the airbag. He immediately complained of chest pain and headaches. On May 20, 2013, plaintiff began treatments with Dr. Hausknecht. He treated with Dr. Hausknecht about three times a week from May 20, 2013 through June 16, 2014. He states that he still continues to experience pain in his neck, back, and both shoulders which has had a significant effect on his daily activities.

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 the plaintiff's 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 the plaintiff 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 defendants, including the affirmed medical report of Dr. Stubel, together with plaintiff's testimony that he only missed approximately one week of school immediately following the accident, are sufficient to meet defendants' prima facie burden by demonstrating that 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 plaintiff raised a triable issue of fact by submitting the affirmed medical reports of Dr. Hausknecht and Dr. Schlusberg attesting to the fact that plaintiff sustained injuries as a result of the accident, plaintiff had significant limitations in range of motion both contemporaneous to the accident and in a recent examination, and concluding that 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 AD2d 367 [2d Dept. 2009]). As such, 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, plaintiff adequately explained the gap in treatment stating that his no fault benefits ran out and he had reached his maximum medical improvement (see Abdelaziz v Fazel, 78 AD3d 1086 [2d Dept. 2010]; Tai Ho Kang v Young Sun Cho, 74 AD3d 1328 [2d Dept. 2010]; Domanas v Delgado Travel Agency, Inc., 56 AD3d 717 [2d Dept. 2008]; Black v Robinson, 305 AD2d 438 [2d Dept. 2003]).

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

ORDERED, that the motion by defendants Rasheed Sattar and Yassim Sattar and the cross-motion by defendants Avin Tilhoo and Harrydatt Tilhoo for an order granting summary judgment dismissing plaintiff's complaint are denied.

Dated: July 29, 2015
Long Island City, N.Y

ROBERT J. MCDONALD
J.S.C.