Hosen v Kos Taxi, LLC
2020 NY Slip Op 31617(U)
April 22, 2020
Supreme Court, Kings County
Docket Number: 19219/05
Judge: Bruce M. Balter

At an IAS Term Part 13 of the Supreme Court of the State of New York held in and for the County of Kings, at the Courthouse, located at 320 Jay Street, Brooklyn, New York on the 22nd day of April 2020.

PRESENT: Honorable Bruce M. Balter
J.S.C.

x

MOHAMMED HOSEN,

Plaintiff,

-against-

KOS TAXI, LLC., LI-CHENG CHU, ASHER HAFT and AURA S. HAFT.,

Defendants.

x

DECISION and ORDER

Index No.: 19219/05

Motion Seq.: 3 and 4
Motion Date: 2/25/20

The following papers numbered to read on this motion:	Papers Numbered
Notice of Motion/ and Affidavits (Affirmations) Annexed	1, A-G
Opposing Affidavits (Affirmations)	2, 1-7
Reply Affidavits (Affirmations)	3
Notice of Cross- Motion and Affidavits (Affirmations) Annexed	4
Opposing Affidavits (Affirmations)	5

Defendants Asher Haft and Aura S. Haft's motion for summary judgment dismissing the complaint and any and all cross-claims on the basis that plaintiff Mohammed Hosen did not sustain a "serious injury," as that term is defined in Insurance Law Section § 5102 (d) and Defendants Kos Taxi , LLC and Li-Cheng Chu cross-motion for identical relief is denied. The Court has carefully considered all of the submissions to the court, including each of the exhibits.

It is undisputed that the subject accident occurred on May 8, 2015. Plaintiff commenced this action on or about January 15, 2018.

To succeed on this motion and cross-motion for summary judgment, defendants must meet the initial burden of showing that plaintiff did not, as a result of the automobile accident at issue, sustain a serious injury as defined by Insurance Law § 5102 (*see Gaddy v Eyler*, 79 NY2d 955 [1992]; *Ocasio v Henry*, 276 AD2d 611 [2000}; *Grossman v Wright*, 268 AD2d 79 [2000]). Defendants can sustain this initial burden and "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 concluded that no objective findings support the plaintiff's claim" of serious injury (*Grossman,* 268 AD2d at 83-84).

In support of the motion for summary judgment, defendants rely upon the transcript of the testimony of the Examination before Trial taken of the plaintiff on November 12, 2018. Defendants further rely upon the examination conducted of the plaintiff as well as the sworn medical report of Sege Parisien, M.D., who, on January 17, 2019, conducted an independent orthopedic examination of the plaintiff.

Once the defendants has *prima facie* established that the plaintiff did not sustain a serious injury, the burden shifts to the plaintiff to "come forward with admissible proof to raise a triable question of fact" *(Napoli v Cunningham,* 273 AD2d 366 {2000}). If the plaintiff is unable to meet this burden, summary judgment will be granted to the defendants *(see e.g. Ginty v MacNamara*, 300 AD2d 624, 625 [2002]; *Attanasio v Lashley*, 223 AD2d 614, 614-615 [1996]; *Sotirhos v Pinello*, 209 AD2d 687, 687-688 [1994]).

Defendants have established a prima facie entitlement to summary judgment dismissing the complaint by submitting the affirmed report which indicate that plaintiff did not sustain a serious injury within the meaning of Section 5102(d) of the Insurance Law *(see Kallicharan v Sookhanan,* 282 AD2d 573 [2001]). The affirmed report qualifies as admissible evidence, which may be properly relied upon by defendants *(see* CPLR 2106; *Mezentseff v Ming Yat Lau,* 284 AD2d 379, 379; *Addison v New York City Tr. Auth.*, 208 AD2d 368, 368; *Baker*, 199 AD2d at 661). Thus, it is incumbent upon plaintiff to come forward with admissible evidence to raise a triable issue of fact *(see Gaddy v Eyler*, 79 NY2d 955 [1992]).

In opposition to the motion, and in support of his claim of a "serious injury" pursuant to Insurance Law §5102 (d), plaintiff submits the sworn medical reports of Howard I. Baum, M.D., a board certified orthopedist, Narayan Paruchuri, M.D., a board certified radiologist and Nassef F. Hassan, M.D. who all examined and treated plaintiff.

Plaintiff claims to have sustained a serious and permanent disability casually related to the subject automobile accident in question. Thus, to meet his burden and raise a question of fact on the issue of serious injury, plaintiff was required, *inter alia,* to submit admissible proof that was contemporaneous with the accident showing either any initial range of motion restrictions or an expert's qualitative assessment of plaintiff's condition, which compares plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system (*see Jason*, 1 AD3d at 399).

Based upon the record before it, the court finds that plaintiff has produced evidentiary proof in admissible form sufficient to raise a triable issue of fact as to whether he sustained a "serious injury" (*see Duldulao v City of New York*, 284 AD2d 296, 297 [2001]; *Pierre v Nanton* , 279 AD2d 621, 621-622 [2001].

After a careful review of the complete record, including the transcript of plaintiff's EBT as well as all of the physician affirmations provided to the Court, the Court determines that defendants offer proof that plaintiff did not sustain a "serious injury" under Insurance Law §5102 (d); however, plaintiff's response satisfies the necessary requirement to raise a material issue of fact.

Accordingly, it is **ORDERED** that defendants' motion for summary judgment as to plaintiff is DENIED.

ENTER,

J.S.C.