Cisse v Style Coach Corp.
2017 NY Slip Op 32228(U)
October 19, 2017
Supreme Court, New York County
Docket Number: 153866/15
Judge: Paul A. Goetz

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 22

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MAMADOU CISSE,

Plaintiff,

Index No.: 153866/15
DECISION/ORDER

-against-

STYLE COACH CORPORATION and ABOUB AKAR OMAR,

Defendants.

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HON. PAUL A. GOETZ, J.S.C.:

In this personal injury/automobile accident action, defendants Style Coach Corporation (Style Coach) and Aboub Akar Omar (Omar; together, defendants) move for summary judgment pursuant to CPLR § 3212 to dismiss the complaint on the grounds that the injuries allegedly sustained by plaintiff Mamadou Cisse (Cisse) fail to establish serious injury thresholds as defined by Insurance Law § 5102 (d).

Ciesse's bill of particulars alleges injuries to his left knee, and cervical and lumbar spine and he avers that his injuries meet the following Insurance Law § 5102 (d) criteria: 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 customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injuries or impairments.

BACKGROUND

On August 11, 2013, a taxicab, operated by Cisse was struck from the rear by a second car, owned by Style Coach and driven by Omar, while stopped at a light . *See* notice of motion, exhibit A (complaint), ¶¶ 21-22. The accident took place at approximately 12:55 a.m. at the intersection of Lafayette Street and East 4th Street in the County, City and State of New York. *Id.*, exhibit B (bill of particulars), ¶¶ 4-5. Immediately following the collision, Cisse received treatment at Bellevue Hospital and subsequently was treated by four doctors: anaesthesiologist/pain management specialist Kiran Patel, MD (Dr. Patel); neurologist/pain management specialist Aric Hausknecht, MD (Dr. Hausknecht); anaesthesiologist/pain management specialist Arden Kaisman, MD (Dr. Kaisman); and orthopedic surgeon Charles DeMarco, MD (Dr. DeMarco). *Id.* Cisse aff in opposition, ¶ 16.

PARTIES' CONTENTIONS

Defendants have presented independent medical examination reports from orthopedic surgeon Arnold T. Berman, MD (Dr. Berman), neurologist Naunihal S. Singh, MD (Dr. Singh) and radiologist Mark Decker, MD (Dr. Decker). *See* notice of motion, exhibits E, F, G. Dr. Berman's report, dated March 10, 2016, sets forth the impressions that the injuries to Cisse's cervical and lumbar spine and left knee were all "resolved with no residuals and no findings on clinical exam," and the conclusions that "there was no aggravation of any preexisting condition," and that Cisse "can participate in all activities of daily living . . . [and] work at his regular employment full time without restrictions." *Id.*, exhibit E. Dr. Singh's report, dated February 22, 2016, sets forth the impression that the "alleged injuries to the cervical and lumbar spine [are] resolved," and the conclusion that Cisse "has no neurological disability . . . and . . . is not

disabled from working or from activities of daily living." *Id.*, exhibit F. Dr. Decker's MRI report, dated January 10, 2016, sets forth the impression that there was "no evidence to suggest an acute traumatic injury was sustained - no herniation or fracture," and, while acknowledging the presence of lumbar spinal disc bulges and hypertrophy, sets forth the conclusion that "these findings are all degenerative longstanding, and not causally related to the date of accident of August 11, 2013." *Id.*, exhibit G.

Cisse has presented expert's reports from Drs. Hausknecht and DeMarco.[1] Cisse's opposition, exhibits 12, 13. Dr. Hausknecht's report includes test results showing that Cisse had below normal range of motion in portions of his cervical and lumbar spine, and concludes that: "[w]ith a reasonable degree of medical certainty, Mr. Cisse has sustained significant limitation of function of his lumbrosacral spine," and that "[h]e has a permanent partial disability." *Id.*, exhibit 12. Dr. DeMarco's report reports that Cisse had a "15% schedule loss of use of the left knee," and concludes that "to a reasonable degree of medical certainty . . . Cisse's injuries are causally related to the driver-motor vehicle accident while working that occurred on August 11, 2013." *Id.*, exhibit 13. Cisse himself avers that the pain in his neck, lower back and left knee has not subsided since the accident, that he is currently unable to work full time or to engage in normal physical activity, and that he is no longer undergoing any medical or therapeutic treatment because he can no longer afford to pay for it. *Id.*, Cisse aff in opposition, ¶¶ 13-21.

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[1]Cisse also submitted medical records from Dr. Patel, Dr. Kaisman, Dr. Glickman and Dr. DeMarco purportedly certified pursuant to CPLR § 3122-a. However, "the certification of the medical records and reports by the records custodian of the subject medical facility [is] not sufficient to properly place the medical conclusions and opinions contained in those records and reports before the court, since those opinions must be sworn to or affirmed under the penalties for perjury" (*Irizarry v Lindor*, 110 AD3d 846, 847 [2nd Dept 2013]).

