Hassan v Camara
2021 NY Slip Op 30109(U)
January 7, 2021
Supreme Court, Kings County
Docket Number: 509530/2018
Judge: Reginald A. Boddie
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At an I.A.S. Part 95 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York on the 7th day of January 2020.

PRESENT:
Honorable Reginald A. Boddie
Justice, Supreme Court

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ABUL HASSAN,

Plaintiff,

-against-

ALHAJI B. CAMARA,

Defendant.

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Index No. 509530/2018
Cal. No. 9 MS 1

DECISION AND ORDER

Recitation, as required by CPLR 2219 (a), of the papers considered in the review of this motion:

Papers	Numbered
MS 1	Docs. # 11-25

Upon the foregoing cited papers, defendant's motion for summary judgment, pursuant to CPLR 3212, is decided as follows:

Plaintiff commenced this action against defendant to recover for personal injuries allegedly sustained on November 13, 2017 as a result of a motor vehicle accident at or near the intersection of Borinquen Place and Keap Street, Brooklyn, New York.

At the time of the accident, plaintiff alleged he was the seat-belted driver of a motor vehicle, in the course of his employment as a Lyft driver, when his car was completely stopped for a red traffic light and a vehicle owned and operated by defendant struck plaintiff's vehicle in the rear with hard impact. Plaintiff further alleged that the impact pushed plaintiff's car forward about 1 ½ feet and caused plaintiff's head to hit his chair, and his right knee to hit underneath the

dash resulting in serious and permanent injuries to the cervical spine, lumbar spine, right knee and right shoulder. Specifically, plaintiff alleged the following injuries: internal derangement of the cervical spine; restriction of motion and movement of the cervical spine; cervical radiculopathy; cervical myofascitis; internal derangement of the lumbar spine; lumbar myofascitis; restriction of motion and movement of the lumbar spine; lumbar radiculopathy; straightening of the physiologic consistent with pain and/or spasm on the lumbar spine; large central disc herniation impressing on the thecal sac with its associated nerve roots at L1-L2; central herniation with increased signal in the herniated material consistent with annular tear at L3-L4; impression on the thecal sac with its associated nerve roots on the lumbar spine; central herniation impressing on the thecal sac with its associated nerve roots at L4-L5; right lateral herniation with neural foraminal narrowing and nerve root impingement at L4-L5; central herniation impressing on the cauda equina at L5-S1; traumatic paracervical myofascitis; traumatic paralumbar myofascitis; internal derangement of the right knee; obliquely oriented tear posterior medial meniscus of the right knee; internal derangement of the right shoulder and restriction of motion and movement of the right shoulder.

Defendant moved for summary judgment, pursuant to CPLR 3212, to dismiss the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d). Plaintiff opposed.

Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). A party moving for summary judgment must make a prima facie showing of entitlement as a matter of law sufficient to demonstrate the absence of any material issues of fact, but once a prima facie showing has been made, the burden shifts to the party opposing the

motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require trial of the action (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman*, 49 NY2d at 562).

In a "serious injury threshold" motion for summary judgment, as here, defendant must initially submit competent medical evidence establishing that plaintiff did not suffer a "serious injury" and the injuries are not causally related to the accident (*see* Insurance Law § 5102 [d]; *see Kelly v Ghee*, 87 Ad3d 1054, 1055 [2d Dept 2011]; *see Winegrad*, 64 NY2d at 853). "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 (Insurance Law § 5102 [d]). The issue is not whether plaintiff can ultimately establish a "serious injury," but whether there exists an issue of fact in the case on such issue (*Zuckerman*, 49 NY2d at 562).

