Chikorie v Laskaris
2017 NY Slip Op 32812(U)
December 4, 2017
Supreme Court, Queens County
Docket Number: 702650/2013
Judge: Darrell L. Gavrin
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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN** IA PART 27
Justice

ALLAN CHIKORIE, Plaintiff,	Index No. 702650/2013
	Motion Date June 26, 2017
- against-	
ANNETTE LASKARIS, KIRILK TARPOV, ALBINA, FAYZAKOVA and AVREKH FAYZAKOV,	Motion Cal. No. 21, 22 & 23
Defendants.	Motion Seq. No. 4, 6 & 7

The following papers read on this motion by defendants Annette Laskaris (Laskaris) and Kirilk Tarpov (Tarpov) (collectively, the Taxi Defendants) for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury under Insurance Law § 5102(d); a motion by defendants Albina Fayzakova (Albina) and Avrekh Fayzakov (Avrekh) (collectively, the BMW Defendants) for an order striking the the Taxi Defendants' answer on the ground that they failed to appear for deposition in violation of court orders; and a separate motion by the BMW Defendants for summary judgment on the issue of liability

	Papers Numbered
Notices of Motion - Affidavits - Exhibits.....	EF 55-69; 78-81; 85-90
Answering Affidavits - Exhibits................	EF 82-84; 95-97; 112-118; 126-130
Reply Affidavits...	EF 105-111; 131-134

Upon the foregoing papers it is ordered that these motions are consolidated for purposes of disposition and are determined as follows:

Plaintiff commenced this action to recover for personal injuries allegedly sustained as a result of a motor vehicle accident on October 29, 2012 in which he was a rear-seated passenger in a taxi cab owned by defendant, Laskaris and operated by defendant, Tarpov. The other vehicle was a BMW owned by defendant, Albina and operated by defendant,

Avrekh, in which a non-party was also riding as a front seat passenger. The BMW was proceeding west on Linden Boulevard entering its intersection with 126th Street in Queens, New York, with a green traffic light in its favor, when it was allegedly struck by the front right part of co-defendants' taxi, which was proceeding north on 126th Street against a red traffic signal. After the collision, the taxi continued forward and struck a wire fence surrounding a private home at the corner of the intersection. In his bill of particulars, plaintiff alleges that he sustained lacerations to his forehead with scarring, as well as injuries to the cervical and thoracic regions of his spine, right knee, and right ankle.

In a personal injury action seeking damages for injuries allegedly sustained in a motor vehicle accident, the plaintiff must, as a threshold matter, establish that he or she has sustained a "serious injury" as defined in Insurance Law § 5102(d). Thus, to succeed on a motion for summary judgment, a defendant must make an initial showing that the plaintiff did not, as a result of the subject accident, sustain a serious injury (*see Gaddy v Eyler*, 79 NY2d 955 [1992]; *Ocasio v Henry*, 276 AD2d 611 [2000]; *Grossman v Wright*, 268 AD2d 79 [2000]), such as by submitting an affidavit and/or affirmation of a medical expert who examined the plaintiff and "concluded that no objective findings support the plaintiff's claim" of serious injury (*Grossman*, 268 AD2d at 83–84). Once a defendant has made a *prima facie* showing that the plaintiff did not sustain a serious injury, the burden shifts to the plaintiff to come forward with admissible proof raising a triable question of fact which precludes summary judgment (*see Napoli v Cunningham*, 273 AD2d 366 [2000]).

In moving for summary judgment on serious injury grounds, the Taxi Defendants submit the affirmed medical reports of Drs. Lisa Nason (an orthopedist), Vladimir Zlatnik (a neurologist), Gary S. Bromley (a plastic surgeon), Stacy M. Donegan (physician board-certified in Emergency Medicine), and Audrey Eisenstadt (a radiologist). Both Dr. Nason and Dr. Zlatnik performed objective tests on plaintiff with a goniometer and found normal ranges of motion with respect to the cervical and thoracic spine, concluding that plaintiff had no abnormalities or evidence of residuals or permanency, and that he could perform his usual occupation and daily living activities without restrictions or disability. Dr. Nason also found normal ranges of motion with respect to plaintiff's right knee and ankle. Additionally, based on her review of plaintiff's MRI films taken shortly after the subject accident, Dr. Eisenstadt found no evidence of traumatic disc injury given her findings of degenerative disc disease common at that level for cervical arthritis, osteophyte and dessication changes which predated the accident, and disc bulging that was degenerative rather than traumatic in nature. Further, Dr. Bromley found no evidence of significant scarring /disfigurement and opined that plaintiff's scar did not interfere with plaintiff's daily living activities.

