Valentin v Lesane
2018 NY Slip Op 34457(U)
November 21, 2018
Supreme Court, Kings County
Docket Number: Index No. 500987/2016
Judge: Paul Wooten

SUPREME COURT OF THE STATE OF NEW YORK
KINGS COUNTY

PRESENT: HON. PAUL WOOTEN PART 97
Justice

LUIS VALENTIN,

Plaintiff,

- against -

RAKIM ISAIAH LESANE, ANGELICA BUTTACAVOLI, HAJAJI A. HASSAN and ADAM RENTAL TRANSPORTATION,

Defendants.

INDEX NO. 500987/2016

CALENDAR NO. 44, 45

The following papers, numbered 1 to 5, were read on this motion by defendants for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	1, 2
Answering Affidavits — Exhibits (Memo)	3, 4
Replying Affidavits (Reply Memo)	5

Motion sequence numbers 2 and 5 are consolidated for disposition.

This is a personal injury action relating to a motor vehicle accident that occurred on May 18, 2014, at approximately 7:40 p.m., at or near the intersections of Mermaid Avenue and West 24th Street in Brooklyn, New York. Plaintiff Luis Valentin (plaintiff) was a passenger in the vehicle driven by defendant Hajaji A. Hassan (Hassan) and owned by defendant Adam Rental Transportation (Adam Rental) when it came into contact with the car driven by defendant Rakim Isaiah Lesane (Lesane) and owned by defendant Angelica Buttacavoli (Buttacavoli). Plaintiff commenced this action via Summons and Verified Complaint on January 25, 2016, alleging that he sustained serious bodily injuries as a result of the motor vehicle accident caused by the

defendants' negligence. More specifically, in his Verified Bill of Particulars plaintiff claims that as a result of the accident he sustained, *inter alia*, the following injuries: disc bulges at L1-2, L3-4, L4-5, and L5-S1; lumbar strain/sprain; cervical radiculopathy; cervical herniations; and cervical strain/sprain (*see* Notice of Motion [MS 2], exhibit D).

Before the Court in motion sequence 2, is a motion by Lesane and Buttacavoli for summary judgment, pursuant to CPLR 3212, dismissing the Verified Complaint and any cross-claims against them on the ground that the injuries claimed do not satisfy the "serious injury" threshold requirement of the New York Insurance Law §§ 5102(d) and 5104. Also before the Court, in motion sequence 5, is a motion by Hassan and Adam Rental, for summary judgment, pursuant to CPLR 3212, dismissing the Verified Complaint on the same ground. Plaintiff is in opposition to these applications.

SERIOUS INJURY THRESHOLD

A party seeking damages for pain and suffering arising out of a motor vehicle accident must establish that he or she has sustained at least one of the nine categories of "serious injury" as set forth in Insurance Law § 5102(d) (*see Licari v Elliott*, 57 NY2d 230 [1982]). Insurance 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 loss]; permanent consequential limitation of use of a body organ or member [permanent consequential limitation]; significant limitation of use of a body function or system [significant limitation]; 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 [90/180].

The Court must determine whether, as a matter of law, plaintiff has sustained a "serious injury" under at least one of the claimed categories. "Serious injury" is a threshold issue, and

thus, a necessary element of a plaintiff's prima facie case (*Licari*, 57 NY2d at 235; Insurance Law § 5104[a]). The serious injury requirement is in accord with the legislative intent underlying the No-Fault Law, which was enacted to "'weed out frivolous claims and limit recovery to significant injuries'" (*Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d 345, 350 [2002], quoting *Dufel v Green*, 84 NY2d 795, 798 [1995]). As such, to satisfy the statutory threshold, the plaintiff is required to submit competent objective medical proof of his or her injuries (*id.* at 350). Subjective complaints alone are insufficient to establish a prima facie case of a serious injury (*id.*).

BURDEN OF PROOF

The issue of whether a claimed injury falls within the statutory definition of "serious injury" is a question of law for the Court, which may be decided on a motion for summary judgment (*see Licari*, 57 NY2d at 237). Where a defendant is the movant, the defendant, bears the initial burden of establishing, by the submission of evidentiary proof in admissible form, a prima facie case that plaintiff has not suffered a "serious injury" as defined in section 5102(d) (*see Toure*, 98 NY2d at 352; *Gaddy v Eyler,* 79 NY2d 955, 956-57 [1992]). Once the defendant has made such a showing, the burden shifts to the plaintiff to submit prima facie evidence, in admissible form, rebutting the presumption that there is no issue of fact as to the threshold question (*see Franchini v Palmieri*, 1 NY3d 536, 537 [2003]; *Rubensccastro v Alfaro*, 29 AD3d 436, 437 [1st Dept 2006]).