Here, defendant proffered the report of Dr. Alan J. Zimmerman, M.D., a board certified orthopedic surgeon, who on October 8, 2019, conducted an independent orthopedic evaluation on plaintiff. Dr. Zimmerman's examination of plaintiff's cervical spine revealed "normal muscle contours without spasm or atrophy" and "no tenderness over the trapezil [sic], paravertebral muscles or spinous processes." Upon his examination, Dr. Zimmerman also found normal ranges of motion for the cervical spine as well as negative Soto-Hall, Tenderness Paraspinals,

Tenderness Suprascapular and Spurting tests. Dr. Zimmerman also found normal ranges of motion with respect to the lumbar spine as well as negative Lasegue Sign and Facet loading tests and a normal Reverse straight leg raise test. He also noted no spasm nor tenderness on the lumbar spine. Dr. Zimmerman's evaluation of the thoracic spine revealed normal ranges of motion with no kyphosis and scapular winging. His examination of the shoulder revealed normal ranges of motions and negative Impingement Sign, Supraspinatous, Hawkins, Neer, Apprehension, Empty Can, Speed's, and Yergason's tests. Upon Dr. Zimmerman's evaluation of plaintiff's knees, he found negative McMurray, Joint line tenderness, Varus/Valgus stress, Lachman, Pivot Shift, Anterior/posterior drawer, Crepitus, Patellar compression, and Apprehension sign tests. With respect to range of motion, Dr. Zimmerman found normal ranges in both the left and right knees. Dr. Zimmerman concluded that

> The claimant presents a normal orthopedic examination on all objective testing; subjective complaints do not correlate with negative clinical test results. The orthopedic examination is objectively normal, and indicates no findings which would result in orthopedic limitations in use of the body parts examined. The claimant is capable of functional use of the examined body parts, for normal activities of daily living, as well as all usual dally activities including regular work duties.

Defendant also proffered the report of Scott A. Springer, D.O., D.A.B.R, a board certified radiologist, who on March 18, 2018, performed a lumbar spine MRI examination on plaintiff. That examination revealed ". . . no fracture, subluxation or paravertebral soft tissue swelling." Dr. Springer noted L1-L2 discs demonstrated disc desiccation and mild loss of disc space height and L3-L4, L4-L5 and L5-S1 discs demonstrated mild disc desiccation and loss of disc space height. He added "[d]isc desiccation is a drying out and loss of disc substance process unrelated to trauma and is indicative of degenerative disc disease." Dr. Springer noted L1-L2 demonstrated a mild broad-based disc herniation with mild mass effect on the anterior thecal sac and contact with the cauda equina. He averred that L2-L3 demonstrated no disc bulge or disc herniation.

However, he observed L3-L4 and L5-S1 demonstrated a mild disc bulge with mild mass effect on the anterior thecal sac. Dr. Springer concluded that the observed disc herniations were the result of degenerative changes and were chronic in nature. He further concluded "[t]he disc bulging, as described above, has no traumatic basis. It is degenerative in origin, related to ligamentous laxity and weakening of the outer ligamentous fibers" and there were "no posttraumatic changes causally related to the 11/13/2017 incident."

Dr. Springer also reviewed an examination of plaintiff's right knee performed on January 20, 2018. He found mucoid degenerative change of the posterior horn of the medial meniscus; small joint effusion; no fracture, dislocation or internal derangement of the knee. He noted "[n]o posttraumatic changes causally related to the 11/13/2017 incident." Defendant thus met its prima facie burden by submitting competent medical evidence establishing plaintiff did not suffer a "serious injury" and the injuries are not causally related to the accident (*see* Insurance Law § 5102 [d]; *see Kelly*, 87 AD3d at 1055).

In opposition, plaintiff proffered the affirmation of William A. Weiner, D.O., D.A.B.R., a board certified radiologist, who interpreted an MRI of plaintiff's right knee conducted on January 20, 2018. He noted that "the menisci show there is an obliquely oriented tear through the posterior horn of the medial meniscus." He also interpreted an MRI of plaintiff's lumbar spine conducted on March 18, 2018. Dr. Wiener noted

> There is straightening of the physiologic lordosis consistent with pain and/or spasm. At L1-L2 there is large central disc herniation impressing on the thecal sac with its associated nerve roots. At L3-L4 there is central herniation with increased signal in the herniated material consistent with annular tear. There is impression on the thecal sac with its associated nerve roots. At L4-L5 the central herniation impressing on the thecal sac with its associated nerve roots. At L4-L5 there is also right lateral herniation with neural foraminal narrowing and nerve root impingement. At L5-S1 the central herniation impressing on the cauda equina.