DISCUSSION

The "damages" component of Cisse's negligence claim is predicated on the allegation that he suffered a "serious injury," as that term is defined by statute. *See* notice of motion, exhibit A (complaint), ¶ 26. Insurance Law § 5102 (d) specifically provides as follows:

> "'Serious injury' means 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."

"To prevail on a [threshold] motion for summary judgment, the defendant has the initial burden to present competent evidence showing that the plaintiff has not suffered a serious injury" (*Spencer v Golden Eagle, Inc.*, 82 AD3d 589, 590 [1st Dept 2011] [internal quotation marks and citations omitted]). Once defendant meets its initial burden, plaintiff must then demonstrate a triable issue of fact as to whether s/he sustained a serious injury within the meaning of Insurance Law § 5102 [d] (*Shinn v Catanzaro*, 1 AD3d 195, 197 [1st Dept 2003]).

In *Toure v Avis Rent A Car Sys.* (98 NY2d 345 [2002]), the Court of Appeals held that the:

> "plaintiff's proffered evidence raises issues of material fact as to whether he sustained a 'permanent consequential limitation of use of a body organ or member' or a 'significant limitation of use of a body function or system.'
>
> "For these two statutory categories, we have held that '[w]hether a limitation of use or function is "significant" or "consequential" (i.e., important ...) relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part.' While [plaintiff's doctor's] affirmation does not ascribe a specific

> percentage to the loss of range of motion in plaintiff's spine, he sufficiently describes the 'qualitative nature' of plaintiff's limitations 'based on the normal function, purpose and use of the body part.' [Plaintiff's doctor] further attributes the limitations in plaintiff's physical activities to the nature of the injuries sustained by opining that plaintiff's 'difficulty in sitting, standing or walking for any extended period of time and his inability to lift heavy boxes at work are a natural and expected medical consequence of his injuries.'
>
> "We cannot say that the alleged limitations of plaintiff's back and neck are so 'minor, mild or slight' as to be considered insignificant within the meaning of Insurance Law § 5102 (d). As our case law further requires, [plaintiff's doctor's] opinion is supported by objective medical evidence, including MRI and CT scan tests and reports, paired with his observations of muscle spasms during his physical examination of plaintiff. Considered in the light most favorable to plaintiff, this evidence was sufficient to defeat defendants' motion for summary judgment."

98 NY2d at 352-353 (internal citations omitted). Here, defendants raise four arguments as to why Cisse's injuries fail to meet the statutory threshold.

First, defendants raise what they refer to as the "absence of trauma" argument. Defendants assert that Cisse's injuries cannot satisfy any of the statute's categories of "serious injuries," as a matter of law, because the medical evidence discloses that Cisse did not suffer any traumatic injuries in the automobile accident, which consequently nullifies the causation element of his claim. *See* notice of motion, Cassella affirmation, ¶¶ 33-34. Defendants specifically cite the decision of the Appellate Division, First Department, in *Kester v Sendoya* (123 AD3d 418 [1st Dept 2014]) to support this argument. *Id.* In *Kester*, which involved a plaintiff whose shoulder was injured when the defendant's taxi cab struck her car from the rear, the First Department held that "[a]bsent any evidence of contemporaneous, postaccident treatment or evaluation of plaintiff's shoulder, she failed to raise an issue of fact as to whether her shoulder condition was causally related to the accident." 123 AD3d at 418. The Court also noted that "the affirmed

report of her orthopedic surgeon, who first examined plaintiff a year after the accident, was insufficient to raise an issue of fact." *Id.* Here, by contrast, the medical reports that Cisse submitted from Drs. Hausknecht and DeMarco indicate that he sought treatment for both his back and knee injuries within approximately one month of his accident. Cisse's affidavit states he continued to seek treatment for as long thereafter as he could afford to pay. *See* Levine affirmation in opposition, exhibits 3-10. The existence of this "contemporaneous treatment" takes Cisse's situation outside the ambit of the *Kester* holding, and renders that decision unavailable to support defendants' argument. It is true that the submissions from defendants' doctors all state that Cisse's back and knee injuries were either "resolved" or "non-traumatic." *See* notice of motion, exhibits E, F, G. However, both Drs. Hausknecht's and DeMarco's expert reports specifically opine that Cisse's injuries *were* both disabling and causally related to the August 11, 2013 accident. *See* Levine affirmation in opposition, exhibits 12, 13. The court finds that this evidence raises an issue of fact sufficient to defeat defendants' first dismissal argument.

