

Lewis v St. Juste
2017 NY Slip Op 30024(U)
January 9, 2017
Supreme Court, Queens County
Docket Number: 701602/2013
Judge: Robert J. McDonald
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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.

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

- - - - - x

CRAIG D. LEWIS and TONDAY JOHNSON, Index No.: 701602/2013

Plaintiffs, Motion Date: 11/17/16

- against - Motion No.: 104

EDOUARD ST. JUSTE AND "JOHN/JANE DOE", Motion Seq.: 2
 a fictitious name for the operator of
 a 1998 Infinity bearing New York State
 registration number EXN4106,

Defendants.

- - - - - x

The following papers numbered read on this motion by defendant
 EDOUARD ST. JUSTE for an Order pursuant to CPLR 3212 and New York
 Insurance Law 5102(d) granting summary judgment and dismissing
 the complaint:

	Papers Numbered
Notice of Motion-Affirmation-Exhibits-Memo. of Law...	EF 25 - 45
Affirmation.....	EF 51
Affirmation in Opposition-Exhibits.....	1 - 4

In this negligence action, plaintiffs seek to recover damages for personal injuries allegedly sustained as a result of a motor vehicle accident that occurred on May 13, 2010 on 217th Street at or near its intersection with Hempstead Avenue in Queens County, New York. Plaintiff Tonday Johnson was a front seat passenger in the vehicle owned and operated by plaintiff Craig D. Lewis. Mr. Lewis alleges that his vehicle was stopped at a red traffic light when it was struck in the rear by the vehicle owned and operated by Edouard St. Juste (defendant). The identity of the driver of defendant's vehicle is unknown as defendant's vehicle left the scene of the accident. As a result of the accident, Mr. Lewis contends that he sustained serious injuries to his cervical spine, lumbar spine, and thoracic spine. Mr.

Johnson contends that he sustained serious injuries to his right knee, lumbar spine, and cervical spine.

Plaintiffs commenced this action by filing a summons and complaint on May 3, 2013. Issue was joined by service of defendant's verified answer dated May 29, 2013. Defendant previously moved to dismiss the complaint. By Short Form Order dated October 14, 2014, this Court denied defendant's motion. Defendant now seeks to dismiss the complaint on the grounds that neither plaintiff sustained a serious injury and on the ground that plaintiffs failed to establish that defendant's vehicle was involved in the subject accident.

That branch of defendant's motion for summary judgment on the ground that defendant was not involved in the subject accident is denied. By Short Form Order dated October 14, 2014, this Court already denied such on the ground that there are issues of credibility which cannot be decided on a summary judgment motion. Thus, that branch of the pending motion for the same relief already denied by this Court is barred by the law of the case doctrine (see Gilligan v Reers, 255 AD2d 486 [2d Dept. 1998][holding that the law of the case doctrine applies to legal determinations that were necessarily resolved on the merits in the prior decision and to the same questions presented in the same case]).

Turning to that branch of the motion to dismiss the complaint on the ground that neither plaintiff sustained a serious injury, 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 the 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 his or her 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 he or she 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]).

On October 21, 2015, Mr. Johnson appeared for an examination before trial. He testified that he was able to exit the vehicle unassisted. Following the accident, he needed to use a cane for walking. He was not using a cane on the date of the deposition.

Defendant submits Dr. Tonusa Basu's report in support of the motion for summary judgment. Although Dr. Basu's report is unsworn, defendant may use such records in support of his motion since they were provided by plaintiffs (see Wiegand v Schunck, 294 AD2d 839 [4th Dept. 2002]; Lowe v Bennett, 122 AD2d 728 [1st Dept. 1986, *aff'd* 69 NY2d 700 [1986]]). Four months after the subject accident, Dr. Tonusa Basu performed a medical examination on Mr. Johnson. Mr. Johnson did not complain of any knee pain. All ranges of motion regarding his left and right knees were normal. However, Dr. Basu did record objectively-measured limitations in range of motion regarding Mr. Johnson's lumbar spine and cervical spine.

Dr. Eisenstadt also performed an independent review of the MRIs of Mr. Johnson's lumbar spine and cervical spine. Dr. Eisenstadt concludes that there was no evidence of osseous, ligamentous, or intervertebral disc changes posttraumatic in origin or causally related to the subject accident regarding the lumbar spine. The spondylolisthesis observed was related to chronic degenerative disc disease.

Defendant's counsel contends that the medical reports and Mr. Lewis' deposition testimony are sufficient to demonstrate that Mr. Lewis did not sustain a permanent loss of use of a body, organ, member, function or system; a permanent consequential limitation of use of a body organ or member; a significant limitation of use of a body function or system; or a medically determined injury or impairment of a nonpermanent nature which prevented him from performing substantially all of the material acts which constitute his 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.

