Stano v Zayas
2015 NY Slip Op 31890(U)
September 15, 2015
Supreme Court, Bronx County
Docket Number: 20176/12
Judge: Wilma Guzman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Index No. **20176/12**
Motion Calendar No. 21
Motion Date: 7/13/15

JAMES STANO

Plaintiff,

-against-

DECISION/ ORDER
Present:
Hon. Wilma Guzman,
Justice Supreme Court

JOSE D. ZAYAS, EDE SERVICE CORP.,
SASWINDER PARMAR, FAJOMARG TAXI CORP.,
SHIRAJ UDDIN and ROSADA CAB CORP.,
Defendants.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for summary judgment:

Papers	**Numbered**
Defendants Notice of Motion, Affirmation in Support, and Exhibits Thereto	**1**
Affirmation in Opposition	**2**
Reply Affirmation	**3**

Upon the foregoing papers and after due deliberation, and following oral argument, the Decision/Order on this motion is as follows:

Defendants Uddin and Rosada Cab Corp. move for an Order granting summary judgment dismissing plaintiffs complaint on the grounds that plaintiff failed meet the burden of a sustainable serious injury under Ins. Law sections 5102(d) and 5104(a). Defendants Parmar and Fajomarg Taxi Corp., incorporating and relying upon the exhibits in the Uddin/Rosada Cab Corp motion, cross-move for an Order granting summary judgment dismissing plaintiffs complaint on the grounds that plaintiff failed meet the burden of a sustainable serious injury under Ins. Law sections 5102(d) and 5104(a). Plaintiff submitted written opposition to both motions. Defendants Zayas and Ede Service Corp. take no position on the motions.

Plaintiffs commenced this cause of action seeking damages for injuries allegedly sustained as the result of a motor vehicle accident which occurred on October 5, 2010.

In support of the motion for summary judgment, a defendant may rely either on the sworn statements of the defendant's examining physician or the unsworn reports of the plaintiff's examining physician. Pagano v. Kingsbury, 182 A.D.2d 268, 587 N.Y.S.2d 692 (2nd Dept. 1992) Also, an affirmed physician's report, being in admissible form and showing that a plaintiff was not suffering from any disability or consequential injury from the accident would be sufficient to satisfy a defendant's burden of proof and shift to the plaintiff the burden of establishing the existence of a triable issue of fact. See Gaddy v. Eyler, 79 N.Y.2d 955, 582 N.Y.S.2d 990 (1992), where defendant established a prima facie case that plaintiff's injuries were not serious through the affidavit of a physician who examined plaintiff and concluded that plaintiff had a normal examination. When the movant has made such a showing, the burden shifts and it then becomes incumbent upon the plaintiff to produce prima facie evidence in admissible form to support the claim of serious injury. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). To raise a triable issue of fact as to whether a herniated disc constitutes a serious injury, a plaintiff is required to 'provide objective evidence of the extent or degree of the alleged physical limitations resulting from the [injury] and their duration' (Noble v. Ackerman, 252 A.d.2d 392, 394). In lieu thereof, "[a]n expert's qualitative assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system (see Dufel, 85 N.Y.2d at 798." (Toure v. Avis Rent A Car Systems, Inc., 98 N.Y.2d 345, 350.).

Defendant has met the burden of prima facie entitlement to summary judgment through the submission of inter alia, the affidavit of

Dr. Jean-Robert Desrouleaux, examined the plaintiff on January 27, 2014 and who after performing an independent neurological examination noted normal ranges of motion in the plaintiff's neck, thoracic spine and lumbar spine as compared to the norms. Dr. Desrouleaux opined that the alleged injuries to the head, cervical, thoracic and lumbar spines had resolved and there was no residual effect. Dr. Desrouleaux opined that the plaintiff is able to function in his pre-accident capacity and carry out work and day to day activities without neurological restriction.

Dr. Lisa Nason conducted an orthopedic evaluation of plaintiff on October 5, 2010 and noted normal ranges of motion in the cervical spine, right shoulder, thoracic spine and lumbar spine. Dr.

Nason opined that all injuries had resolved and there were no residuals or permanency. She further opined that the plaintiff is able to perform work duties and activities of daily living with no restriction.

In opposition, plaintiff has submitted sufficient proof to raise a triable issue of fact. Dr. Gideon Hedrych began treating plaintiff on October 11, 2010 through January 3, 2012. During this time peridod, he noted range of motion limitations. In the cervical and lumbar spine. His review of the plaintiff's November 21, 2010 revealed disc hernations at L5/S1 which was compressing and displacing the L5 nerve root and herniations at C5/C6 deforming the thecal sac impinging the spinal cord. Dr. Hedrych opined that the subject accident was the competent producing cause of the cervical and lumbar spine damage. Dr. Hedrych recommended surgical intervention to alleveate pain. Dr. Hedrych also noted that during the fifteen month time period in which he treated plaintiff he instructed plaintiff that he could not work in his profession due to the injuries to his neck and back.

Dr. A. Lawrence Attia, plaintiff's treating physician since 2007 and affirms that prior to the subject accident, the plaintiff never complained of neck or low back pain and he did not prescribe any treatment for those areas of the body.

Dr. Robert Hertz administered pain management epidural spinal injections on February 23, 2012, March 15, 2012 and April 12, 2012. The injections provided temporary relief. Three additional injections were on July 30, 2013, September 9, 2013 and October 21, 2013, which again only provided temporary relief. By December 31, 2013, plaintiff was experiencing unrelenting low back pain radiating into his right leg. Dr. Hertz further informs that plaintiff is required to take Percocet every six hours to control his pain, a regimen which continues until today (November 10, 2014). Based upon the aforementioned, Dr. Hertz opined that plaintiff's injuries are not only significant but also permanent.

Plaintiff also treated with Dr. Jhn Galeno who diagnosed the plaintiff with cervical derangement, cervical radiculopathy, lumbar spine derangement with herniated disc and lumbar radiculopathy.

Plaintiff has submitted medical records contemporaneous with the subject accident. Contra Camilo v. Villa Livery Corp., 118 A.D.3d 586 (1st Dept. 2014); Perl v. Meher, 18 N.Y.3d 208 (2011). Plaintiff has raised a triable issue of fact as to whether she suffered a significant limitation

and permanent injury to meet the serious injury threshold. Perdomo v. City of New York, 129 A.D3d 585 (1st Dept. 2015); Plaintiff has submitted competent medical proof that she could not perform substantially all of his customary daily activities for the first 90 out of 180 days following the accident. *Contra* Coley v. DeLarosa, 105 A.D3d 527 (1st Dept. 2013); Uddin v. Cooper., 32 A.D.3d 270 (1st Dept.2006). Plaintiff has submitted competent medical proof to address defendants arguments of degeneration and gap in treatment. Young Kyu Kim v. Gomez, 105 A.D3d 415 (1st Dept. 2013). Plaintiff has submitted sufficient proof to raise a triable issue of fact as to whether he sustained a permanent injury under Ins. Law 5104. Accordingly, it is

ORDERED that defendant's motion for summary judgment under Ins. Law 5102(d) is hereby denied. It is further

ORDERED that defendant serve a copy of this order upon all parties with notice of entry, within thirty(30) days of this order.

This constitutes the decision of the Court.

9/15/15

DATE

HON. WILMA GUZMAN, JSC.