Next, defendants argue that Cisse's "doctors reported normal findings on a myriad of objective tests, with full (or near normal) ranges of motion and no functional disability," which defeat his claim of having suffered a "serious injury." *See* notice of motion, Cassella affirmation, ¶ 35. Defendants also note that the mere presence of positive MRI findings, and/or tears and bulges, is not sufficient evidence to overcome the "serious injury" threshold. *Id.* Cisse responds that this argument mischaracterizes the medical evidence. The court again notes that there is a disparity between defendants' and Cisse's medical evidence. The reports from defendants' doctors all state that Cisse's back and knee injuries were "resolved" at the time they examined him (in 2016, five years after the accident). *See* notice of motion, exhibits E, F, G. They also

include a description of the examinations that they performed on Cisse to obtain these results. *Id.* As an evidentiary matter, this is sufficient for defendants to establish a prima facie claim that Cisse did not sustain a "serious injury." *See e.g. Manzi v Lindenlaub*, 304 AD2d 802 (2d Dept 2003). However, in opposition, Cisse has presented: Dr. Hausknecht's examination results, which indicate below normal ranges of motion for his cervical and lumbar spine and confirms disc bulges with attendant radiculopathy; and Dr. DeMarco's examination results, which indicate left knee meniscus pathology, partially based on an MRI of the left knee showing a meniscus tear. *See* Levine affirmation in opposition, exhibits 3-10. This evidence is sufficient to raise a question of fact. *See Martinez v Pioneer Trans. Corp.*, 48 AD3d 306 (1st Dept 2008). Therefore, the court rejects defendants' second dismissal argument.

Next, defendants argue that "by finding no current limitations, and also normal results on a variety of clinical tests, defendants' doctors [have] ruled out any basis for a permanent consequential limitation." *See* notice of motion, Cassella affirmation, ¶ 39. Defendants do not elaborate further on this argument, and presumably rely on their three medical submissions to support it. In opposition, Cisse asserts that defendants' argument ignores both his own testimony and the medical evidence presented by Drs. Hausknecht and DeMarco. *See* Levine affirmation in opposition, ¶¶ 47-57. As was previously observed, the expert reports of those two physicians indicate that Cisse has a below normal range of motion in portions of his cervical and lumbar spine, and a 15% loss of functionality in his left knee. *Id.*, exhibits 12, 13. The court here also notes that those reports were prepared in 2016, five years after Cisse's accident, and that they acknowledge degenerative damage in both of the injured areas, in addition to the damage that they ascribe to accident trauma. Cisse further cites the recent decision of the Appellate Division,

First Department, in *Birch v 31 N. Blvd., Inc.* (139 AD3d 580 [1st Dept 2016]), to support his contention that medical evidence, which includes below normal range on motion and/or percentage loss of use calculations, is generally sufficient to raise a triable issue of fact. The court agrees that this decision is helpful. The First Department acknowledged that it is not necessary to include these types of calculations in the initial medical treatment reports of an accident victim, as long as the treating physician includes them in his final expert's report. Such is the case here. As a result, the court finds that Cisse's evidence does establish a triable issue of fact as to whether he sustained a "permanent consequential limitation" of his spine and/or left knee. It is neither remarkable, nor dispositive, that Cisse's doctors reported degenerative changes along with the damage that they ascribed to his accident related trauma. What is significant is that they made both records of their treatment of Cisse that were contemporaneous with his accident, and later made final reports which contained the requisite calculations. In short, Cisse has met his evidentiary requirements at this juncture. As a result, the court rejects defendants' third dismissal argument.

Finally, defendants argue that their proof "ruled out the 90/180 day category of the statute." *See* notice of motion, Cassella affirmation, ¶ 39. Cisse responds that defendants' argument fails, because they did not meet their burden of proving it; specifically, because defendants' doctors did not examine him until well after the 90/180 day postaccident period had passed, they are consequently incapable of presenting evidence that he was not precluded from performing "substantially all" of his normal activities during that time. *See* Levine affirmation in opposition, ¶¶ 58-66. Cisse cites a quantity of case law regarding the allocation of said burden of proof. *Id.* However, the court finds that this case law is inapposite, because it is superceded by

Cisse's own admission, during his deposition, that he returned to work as a taxi driver on a part-time basis two months after his accident. *See* notice of motion, exhibit D at 46. Further, Cisse's affidavit in opposition to the motion merely states that he "missed several months of work and was able to return to work in a part-time capacity," and that he has "been unable to work full-time since the accident," without making any specific allegations relating to the 90/180 day period directly after his accident. *See* Cisse aff in opposition, ¶¶ 11, 19. This evidence, in the form of plaintiff's admissions, is sufficient to foreclose his reliance on that portion of the statute that acknowledges the 90/180 day category of "serious injuries." Therefore, summary judgment to Defendants on Plaintiff's 90/180 day claim must be granted.

DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 3212, of defendants Style Coach Corporation and Aboub Akar Omar is granted only as to plaintiff Cisse's 90/180 day claim and denied as to all other claims.

Dated: New York, New York
October 19, 2017

ENTER:

Hon. Paul A. Goetz, J.S.C.