

McNamara v Belizaire
2016 NY Slip Op 31654(U)
August 29, 2016
Supreme Court, New York County
Docket Number: 159566/14
Judge: Leticia M. Ramirez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 22

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KIMBERLY McNAMARA and DENIS MANGAN,

Index #: 159566/14
Mot. Seq: 05 & 06

Plaintiff(s),

DECISION/ORDER

-against-

HON. LETICIA M. RAMIREZ

JACQUES BELIZAIRE, MD R. AFROZ, 333 CAB
CORP. and ARSLAN AHMAD,

Defendant(s).

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Defendants Jacques Belizaire and MD R. Afroz's motion, pursuant to CPLR §3212, for summary judgment on the basis that plaintiffs did not sustain a "serious injury" within the meaning of Insurance Law §5102(d). Plaintiffs' cross-motion for an Order, pursuant to CPLR §3025, granting plaintiffs leave to serve an amended Bill of Particulars. Defendants 333 Cab Corp. and Arslan Ahmad's motion, pursuant to CPLR §3212, for summary judgment on the issue of liability. These motions are consolidated for disposition and decided as follows:

Plaintiffs' cross-motion for an Order, pursuant to CPLR §3025, granting plaintiffs leave to amend their Bill of Particulars to include a claim that plaintiffs sustained a "serious injury" within the meaning of Insurance Law §5102(d) based upon the "significant disfigurement" category is granted. Plaintiffs' Amended Verified Bill of Particulars, annexed to plaintiffs' cross-motion as Exhibit "H," is hereby deemed timely filed and served upon all defendants.

That portion of defendants Jacques Belizaire and MD R. Afroz's motion seeking summary judgment against plaintiff Kimberly McNamara on that basis that said plaintiff did not sustain a "serious injury" based upon the "fracture category" of the Insurance Law is denied. Plaintiff Kimberly McNamara sufficiently raised a triable issue of fact as to whether she sustained a nose fracture as a result of the subject accident with the affirmation of Dr. Joseph Wolf, who opined that said plaintiff sustained a nose fracture as a result of the subject accident, but could not undergo x-rays at the time of the subject accident because she was 18 weeks pregnant. *Hourigan v. McGarry*, 106 A.D.2d 845, appeal dismissed 65 N.Y.2d 637 (1985); *Andre v. Pomeroy*, 35 N.Y.2d 361 (1974); *Warney v Haddad*, 237 A.D.2d 123 (1st Dept. 1997); *Assaf v Ropog Cab Corp.*, 153 A.D.2d 520 (1st Dept. 1989).

Plaintiff Kimberly McNamara also sufficiently raised a triable issue of fact as to whether she sustained a “significant disfigurement” as a result of the subject accident with her affidavit, Dr. Wolf’s affirmation and recent photographs of said plaintiff’s scar in which a curved scar can be seen on said plaintiff’s forehead above her left eyebrow. This is furthered by the photographs of said plaintiff’s scar taken by defendant’s expert, Dr. Gary Bromley, who conducted a plastic surgery IME of said plaintiff on August 3, 2015 as well as Dr. Bromley’s opinion in his affirmed report that “further reconstructive surgery may result in some improvement in this forehead scar.” Given the above, the finder of fact must determine whether plaintiff Kimberly McNamara’s scar is one that “a reasonable person would view... as unattractive, objectionable, or as the subject of pity or scorn.” *Sidibe v Cordero*, 79 A.D.3d 536 (1st Dept. 2010); *Assaf v Ropog Cab Corp.*, *supra.*; *Zuckerman v City of New York*, 49 N.Y.2d 557 (1980); *Winegrad v New York Univ. Med. Ctr.*, 64 N.Y.2d 851 (1985); *Alvarez v Prospect Hosp.*, 68 N.Y.2d 320 (1986).