This Court finds that the conclusion that Mr. Johnson did not suffer a serious injury as a result of this accident was directly contradicted by Dr. Basu's recorded objectively-measured limitations in range of motion regarding Mr. Johnson's lumbar spine and cervical spine. Additionally, Dr. Basu concluded that

there are significant functional limitations to Mr. Johnson's neck, mid back, and lower back as a direct result of the subject accident. As defendant failed to submit a recent independent medical evaluation regarding Mr. Johnson's lumbar spine and cervical spine, this Court cannot conclude that Mr. Johnson does not still suffer from significant limitations that constitute a serious injury.

Based on the foregoing, defendant failed to make a prima facie showing of entitlement to judgment as a matter of law that plaintiff Mr. Johnson did not sustain a serious injury within the meaning of Insurance Law § 5102(d), tendering sufficient evidence to demonstrate the absence of any material issues of fact (see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]; Reynolds v Wai Sang Leung, 78 AD3d 919 [2d Dept. 2010]). Where a defendant fails to meet the defendant's prima facie burden, the court will deny the motion for summary judgment regardless of the sufficiency of the opposition papers (see Ayotte v Gervasio, 81 NY2d 1062 [1993]; Barrera v MTA Long Island Bus, 52 AD3d 446 [2d Dept. 2008]; David v Bryon, 56 AD3d 413 [2d Dept. 2008]).

Mr. Lewis appeared for an examination before trial on October 21, 2015. He testified that at the time of the accident he was employed as a home health aide. Following the accident, he had some difficulty in performing his duties. After approximately one or two weeks, he was able to perform his regular duties without any assistance. There are no activities that he is unable to do as a result of the subject accident.

On December 7, 2015, Dr. J. Serge Parisien performed an orthopedic examination on plaintiff Mr. Lewis. Mr. Lewis presented with complaints of pain in his neck and mid and lower back. Dr. Parisien identified the medical records he reviewed, and performed range of motion testing using a goniometer. Dr. Parisien found all normal ranges of motion in Mr. Lewis' cervical spine, thoracic spine, and lumbosacral spine. All other objective tests were negative. Dr. Parisien concludes that there is no objective evidence of an ongoing disability resulting from the subject accident.

Dr. Audrey Eisenstadt conducted an independent review of Mr. Lewis' lumbar spine and cervical spine MRIs. She concluded that there was no evidence of osseous, ligamentous, or intervertebral disc changes posttraumatic in origin or causally related to the subject accident regarding the lumbar spine. Regarding the cervical spine, she notes that the osteophyte formation and desiccation and disc bulging are indications of degenerative disc disease which was pre-existing.

Defendant's counsel contends that the medical reports and Mr. Lewis' deposition testimony are sufficient to demonstrate that Mr. Lewis did not sustain a permanent loss of use of a body, organ, member, function or system; a permanent consequential limitation of use of a body organ or member; a significant limitation of use of a body function or system; or a medically determined injury or impairment of a nonpermanent nature which prevented him from performing substantially all of the material acts which constitute his 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.

Regarding Mr. Lewis, this Court finds that the competent proof submitted by defendant, including the affirmed medical report of Dr. Parisien and Mr. Lewis' testimony that within one to two weeks following the accident he was able to perform his regular duties without assistance, is sufficient to meet defendant's prima facie burden by demonstrating that Mr. Lewis 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]; Carballo v Pacheco, 85 AD3d 703 [2d Dept. 2011]; Ranford v Tim's Tree & Lawn Serv., Inc., 71 AD3d 973 [2d Dept. 2010]).

In opposition, this Court finds that Mr. Lewis failed to raise a triable issue of fact. Mr. Lewis submits an affirmation from David Khanan, M.D. affirming his report concerning Mr. Lewis to be true and complete. However, the copies of the records and reports annexed to the affirmation are from Samuel H. Kelman, D.O., Richard Rizzuti, M.D., Tonusa Basu, M.D., Robert A. Sohn, D.C., Alexandre B. de Moura, M.D., Mindy F. Chen, and A.B. Perkins, M.D. As the records are unsworn by the doctors who created them, they lack any probative value, and thus, are not capable of raising a triable issue of fact as a matter of law (see DeJesus v Paulino, 61 AD3d 605 [1st Dept. 2009]; Garcia v Lopez, 59 AD3d 683 [2d Dept. 2009]). The remainder of plaintiffs' opposition is insufficient to defeat defendant's summary judgment motion against Mr. Lewis.

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

ORDERED, that defendant's summary judgment motion is granted to the extent that plaintiff TONDAY JOHNSON's complaint is dismissed, and the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED, that plaintiff CRAIG D. LEWIS' action shall remain

on the Trial Scheduling Part's Calendar for March 7, 2017.

Dated: January 9, 2017
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C