

Ali v Portonovo Express Inc.

2019 NY Slip Op 35193(U)

October 3, 2019

Supreme Court, Queens County

Docket Number: Index No. 700116/2018

Judge: Chereé A. Buggs

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Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS**

IAS PART 30

Justice

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Index No.: 700116/2018

KAHLIL ALI,

Plaintiff,

Motion

Date: September 11, 2019

-against-

Motion Cal. No.: 3

PORTONOVO EXPRESS INC.

and MOISE AKPODJI,

Motion Sequence No.: 1

Defendants.

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The following efile papers numbered 14-31 submitted and considered on this motion by defendants Portonovo Express Inc. and Moise Akpodji seeking an Order pursuant to Civil Practice Law and Rules (“CPLR”) 3212 granting summary judgment in their favor against plaintiff Kahlil Ali on the ground that plaintiff did not sustain a serious injury under New York State Insurance Law §5104(a).

Papers
Numbered

Notice of Motion-Affidavits-Exhibits.....	EF 14-23
Affirmation in Opposition-Affidavits-Exhibits....	EF 24-31

This litigation which was commenced on January 3, 2018 arises from a motor vehicle accident which occurred on June 10, 2017. Plaintiff Kahlil Ali (hereinafter “Ali”) alleged that he sustained serious injuries at or near the intersection of Sutphin Boulevard and 112th Avenue, County of Queens, State of New York, when a vehicle driven by defendant Moise Akpodji (hereinafter “Akpodji”) and owned by Portonovo Express Inc. (hereinafter “Portonovo”) ran over his right foot, causing injuries to his right foot and right ankle. Akpodji and Portonovo served a verified answer with affirmative defenses and demand for a verified bill of particulars on March 14, 2018. Discovery is complete. Plaintiff filed a Note of Issue and Certificate of Readiness on January 16, 2019. Portonovo and Akpodji’s documentary evidence included the pleadings; Ali’s deposition transcript and verified bill of particulars; medical records from Jamaica Hospital Medical Center; and reports of Dr. Thomas J. Nipper and Dr. Scott A. Springer

Plaintiff's Verified Bill of Particulars

Ali served a verified bill of particulars on or about April 23, 2018. He alleged that the accident occurred on June 10, 2017 at about 9:40 P.M. at the intersection of 112th Avenue and Sutphin Boulevard, Queens, New York. As a result of the occurrence he sustained injuries to his right ankle and right foot. Further, any pre-existing injuries were exacerbated or aggravated by the accident. He did not state the specific amount of time he was limited to his bed or home. He was self-employed at the time of the occurrence and was not making a loss of earnings claim at that time. He claimed that he sustained a serious injury under the significant disfigurement; permanent loss of use of a body organ, member function or system; permanent consequential limitation of use of a body organ, member, function or system and/or the 90/180 day categories of the Insurance Law.

Deposition Testimony of Khalil Ali

Ali gave sworn testimony in this matter on August 1, 2018. Ali stated that the accident occurred on June 10, 2017 at about 9:30 P.M. He had gotten into a "dollar" cab on Sutphin Boulevard and Archer Avenue, Queens, New York that evening. The accident occurred while he was exiting the cab at the intersection of Sutphin Boulevard and 112th Avenue. Besides himself, there were three other passengers in the cab. A passenger in the cab requested that the driver stop at the intersection. He was seated in the back on the passenger side and got out to let the passenger which he thought needed to exit the cab at the intersection, however, instead the passenger in the front exited the vehicle. He got back into the cab and then got back out to get in the front passenger seat. As he attempted to exit the cab with the rear passenger door fully open and with his feet on the ground outside and a portion of his body inside the cab, it pulled off and ran over his right foot and ankle. He was taken from the scene by ambulance to Jamaica Hospital and treated in the emergency room and released. He received physical therapy two to three times a week for two or three months. He used a cane for walking. He was sent for Magnetic Resonance Imaging (MRI) of his right ankle and surgery was recommended by his orthopedic surgeon, Sid Sharma, M.D. At the time of the accident he was self-employed. He still experienced pain in his right ankle and right foot, is less active and claimed as a result he has gained weight. He had a prior injury to his right ankle in 1996.

Jamaica Hospital Medical Center

Medical records from Jamaica Hospital Medical Center related to Ali's medical treatment on the day of the accident were annexed to the motion. Right ankle tenderness with mild restriction was noted. He was seen in the emergency room for right ankle pain. Ali walked out or left the hospital before he was released.