However, Dr. Zlatnik's opinion that plaintiff's neurological exam was normal, that his alleged post-concussion syndrome and spinal injuries resolved, and that there was no

evidence of permanent neurological injury casually related to the subject accident is conclusory, given his findings which included range of motion limitations with respect to the cervical spine. Specifically, Dr. Zlatnik's range of motion examination for the cervical spine revealed extension 45 degrees (normal 60 degrees), flexion 40 degrees (normal 50 degrees), left lateral bend 45 degrees (normal 45 degrees), right lateral bend 40 degrees (normal 45 degrees), left rotation 70 degrees (normal 80 degrees), and right rotation 65 degrees (normal 80 degrees). These limitations in range of motion, reported up to as much as 25%, raise a triable issue of fact regarding whether plaintiff exhibited significant limitations in range of motion as a result of the subject accident (*see Chun Ok Kim v Orourke*, 70 AD3d 995 [2010]; *Barrington-Stotsky v Robinson*, 70 AD3d 990 [2010]; *Bentivegna v Stein*, 42 AD3d 555 [2007]). Moreover, Dr. Zlatnik's opinion that the limitations in plaintiff's range of motion are "self-restricted" or voluntary presents an issue of fact that cannot be resolved on the papers now before the court, particularly where no such concern was voiced during other examinations of the cervical spine (*see e.g. Martinez v Pioneer Transp.*, 48 AD3d 306, 307 [2008] [where varying inferences could be drawn from evidence presented], citing *Noble v Ackerman*, 252 AD2d 392, 395 [1998]; *see also Bengaly v Singh*, 68 AD3d 1030 [2009] [where orthopedic surgeon failed to explain or substantiate, with objective medical evidence, the basis for his conclusion that the noted limitations were self-restricted]; *Colon v Chuen Sum Chu*, 61 AD3d 805 [2009] [same]).

As the Taxi Defendants fail to satisfy their *prima facie* burden of demonstrating, that plaintiff did not sustain a serious injury, the court need not consider the sufficiency of plaintiff's papers in opposition to the motion (*see Held v Heideman*, 63 AD3d 1105 [2009]).

Turning to the issue of liability, through defendant, Avrekh's uncontroverted testimony, the BMW Defendants established that their vehicle was proceeding on Linden Boulevard towards its intersection with 126th Street at 20-25 miles per hour, with a green traffic light in its favor, when it was struck by the Taxi Defendants' vehicle. According to defendant, Avrekh, he was already in the intersection when the taxi ran through the red light as it was traveling northward on 126th Street, from defendant, Avrekh's left to right, and collided with his vehicle. Defendant, Avrekh further testified that he only saw the taxi approximately three seconds before the impact, and that he blew the horn and tried to hit the brakes, but was unable to avoid the accident. Such evidence successfully demonstrates, *prima facie*, that defendant, Avrekh was not negligent in the happening of the accident, and that the sole proximate cause thereof was defendant, Tarpov's conduct in entering the intersection without stopping at the red light, in violation of Vehicle and Traffic Law §§ 1110(a) and 1111(d)(1) (*see Bentick v Gatchalian*, 147 AD3d 890 [2017]; *Chuachingco v Christ*, 132 AD3d 798, 798-799 [2015]).

In opposition, the Taxi Defendants fail to raise any triable issues of fact to defeat summary judgment (*see* CPLR 3212[b]; *Roche v Hearst Corp.*, 53 NY2d 767, 769 [1981]). Plaintiff's testimony did not raise any questions as to whether defendant, Avrekh was negligent, nor did the Taxi Defendants' showing. In the absence of testimony by defendant, Tarpov, the driver of the taxi, who has thus far failed to appear for deposition in this matter and has not submitted any affidavit concerning the happening of the accident, the Taxi Defendants rely solely on a certified copy of the police report of the subject accident, in which defendant, Tarpov stated that he had a green light at the time of the collision and the responding officer stated that the traffic light was not working. The accident report also noted "Driver inattention/distraction" on defendant, Avrekh's behalf, and the documentation of the location of damage on both cars suggested that Tarpov's vehicle had already entered the intersection when it was in fact "T-boned" by defendant, Avrekh's vehicle, according to the Taxi Defendants. However, the statements in the accident report are inadmissible insofar as the record is insufficient to demonstrate that the disputed information contained therein was derived from the personal observations of the police officer, who did not witness the accident (*see Hartfield v Seenarraine*, 138 AD3d 1060 [2016]; *Memenza v Cole*, 131 AD3d 1020 [2015]). Therefore, the Taxi Defendants fail to raise any triable issues of fact in opposition to the motion, and summary judgment in the BMW Defendants' favor is warranted (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]).

Finally, with respect to the BMW Defendants' motion to strike the Taxi Defendants' answer based on defendant, Tarpov's failure to appear for deposition, the court finds that the conduct complained of does not rise to the level of contumaciousness required for the harsh sanction of striking a pleading under CPLR 3126 (*see Holloway v Station Bar Corp.*, 112 AD3d 784 [2013]; *Abbadessa v Sprint*, 291 AD2d 363 [2002]). Moreover, defendant, Tarpov's failure to appear for deposition does not provide any basis for striking the answer as asserted by defendant, Laskaris. Although defendant, Tarpov's cooperation in returning from Bulgaria to appear for deposition may be less than exemplary, the appropriate remedy is to preclude defendant, Tarpov from offering any testimony at trial unless he is deposed beforehand (*see Brodsky v Amber Court Assisted Living, LLC*, 147 AD3d 810 [2017]; *Williams v Ryder TRS, Inc.*, 29 AD3d 784 [2006]).

The court has considered the parties' remaining contentions and finds them unavailing.

Accordingly, the Taxi Defendants' motion for summary judgment on serious injury grounds, is denied. The BMW Defendants' motion for summary judgment on the issue of liability, is granted.

The BMW Defendants' motion to strike the Taxi Defendants' answer is granted only to the extent that, no later than February 15, 2018, defendant, Tarpov shall appear for examination before trial, and in the event of anything less than full and timely compliance, defendant, Tarpov shall be precluded from testifying at trial.

Dated: December 4, 2017

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DARRELL L. GAVRIN, J.S.C.