McClatchie v Luqman
2021 NY Slip Op 30649(U)
March 5, 2021
Supreme Court, Kings County
Docket Number: 522308/2018
Judge: Lillian Wan

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 17
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CHARLES MCCLATCHIE,

Plaintiff,

-against-

AKIL A. LUQMAN and GOLDEN TOUCH TRANSPORTATION OF NY, INC.,

Defendants.
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Index No.: 522308/2018
Motion Date: 3/3/21
Motion Seq.: 02 & 03

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 02) 36, 37, 39-52 and (Motion 03) 61-81, 85-87, 89 were read on these motions for summary judgment.

The defendants seek an order granting summary judgment based on Insurance Law § 5102(d), claiming that the plaintiff's injuries fail to meet the serious injury threshold as required by the statute. The plaintiff opposes the motion and cross moves for summary judgment on liability. For the reasons set forth below, the defendants' motion (Motion 02) and the plaintiff's motion (Motion 03) are denied.

The plaintiff alleges he sustained personal injuries arising from a motor vehicle accident which occurred on August 2, 2016 in the County of Queens, City and State of New York. According to the plaintiff's verified bill of particulars, his injuries include, inter alia, cervical facet arthropathy; C3-4 and C6-7 large central and left paracentral disc herniation with marked spinal stenosis; L2-3, L3-4, L4-5 and L5-S1 moderate diffuse disc herniations with central, bilateral lateral recess neural foraminal stenosis with bilateral facet arthrosis and ligamentum hypertrophy; left C6-7 radiculopathy and polyneuropathy; and right L4-5 radiculopathy. The plaintiff received bilateral diagnostic cervical C4-5, and C6-7 medial branch nerve blocks.

The defendants argue that the plaintiff's injuries do not fall within any one of the nine categories of serious injury specified in Insurance Law § 5102(d). In support of their motion the defendants submit the pleadings, discovery demands and responses, the deposition transcripts of the plaintiff, defense witness Connie Sabatelli, and nonparty witnesses Jose Mendoza and Travis Fraser, CPLR § 3101(d) notice of expert disclosure, and the affirmed report of their medical expert, Dr. Jeffrey Dermksian, a board certified orthopedic surgeon. The defendants also submit the medical records of the plaintiff's medical providers, University Hospital of Brooklyn, Physical Infinity Medical, P.C, Metro Pain Specialists, P.C. and Dr. Oded Greenberg, a board certified radiologist.

The defendants' medical expert, Dr. Dermksian, examined the plaintiff on January 15, 2020, more than three years after the accident. Dr. Dermksian determined that objective testing with the use of a goniometer, of the plaintiff's cervical spine revealed abnormal range of motion in extension to 30 degrees (normal 60 degrees), left lateral bending to 35 degrees (normal 45 degrees), and right lateral bending to 40 degrees (normal 45 degrees). He found sensory examination to light touch/coolness/dampness was diminished in the right upper arm as compared to the left, and the left forearm as compared to the right forearm, and mild tenderness on palpation over the left trapezius. Dr. Dermksian also conducted objective testing of the plaintiff's lumbar spine which revealed normal range of motion. He determined that the plaintiff had diminished sensation to light touch/coolness/dampness on the lateral side of the right thigh as compared to the left, and the lateral side of the left leg as compared to the right leg, and mild tenderness on palpation over the L4 and L5 vertebra and along the left paraspinal musculature.

Dr. Dermksian opined that based on his examination of the plaintiff and review of the medical records and MRI reports, the plaintiff had a resolved cervical and lumbar spine strain, and pre-existing, degenerative arthritis of his cervical and lumbar spine that were not causally related to the accident. He further concluded that there was no objective evidence that correlated with the findings of radiculopathy from the nerve conduction studies performed on October 6, 2016. Dr. Dermksian noted that the plaintiff had received one injection in his lower back, in addition to receiving physical therapy, acupuncture and chiropractic care for approximately nine to ten months, and was given a back brace to wear.

A motion for summary judgment is granted in favor of the moving party where there are no material issues of fact, and as a result, the moving party is entitled to judgment as a matter of law. *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986). As the proponent of the summary judgment motion, the defendants have the initial burden of establishing that the plaintiff did not sustain a serious injury under the categories of injury claimed in his bill of particulars. *See Toure v Avis Rent A Car Sys.*, 98 NY2d 345 (2002).