Independent Radiology review by Dr. Scott A. Springer

Dr. Scott A. Springer performed an independent radiology review of the MRI of Ali's right ankle taken at Lenox Hill Radiology on July 5, 2017. According to his report dated February 14, 2018, the impression was contusion, posterior calcaneus, small joint effusion, mild soft tissue swelling. Dr. Springer stated that these were temporary findings which would resolve. There was no evidence of fracture, dislocation or effusion.

Independent Medical Examination by Dr. Thomas J. Nipper

Dr. Thomas J. Nipper, Diplomate of the American Board of Orthopedic Surgery, performed an independent orthopedic examination on Ali on September 6, 2018 and rendered his report on November 2, 2018. His past medical history included a right ankle arthroscopy in 1996. He underwent right foot surgery in December 2017. The doctor stated that Ali was employed in retail and he did not lose any time from work due to his injuries. The doctor reviewed the verified bill of particulars and performed an examination. Range of motion testing was performed with a goniometer and the results were as follows:

Knees- flexion 130 degrees bilaterally (130 degrees normal); extension to 0 degrees bilaterally (0 degrees normal);

Ankles/Feet- flexion 40 degrees (40 degrees normal); extension 20 degrees (20 degrees normal); inversion to 30 degrees (30 degrees normal); eversion to 20 degrees (20 degrees normal).

Dr. Nipper also reviewed the MRI report of the right ankle taken at Lenox Hill Radiology & Medical Imaging Associates, P.C. which noted bone contusion of the posterior calcaneus; intermediate grade partial thickness tear of the anterior talofibular ligament. Moderate tibiotalar joint effusion. Lateral subcutaneous edema adjacent to the calcaneus likely sequela of soft tissue contusion. Dr. Nipper stated that there was evidence of an acute traumatic injury to the right ankle which was consistent with contusion. He also reviewed the MRI report of the right ankle taken at Precision Radiology which noted retrocalcaneal bursal effusion. Anterior and posterior talofibular ligament tears. He stated that there was evidence of an acute traumatic injury to the right ankle which was again consistent with contusion. In his opinion the examination indicated that Ali's injuries had fully resolved.

Law and Application

Summary judgment which is a drastic remedy, will not be granted by the Court if there is any doubt as to the existence of a triable issue of fact (*Andre v Pomeroy*, 32 NY2d 361 [1974]; *Kwong on Bank, Ltd., v Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v Prospect Hospital*,

68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must produce competent evidence in admissible form to establish the existence of a triable issue of fact. (See *Zuckerman v City of New York*, 49 NY2d 557 [1980].)

Under New York's Insurance Law §5102(d) a "serious injury" is "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."

Portonovo and Akpodji failed to establish prima facie, that Ali did not sustain a "serious injury" within the meaning of the Insurance Law (see *Gaddy v Eycler*, 79 NY2d 955 [1992]; *Licari v Elliott*, 57 NY2d 230, 235 [1982]; *Grossman v Wright*, 268 AD2d 79, 83-84 [2d Dept 2000]).

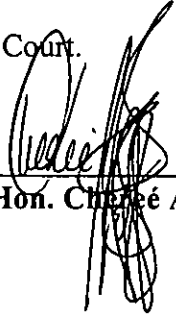
Portonovo and Akpodji failed to adequately address Ali's claim, set forth in his verified bill of particulars that he sustained a serious injury under the significant disfigurement category under the Insurance Law §5102(d). (See *Feutcher v Composite Tr.*, 171 AD3d 647 [1st Dept 2019]; *Garcia v County of Suffolk*, 149 AD3d 812 [2d Dept 2017]; *Borquist v Hyde Park Cent. School Dist.*, 107 AD3d 926 [2d Dept 2013]; *Langensiepen v Kruml*, 92 AD3d 1302 [4th Dept 2012]; *Waldron v Wild*, 96 AD2d 190 [4th Dept 1983]).

Although the Court need not address the merits of Ali's opposition papers (see *Tudy v Sandoval*, 97 AD3d 739 [2d Dept 2012]; *Coscia v 938 Trading Corp.*, 283 AD2d 538 [2d Dept 2011]), the Court finds that in opposition, Ali's submissions, which included the reports of Dr. Thomas Mather and Dr. Siddhartha Sharma raised triable issues of fact (*Perl v Meher*, 18 NY3d 208 [2011]; *Herrin v Airborne Freight Corp.*, 301 AD2d 500 [2d Dept 2003]).

Therefore, the defendants' motion is denied.

This constitutes the decision and Order of the Court.

Dated: October 3, 2019


Hon. Chereé A. Buggs, JSC