Next, that portion of defendants Jacques Belizaire and MD R. Afroz’s motion seeking summary judgment against plaintiff Denis Mangan on the basis that said plaintiff did not sustain a “serious injury” based upon the “significant disfigurement” category is granted. Said defendants sufficiently met their burden of demonstrating the absence of a serious injury under said category with the affirmed report of plastic surgeon, Dr. Gary Bromley, who examined said plaintiff on August 3, 2015. In his report, Dr. Bromley noted that said plaintiff had a “linear scar at the bridge of his nose measuring approximately 1.2 cm in length by 1 to 2 mm in width” and stated that the “scar was light and blends in very well with the surrounding skin and soft tissues.” Dr. Bromley took 2 color photographs of said plaintiff at the time of his examination, also submitted by said defendants, in which the scar was barely, if at all, visible. Dr. Bromley noted that said plaintiff’s forehead did not demonstrate any residual skin changes or scarring and that his upper and lower lips did not reveal any external scarring. Although Dr. Bromley noted internal scars on said plaintiff’s upper and lower lips, he stated that the scars were not visible externally. Dr. Bromley opined that the plaintiff’s scars are “cosmetically acceptable” did not interfere with plaintiff’s ability to participate in his activities of daily living and required no further treatment.

Plaintiff Denis Mangan failed to raise a triable issue of fact to substantiate a claim under the “significant disfigurement” category, in that he failed to demonstrate that his scars are such

that "a reasonable person would view... as unattractive, objectionable, or as the subject of pity or scorn." *Sidibe v Cordero, supra.*; *Assaf v Ropog Cab Corp., supra.*; *Zuckerman v City of New York, supra.*; *Winegrad v New York Univ. Med. Ctr., supra.*; *Alvarez v Prospect Hosp., supra.*

However, plaintiff Denis Mangan sufficiently raised a triable issue of fact as to whether he sustained a "significant" and/or "permanent consequential" limitation as a result of the subject accident with his affidavit and the affirmation of Dr. Joseph Wolf. In his affidavit, plaintiff, in describing the internal scars on his upper and lower lips, stated that he has difficulty eating, frequent pain and impaired speech. Dr. Wolf, in his affirmation, opined that plaintiff has swelling and indurated scarring from the sutures that will have to be removed surgically and that his injuries are permanent in nature. As such, those portions of defendants Jacques Belizaire and MD R. Afroz's motion seeking summary judgment against plaintiff Denis Mangan on the basis that said plaintiff did not sustain a "serious injury" based upon the "significant" and/or "permanent consequential" limitation categories are denied.

Those portions of defendants Jacques Belizaire and MD R. Afroz's motion seeking dismissal of plaintiffs' claims of sustaining a "serious injury" based upon the "90/180" category are granted. Plaintiffs failed to raise a triable issue of fact as to whether they were prevented from performing substantially all of their usual and customary daily activities for not less than 90 days during the 180 days immediately following the subject accident in accordance with the Insurance Law. Furthermore, no competent objective medical evidence was submitted to support plaintiffs' claims under the "90/180" category of the Insurance Law. *Elijah v Mahlah, 58 A.D.3d 434 (1st Dept. 2009)*; *Springer v Arthurs, 22 A.D.3d 829 (2nd Dept. 2005)*; *Bennett v Reed, 263 A.D.2d 800 (3rd Dept. 1999)*. As such, plaintiffs' claims of sustaining a "serious injury" based upon the "90/180" category are dismissed.

Accordingly, defendants Jacques Belizaire and MD R. Afroz's motion summary judgment motion is denied in part and granted in part, as explained herein.

Finally, defendants 333 Cab Corp. and Arslan Ahmad's motion, pursuant to CPLR §3212, for summary judgment on the issue of liability is denied, given defendant Arslan Ahmad and defendant MD R. Afroz's conflicting accounts as to how the accident occurred. Evidence demonstrating alternate theories of the cause of an accident raise material issues of fact that must

be determined at trial. *Mitchell v The Maguire Co., Inc.*, 151 A.D.2d 355 (1st Dept. 1989). See also, *Andre v. Pomeroy*, 35 N.Y.2d 361 (1974); *Thomas v Ronai*, 82 N.Y.2d 736 (1993); *Maniscalco v New York City Transit Auth.*, 95 A.D.3d 510 (1st Dept. 2012); *Villa v Leandrou*, 94 A.D.3d 980 (2nd Dept. 2012). Furthermore, credibility determinations must be resolved by the trier of fact. *Assaf v Ropog Cab Corp.*, *supra*.

Plaintiffs are directed to serve a copy of this Decision/Order with Notice of Entry upon defendants within 20 days of this Decision/Order.

This constitutes the Decision/Order of the Court.

Dated: August 29, 2016
New York, New York



HON. LETICIA M. RAMIREZ, L.S.C.