Based on the foregoing, the defendants' motion must be denied since they failed to meet their prima facie burden of showing that the plaintiff did not sustain a serious injury under Insurance Law § 5102(d). *See Toure v Avis Rent A Car Sys*., 98 NY2d 345 (2002); *McEachin v City of New York*, 137 AD3d 753 (2d Dept 2016). Using objective testing, the defendants' own medical expert, Dr. Dermksian, recorded significant decreased range of motion of plaintiff's cervical spine in extension and left and right lateral bending more than three years after the accident. He also found sensory deficits of the plaintiff's right upper arm and the lateral side of the plaintiff's right thigh. Moreover, although Dr. Dermksian's report states that he used a goniometer to conduct objective testing of the plaintiff's cervical spine, his findings are contradictory in that he states that the loss of range of motion in the cervical spine is "voluntary" and "is considered a subjective finding…" Although Dr. Dermksian did not conduct his own nerve conduction studies he opined, in conclusory fashion, that there was no objective evidence

that correlates the radiculopathy findings of the nerve conduction studies performed more than three years earlier of the plaintiff's cervical and lumbar spine. Dr. Dermksian did not address his findings of diminished sensation relating to the plaintiff's cervical and lumbar spine. Therefore, the defendants' submissions fail to demonstrate that the plaintiff's injuries, as set forth in his bill of particulars, did not constitute a serious injury under Insurance Law § 5102(d), or were not caused by the accident. *See Manton v. Lape*, 173 AD3d 731 (2d Dept 2019); *Mercado v Mendoza*, 133 AD3d 833 (2d Dept 2015); *Miller v Bratsilova*, 118 AD3d 761 (2d Dept 2014); *see also Forlong v Faulton*, 29 AD3d 856 (2d Dept 2006). Since the defendants failed to meet their prima facie burden of showing that the plaintiff did not suffer a serious injury, it is unnecessary to consider the plaintiff's opposing papers in this regard. *See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985); *Marmer v IF USA Express, Inc.*, 73 AD3d 868 (2d Dept 2010).

On his cross motion, the plaintiff seeks summary judgment on liability, arguing that the defendants' vehicle struck his stopped vehicle in the rear and therefore establishes, prima facie, that the defendants were negligent. In support of the motion the plaintiff submits the pleadings, plaintiff's deposition transcript, and the deposition transcript of defense witness Connie Sabatelli. The defendants oppose the motion, and submit the handwritten, unsworn statement of nonparty witness Travis Fraser,[1] and the deposition transcript of nonparty witness Adriel Medina. The defendants argue that questions of fact exist as to whether the plaintiff's vehicle was moving at the time of the accident, and that contrary to the plaintiff's assertion, the accident was not a rear-end collision, but rather a sideswipe between the two vehicles, and that in any event the defendants have a non-negligent explanation for the accident.

The plaintiff testified that just prior to the accident he was driving in John F. Kennedy International Airport, when he pulled over into a driveway to ask for directions from security personnel. He parked the vehicle and remained inside, when he suddenly felt an impact from a passenger bus which struck the rear driver's side of his vehicle. The plaintiff stated that there were no honking horns or other indication that the accident was about to occur.

According to the deposition testimony of Adrien Medina, a passenger in the bus at the time of the accident, he observed plaintiff's parked vehicle blocking the right lane, and the bus driver sounding the horn a couple of times prior to the collision. He testified that before the accident the plaintiff's vehicle moved his vehicle in front of the bus, and the bus started moving. The bus driver then braked again, and then started moving when he felt the bus driver abruptly apply the brakes. He stated that he first observed the plaintiff's vehicle when it was approximately five to ten feet in front of the bus, and that he believed that both vehicles were moving at the time of the accident.

[1] The statement of nonparty witness Travis Fraser is unsworn, and therefore inadmissible. *See Municipal Testing Lab., Inc. v Brom*, 38 AD3d 862 (2d Dept 2007).

The plaintiff has established his prima facie entitlement to summary judgment as a matter of law that the defendants were negligent through his deposition testimony. However, in opposition the defendants have raised a triable issue of fact through the deposition testimony of Adrien Medina, as to whether this was a rear-end collision, and if so, whether there was a non-negligent explanation for the rear-end collision. The defendants have also raised a triable issue of fact as to whether both vehicles were moving when the accident occurred. The conflicting testimony between the plaintiff's version of the facts surrounding the accident and that of nonparty witness Adrien Medina, precludes a grant of summary judgment on liability in favor of the plaintiff. *See Twizer v Lavi*, 140 AD3d 736 (2d Dept 2016); *Bullock v Calabretta*, 119 AD3d 884 (2d Dept 2014).

The remaining contentions are without merit.

Accordingly, it is hereby

ORDERED that the defendants' motion for summary judgment (Motion 02) is denied in its entirety and it is further;

ORDERED, that the plaintiff's cross motion (Motion 03) is denied in its entirety.

This constitutes the decision and order of the Court.

Dated: March 5, 2021

Lillian Wan

HON. LILLIAN WAN, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020.