

Thrower v Adekunle
2015 NY Slip Op 32150(U)
October 15, 2015
Supreme Court, Bronx County
Docket Number: 307369/13
Judge: Elizabeth A. Taylor
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10/21/15
DENIED

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, I.A.S. PART 2
SAHARA THROWER,

Plaintiffs,

Index No. 307369/13

DECISION/ORDER

-against-

Present:
HON. ELIZABETH A. TAYLOR

ABOUDU ADEKUNLE and LENA CAB CORP.,
Defendants.

The following papers numbered 1 to ___ read on this motion, _____

No	On Calendar of	PAPERS NUMBERED
	Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed-----	1-2
	Answering Affidavit and Exhibits-----	3-4
	Replying Affidavit and Exhibits-----	5
	Affidavit-----	
	Pleadings -- Exhibit-----	
	Stipulation -- Referee's Report --Minutes-----	
	Filed papers-----	

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Motion pursuant to CPLR 3212 for summary judgment dismissing the complaint, on the ground that plaintiff has not suffered a serious injury, is decided as follows.

Plaintiff commenced this personal injury action for alleged injuries sustained as a result of an accident that occurred on January 30, 2013, when he was a passenger in a motor vehicle which was struck by defendants' vehicle. In plaintiff's bill of particulars, he alleges that he suffered a serious injury as defined by Insurance Law 5102(d). Specifically, plaintiff alleges, among others, injuries to his cervical spine, lumbar spine and the left shoulder. Defendants move for summary judgment dismissing the complaint on the ground that plaintiff did not suffer a serious injury within the meaning of the No-Fault Law.

Plaintiff concedes that the categories of "serious injury" he is claiming are: 1) "permanent consequential limitation of use of a body organ or member;" and 2)

“significant limitation of use of a body function or system.” It is noted that plaintiff does not allege, in his complaint or bill of particulars, that he suffered a non-permanent medically determined injury that prevented performance of the usual and customary daily activities for the 90 of the 180 days immediately subsequent to the accident.

To prevail on a motion for summary judgment, defendants have the initial burden of presenting competent evidence establishing that plaintiff has not suffered a serious injury (*see Spencer v Golden Eagle, Inc.*, 82 AD3d 589 [1st Dept 2011]). Such evidence includes affirmations of medical experts who examined the plaintiff and have concluded that no objective medical findings support plaintiff's claim (*Id.*).

In support of their motion, defendants submit the affirmations of Jean Robert Desrouleaux, M.D. and Alexios Apazidis, M.D. On September 15, 2014, Dr. Desrouleaux performed a neurological examination of plaintiff including testing of plaintiff's cervical spine, thoracic spine, and lumbar spine. Based upon the testing, Dr. Desrouleaux concluded that any injuries to the cervical, thoracic and lumbar spine were resolved and the neurological exam was normal. On September 18, 2014, Dr. Apazidis conducted an orthopedic examination of plaintiff, including testing of the cervical spine, lumbar spine, and left shoulder. Dr. Apazidis found decreased range of motion in plaintiff's left shoulder. However, Dr. Apazidis concluded that any injury plaintiff suffered had been resolved, and that there was no casually related disability.

Based upon the affirmations of defendants' experts, this court finds that they have met their prima facie burden of demonstrating that plaintiff has not suffered a serious injury within the meaning of Insurance Law 5102(d).

To create an issue of fact, plaintiff must establish a serious injury arising from a “permanent consequential limitation of use of a body organ, member, function or system” or “significant limitation of use of a body function or system.” To establish that an injury is permanent or consequential, plaintiff must set forth medical proof containing objective, quantitative evidence with respect to diminished range of motion or a qualitative assessment comparing plaintiff’s present limitation to the normal function, purpose and use of the affected body organ, member, or system (*Perl v Meher*, 18 NY3d 208 [2011]; *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 353 [2002]). Further, where the proof takes the form of a physician’s qualitative assessment, it must be supported by objective medical evidence such as MRI reports, CT scan reports and observations during an examination (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 353 [2002]).

In the instant matter, plaintiff submits the affirmed reports of Bozena Augustyniak, M.D., the affirmed MRI reports dated March 11, 2013, March 14, 2013, and March 20, 2013 of Robert-Scott Schepp, M.D., the affirmed EMG/NCV test report dated March 21, 2013 of Regina Gurevich, M.D. and the affirmed EMG/NCV test report dated May 22, 2013 of Yong Chi, M.D.

Dr. Augustyniak examined plaintiff on February 20, 2013, about three weeks after the accident. Dr. Augustyniak concluded that the plaintiff suffered from pain in his cervical spine, lumber spine and left shoulder. Dr. Augustyniak concluded that plaintiff’s injuries were causally related to the motor vehicle accident on January 30, 2013. On May 7, 2015, Dr. Augustyniak conducted an examination of plaintiff, including range of motion testing. Dr. Augustyniak concluded that plaintiff continued to suffer

from complaints of pain as well as diminished range of motion of the cervical spine, lumbar spine, and left shoulder. Additionally, Dr. Augustyniak concluded that the injury to plaintiff's cervical spine and lumbar spine were casually related to the motor vehicle accident. Dr. Augustyniak further concluded that injuries to plaintiff's cervical spine and lumbar spine are permanent and that the prognosis for full recovery is poor.

The fifteen month gap between the examinations is not dispositive in light of Dr. Augustyniak's conclusions (*see Rosario v Universal Truck & Trailer Service*, 7 AD3d 306 [1st Dept 2004][court held two year gap between examinations went to the weight the evidence where plaintiff's physician conducted range of motion test and found a permanent injury casually related to the accident during last examination]).

Based upon the affirmations of plaintiff's experts, this court finds that plaintiff raises an issue of fact as to whether he suffered a serious injury (*see Grant v United Pavers Co. Inc.*, 91 Ad3d 499 [1st Dept 2012]).

Accordingly, defendants' motion is for summary judgment dismissing the complaint, is denied.

The foregoing shall constitute the decision and order of this court.

Dated: OCT 15 2015



A.J.S.C.