

Kouyate v Croughn
2017 NY Slip Op 31608(U)
July 18, 2017
Supreme Court, Bronx County
Docket Number: 23878/14
Judge: Paul L. Alpert
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART IA-29

-----X
Abdoulaye Kouyate

Plaintiff,

-against-

Corey M. Croughn and
New York Restoration Project

Defendants.
-----X

Index No.: 23878/14

DECISION/ORDER

Recitation, as required by CPLR §2219(a), of the papers considered in the review of the motion as indicated below:

Papers	Numbered
Notice of Motion for Summary Judgment, Affirmation in Support & Exhibits.....	1, 2, 3
Affirmation in Opposition & Exhibits.....	4, 5

Upon the foregoing cited papers the Decision/Order on this motion is decided as follows:

The plaintiff commenced this action seeking damages as a result of a motor vehicle accident that occurred on 7/2/14. The plaintiff Abdoulaye Kouyate claims he sustained serious injuries as defined in § 5102(d) of the New York State Insurance Law. The defendants move for summary judgment and to dismiss the action on the basis that the plaintiff did not suffer a serious injury.

Summary judgment is a drastic remedy that a court should employ only in the absence of triable issues of fact (Andre v. Pomeroy, 35 NY2d 361 [1974]). The defendants bear the initial burden of establishing the absence of a serious injury by tendering evidentiary proof in admissible form eliminating any material issues of fact from the case (see Toure v. Avis Rent A

Car Systems, Inc., 98 NY2d 345 [2002]). Insurance Law § 5102(d) defines a serious injury in pertinent part as:

a personal injury which results in a fracture; 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.

The plaintiff alleges in his Bill of Particulars that he sustained injuries to his right shoulder, right knee, cervical spine and lumbar spine. In a motion for summary judgment, the defendant has the initial burden to present competent evidence showing that the plaintiff has not suffered a "serious injury" (see Spencer v. Golden Eagle, Inc., 82 AD3d 589 [App Div 1st Dept 2011]; Rodriguez v. Goldstein, 182 AD2d 396 [App Div 1st Dept 1992]). This evidence includes " 'affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim' " (Shinn v. Catanzaro, 1 AD3d 195, 197 [App Div 1st Dept 2003], quoting Grossman v. Wright, 268 AD2d 79, 84 [App Div 2nd Dept 2000]; Spencer v. Golden Eagle, Inc., at 590). Here, the defendants did not present an affirmation or affidavit from a doctor who examined the plaintiff. Instead they rely on the attorney's affirmation to demonstrate that the plaintiff did not sustain a serious injury. Therefore, the defendants failed to meet their burden in showing that the plaintiff did not sustain a permanent consequential limitation of use of a body organ or member; or a significant limitation of use of a body function or system.

The defendants also argue that the plaintiff has not sustained a medically determined

injury or impairment of a non-permanent nature which prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the accident. Dr. Vincent Huang, a physiatrist examined the plaintiff on 7/11/14. He states in an affirmed report that the plaintiff is partially disabled and that he has not been able to return to work since the injury. However, in the affirmed report after an August 8, 2014 examination, Dr. Albert Villafuerte wrote that the plaintiff is disabled and working out of financial necessity. He advised the plaintiff to obtain orthopedic clearance for his employment. Courts have held that even if a plaintiff is unable to return to work for more than 90 days out of the first 180 days after the accident, this is not determinative of a 90/180 day injury (see Bailey v. Islam, 99 Ad3d 633 [App Div 1st Dept 2012]; Uddin v. Cooper, 32 Ad3d 270 [App Div 1st Dept 2006]). Moreover, the plaintiff's deposition testimony does not prove that he sustained a 90/180 day injury (see exhibit g pg. 33 lines 1- 25, pg. 34 lines 1-25 and pg. 35 lines 1-22). The testimony demonstrates that the plaintiff worked two days since the injury and focuses on the plaintiff's current physical inabilities.

The plaintiff offered no evidence through the medical records and the deposition testimony that he was restricted from performing substantially all of the material acts that constituted his usual and customary daily activities for 90 days during the 180 days following the accident. The defendants have met their burden in demonstrating that the plaintiff did not sustain a 90/180 day injury. The burden now shifts to the plaintiff to raise a triable issue of fact regarding the 90/180 day injury.

The plaintiff in opposition annexes additional medical records and a recent deposition of

the plaintiff taken on October 24, 2016. However neither the medical records nor the deposition is sufficient to sustain his 90/180 day claim. The medical records do not prove that he could not perform is customary daily activities for not less than 90 days for the first 180 days after the accident. The deposition testimony focuses on the plaintiff's current physical condition and his present inability to perform his customary daily activities. The plaintiff has failed to raise an issue of fact that he sustained a 90/180 day injury.

Based on the foregoing it is hereby:

ORDERED AND ADJUDGED, that the motion for summary judgment is granted to the extent of awarding partial summary judgment and dismissing the plaintiff's 90/180 day claim only, and it is further,

ORDERED AND ADJUDGED, that the motion for summary judgement and to dismiss the plaintiff's claim of sustaining a permanent consequential limitation of use of a body organ or member, is denied, and it is further,

ORDERED AND ADJUDGED, that the defendant's motion for summary judgment and to dismiss the plaintiff's claim that he sustained a significant limitation of use of a body function or system, is denied, and it is further,

ORDERED AND ADJUDGED, that the defendants serve a copy of this Order with Notice of Entry upon the plaintiff within twenty (20) days from the date of entry.

This constitutes the decision and order of the court.

Dated: July 18, 2017


Hon. Paul L. Alpert, JSC

PAUL ALPERT