Plaintiff also proffered the affirmation of Laxmidhar Diwan, M.D., a board certified orthopedic surgeon, who on November 15, 2017, performed an orthopedic evaluation on plaintiff. Dr. Diwan's examination of the cervical spine revealed the following: orthopedic tests demonstrated positive cervical compression and right shoulder depression; motor exam was significant for weakness in the right deltoid, biceps muscles, 4/5; sensory exam exhibited pinprick hypoesthesia in the right C6, C7 dermatomes; and deep tendon reflexes showed diminished right biceps reflexes, 1/4 . With respect to ranges of motion, Dr. Diwan found flexion was limited to 45 degrees with 50 degrees as normal, extension was limited to 40 degrees with 50 degrees as normal, right rotation was limited to 60 degrees with 80 degrees as normal, and left rotation was limited to 60 degrees with 80 degrees as normal.

Dr. Diwan's evaluation of the lumbar spine revealed orthopedic tests were positive for Milgram's and Straight Leg Raise on the right at 40 degrees; motor exam was significant for weakness in the right quadriceps and hamstring muscles, 4/5; sensory exam revealed pinprick hypoesthesia in the right L4, L5 dermatomes; and deep tendon reflexes showed diminished right knee jerk reflexes, 1/4. His range of motion testing revealed flexion was limited to 50 degrees with 90 degrees as normal, extension was limited to 10 degrees with 30 degrees as normal, right lateral bend was limited to 10 degrees with 20 degrees as normal, and left lateral bend was limited to 10 degrees with 20 degrees as normal.

Upon examination of the right knee, Dr. Diwan found positive tests for patellar compression, McMurray's and Valgus/varus. His range of motion of testing revealed flexion was limited to 90 degrees, compared to 140 degrees as normal and extension was limited to -5 degrees, compared to 0 degrees as normal. Dr. Diwan concluded that his initial diagnosis revealed "the patient was totally disabled" and "it was [his] expert medical opinion . . . that the

injuries as diagnosed were casually-related to the motor vehicle accident of November 13, 2017."

Dr. Diwan performed subsequent evaluations on July 11, 2018 and July 23, 2020 after the plaintiff underwent treatment. Upon those evaluations, Dr. Diwan averred "my findings were consistent with my initial examination of the patient . . . that the patient was totally disabled." With respect to the right knee, he noted that the "the tears in the medial and lateral meniscus were not caused by degeneration but rather were traumatically induced." He added "it is with a degree of medical certainty that the patient's injuries are directly and causally related to the motor vehicle accident of November 13, 2017," and "that the injuries as diagnosed have rendered the patient permanently disabled with regard to the functioning of his cervical and lumbar spine, and right knee."

Plaintiff also proffered the affirmation of Stanley Ikezi, M.D., a board certified anesthesiologist, who examined plaintiff 's lumbar spine on May 26, 2018. Dr. Ikezi averred that his examination revealed tenderness to palpation at the right lumbar paraspinal musculature; motor testing was significant for weakness in the right quadriceps and hamstring muscles, 4/5; sensory tests were significant for hypoesthesia in the right 14, L5 dermatomes; and positive facet loading of lumbar spine and positive Straight Leg Raise on the right at 40 degrees. His examination also revealed limited ranges of motion in the lumbar spine and right knee.

Dr. Ikezi reevaluated plaintiff on August 3, 2018, and on July 17, 2020. Upon both evaluations, Dr. Ikezi affirmed his prior diagnosis that "the patient was disabled." He averred that "[i]t is with a degree of medical certainty that the patient's injuries are directly and causally related to the motor vehicle accident of November 13, 2017." He added "[i]t is further my expert medical opinion that the injuries as diagnosed, including the limitations of motion in the cervical

and lumbar spine and right knee, disc pathology and MRI findings, are permanent and will inhibit the patient's ability to carry out his normal activities of daily living, which would involve prolonged sitting, standing, bending, walking, lifting or extreme physical exertion." Therefore, plaintiff has raised a triable issue of fact as to whether he sustained a serious injury (*see Perez v Schreier*, 102 AD3d 938, 939 [2d Dept 2013]). Accordingly, defendants' motion for summary judgment is denied.

ENTER:

Hon. Reginald A. Boddie
Justice, Supreme Court

HON. REGINALD A. BODDIE
J.S.C.

KINGS COUNTY CLERK
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