

Benitez v Butt

2016 NY Slip Op 32294(U)

October 21, 2016

Supreme Court, Kings County

Docket Number: 507441/14

Judge: Larry D. Martin

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

At an I.A.S. Trial Term, Part 41 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Borough of Brooklyn, City and State of New York, on the 21st day of October, 2016.

PRESENT:

Hon. LARRY D. MARTIN, J.S.C.

SUE BENITEZ,

Plaintiff,

Motion Sequences #6
INDEX No. 507441/14

-vs-

WASEEM BUTT, ALEXANDRA TAXI INC.,
SUMON RAHMAN and WITT CAB CORP.,

Defendants.

The following papers numbered 1 to 4 read on this motion	Papers Numbered
Notice of Motion	
and Affidavits (Affirmations) Annexed _____	<u>1-2</u>
Answering Affidavit (Affirmation) _____	<u>3</u>
Reply Affidavit (Affirmation) _____	_____

Upon the foregoing papers, defendants Waseem Butt (“defendant Butt”) and Alexandra Taxi Inc. (“defendant Alexandra Taxi”; collectively, “defendants”) move for an order, pursuant to CPLR 3212, granting summary judgment in favor of defendants, and dismissing the complaint herein, on the grounds that plaintiff Sue Benitez (“plaintiff”) has not sustained a serious injury as defined under New York Insurance Law § 5102 (d)¹.

Plaintiff commenced this action to recover compensatory damages for personal injuries she sustained on November 15, 2011, as a result of a motor vehicle accident (the “subject accident”) involving a livery vehicle (“vehicle #1”) owned by defendants, and a livery vehicle (“vehicle #2”) owned by non-moving defendants Sumon Rahman and Witt Cab Corp. At the time of the accident, defendant

¹Insurance Law § 5102 (d) defines “serious injury” as “a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's 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.”

Butt was operating vehicle #1 and plaintiff was a passenger in vehicle #2.

In the verified bill of particulars, plaintiff alleges, inter alia, that she sustained posterior tibial tendon dysfunction, strain and sprains, hardware failure flexor digitorum and synovitis extensor digitorum requiring surgery of the left foot. She further alleges that she suffered radiculopathy, multiple complex fractures, cartilage and tendon tears, chondral fractures, permanent leg shortening and a permanent limp of her left leg. According to plaintiff, she was confined to her bed for two weeks and to her home for four weeks. Plaintiff also claims to have been incapacitated from her employment and from performing household duties since the date of the accident. Plaintiff asserts that her alleged injuries are deemed serious as defined by section 5102 No-Fault Insurance Law.

When considering a motion for summary judgment, the court should only grant the motion where there are no material and triable issues of fact (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The movant has the burden of demonstrating “a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 852 [1985]). Once the movant has made this showing, the burden of proof shifts to the opponent to produce admissible evidence that establishes the existence of material issues which require a trial (*see Touré v Avis Rent A Car Sys.*, 98 NY2d 345, 352 [2002]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

In support of their motion, defendants submit, inter alia, the transcript of plaintiff’s deposition, the affirmed medical reports of Dr. Ronald A. Paynter (“Dr. Paynter”) and Dr. Michael N. Kang (“Dr. Kang”), as well as the unsworn report of plaintiff’s initial consultation with Dr. Andrew D. Brown (“Dr. Brown”). In Dr. Paynter’s² report, which is based upon a review of plaintiff’s police accident report, EMS report and emergency room records, among other things, he opines that: “[t]here is no indication of significant injury to [plaintiff] as a result of the [motor vehicle accident]” (Defendant’s Notice of

² The Court notes that Dr. Paynter is a physician who is board certified in the area of emergency medicine.

Motion, Exhibit G, 2). Dr. Paynter found that plaintiff's emergency room records showed no pain or restrictions of motion to the head, neck, left elbow, left foot and left ankle at the time of the accident (*id.*). Based on these findings, Dr. Paynter opined that plaintiff's EMS/ER records "are inconsistent with the injuries alleged in the Bill of Particulars and show that the claimed injuries do not have an acute traumatic origin and so could not be causally related to the accident on 11/15/2011" (*id.* at 3).