"In cases such as the present one, a defendant can establish that the 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, 83-84 [2d Dept 2000]). "This established, the burden shifts to the plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating a triable issue of fact that a serious

injury was sustained within the meaning of the Insurance Law" (*id.*; *see Gaddy v Eyler*, 79 NY 2d 955 [1992]). The plaintiff must present objective evidence of the injury. The mere parroting of language tailored to meet statutory requirements is insufficient (*see Grossman*, 268 AD2d at 84). Further, a plaintiff's subjective claim of pain and limitation of motion must be sustained by verified objective medical findings, which shall be based on a recent examination of the plaintiff (*see id.*; *Kauderer v Penta*, 261 AD2d 365 [2d Dept 1999]).

The 90/180 category requires a demonstration that plaintiff has been unable to perform substantially all of his or her usual and customary daily activities for not less than 90 days during the 180 days immediately following the injury *(see Licari*, 57 NY2d at 236). The words "substantially all" mean that the person has been "curtailed from performing his usual activities to a great extent rather than some slight curtailment" (*id.).*

DISCUSSION

After reviewing the papers and hearing oral arguments on the record on November 14, 2018, the Court finds that the defendants have met their prima facie burden of showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident on May 18, 2014, via the submission of medical reports from orthopedic surgeon, Dr. Rubinshteyn; neurologist, Dr. Weiland; and, radiologist, Dr. Fisher (*see Jean-Pierre v Park*, 138 AD3d 1064 [2d Dept 2016]; *Olagunju v Anna & Diane Cab Corp.*, 139 AD3d 924 [2d Dept 2016]). The reports showed, *inter alia*, that plaintiff's range of motion of her cervical and lumbar spine were normal and that any alleged injuries to same have resolved.

In opposition, plaintiff submitted the affirmation of Dr. Reyfman, who examined, treated, and performed tests on plaintiff most recently on March 12, 2018. In his affirmation, Dr. Reyfman concluded that plaintiff had range of motion limitations to his cervical and lumbar spine and that there was a "direct causal relationship between the May 18, 2014 accident as described by [p]laintiff and the [p]laintiff's current injuries. No pre-existing conditions exist that

affects the causality" (Aff in Opp [MS 2], exhibit 3). The Court finds that the conflicting medical reports of the parties raise triable issues of fact as to whether plaintiff sustained serious injuries within the meaning of Insurance Law § 5102(d) (*see Pommells v Perez*, 4 NY3d 566, 576 [2005]; *see also Wilcoxen v Palladino*, 122 AD3d 727, 728 [2d Dept 2014]).

However, the Court finds that the defendants have demonstrated, prima facie, that plaintiff did not sustain a serious injury under the 90/180 category of Insurance Law § 5102(d) (*see McFarlane v Klein*, 131 AD3d 1139 [2d Dept 2015]; *Pryce v Nelson*, 124 AD3d 859 [2d Dept 2015]; *Lanzarone v Goldman*, 80 AD3d 667, 669 [2d Dept 2011]; *Jean v Labin-Natochenny*, 77 AD3d 623 [2d Dept 2010]). Plaintiff fails to raise a triable issue of fact in opposition.

CONCLUSION

Accordingly it is hereby,

ORDERED that defendants Lesane and Buttacavoli's motion for summary judgment dismissing the Verified Complaint is denied, except as to plaintiff's claims under the 90/180 category of Insurance Law § 5102(d), which are dismissed (motion sequence 2); and, it is further,

ORDERED that defendants Hassan and Adam Rental's motion for summary judgment dismissing the complaint is denied, except as to plaintiff's claims under the 90/180 category of Insurance Law § 5102(d), which are dismissed (motion sequence 5); and, it is further,

ORDERED that counsel for plaintiff is directed to serve a copy of this Order with Notice of Entry upon the defendants and the Clerk of the Court.

This constitutes the Decision and Order of the Court.

Dated: 11/21/18

PAUL WOOTEN *J.S.C.*