Importantly, defendants also submit an initial consultation report from Dr. Brown, one of plaintiff's treating physicians. Dr. Brown's examination of plaintiff took place on December 8, 2011, a few weeks after the subject accident occurred. Though unaffirmed (*see Pryce v Nelson*, 124 AD3d 859, 860 [2d Dept 2015]; *Elshaarawy v U-Haul Co. of Mississippi*, 72 AD3d 878, 881 [2d Dept 2010]), the report indicates tenderness in plaintiff's upper extremities and cervical and lumbar spine (Defendant's Notice of Motion, Exhibit J, 2). The report further noted decreased range-of-motion ("ROM") in plaintiff's neck, lumbar spine and her left lower extremities, among other areas (*id.* at 2-3). Based on these findings, Dr. Brown diagnosed plaintiff with strains in the left knee, left ankle and left foot, as well as a sprain in the left wrist, among other things (*id.* at 3). Dr. Brown opined that plaintiff's injuries had a "direct causal relationship" to the subject accident (*id.*).

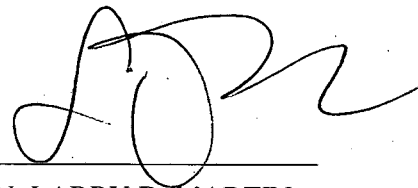
Defendants further proffer an affirmed medical report by Dr. Kang, an orthopedist who performed an independent medical examination of plaintiff on August 25, 2015. During the examination, Dr. Kang observed that plaintiff had four scars on her left foot which were "well healed," though he noted some "residual swelling in this region" (Defendant's Notice of Motion, Exhibit F, 3). Based upon his examination, Dr. Kang opined that plaintiff had full ROM of the cervical and lumbar spine (*id.*). Dr. Kang also found that plaintiff had "full inversion and eversion" in the ROM in her foot and ankle, and "normal strength with plantar flexion, dorsiflexion, and eversion/inversion" (*id.*). Ultimately, Dr. Kang concluded that plaintiff's "lower extremity injury is not causally related to this specific motor vehicle accident" (*id.*). However, it should be noted that while Dr. Kang cited plaintiff's ankle dorsiflexion as

15 degrees and her plantar flexion as 35 degrees, he failed to establish whether these ranges were within normal limits (*see id.*; *see also Ambroselli v Team Massapequa, Inc*, 88 AD3d 927, 928 [2d Dept 2011]; *McCarthy v Gagne*, 61 AD3d 942, 942 [2d Dept 2009]).

Based upon a review of the record submitted by the parties, and the relevant law, the Court finds that defendants have failed to satisfy their initial prima facie burden of proof demonstrating that plaintiff did not sustain serious injuries as a result of the subject accident (*see Gaddy v Eycler*, 79 NY2d 955 956-57 [1992]; *Perez v Ali*, 23 AD3d 363, 364 [2d Dept 2005]; *Nembhard v Delatorre*, 16 AD3d 390, 391 [2d Dept 2005]). In light of the findings in Dr. Brown's report, Dr. Kang's failure to compare his ROM findings to the normal ranges, as well as Dr. Paynter's failure to "set[] forth the objective test or tests performed supporting his conclusion[s]" (*Nembhard*, 16 AD3d at 391; *see Geba v Obermeyer*, 38 AD3d 597, 597 [2d Dept 2007]), the Court finds that there is a triable issue of fact as to whether plaintiff sustained a serious injury as defined by the Insurance Law as a result of the subject accident. Moreover, since defendants have "failed to establish their prima facie entitlement to judgment as a matter of law in the first instance, it is unnecessary to reach the question of whether plaintiff's papers were sufficient to raise a triable issue of fact" (*Perez*, 23 AD3d at 364; *Nembhard*, 16AD3d at 391). Accordingly, defendants' motion for summary judgment dismissing the complaint herein is denied.

The foregoing constitutes the decision and order of the Court.

ENTER,



HON. LARRY D. MARTIN,
J.S.C.

OCT 21 2016

For Clerks use only

MG
MD

Motion Seq. #

6