

Almonte v Sahib Garna LLC

2022 NY Slip Op 34088(U)

November 30, 2022

Supreme Court, Kings County

Docket Number: Index No. 506716/2015

Judge: Bernard J. Graham

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At an IAS Part 36 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 30th day of November, 2022.

P R E S E N T :

Hon. Bernard J. Graham, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

Index No.: 506716/2015

DOMINGA ALMONTE and JUAN CARLOS SANTOS

Plaintiffs,

DECISION / ORDER

-against-

SAHIB GARNA LLC and JOHN DOE,

Defendant.

Recitation, as required by CPLR 2219(a), of the papers considered on the review of this motion to: dismiss plaintiff’s complaint pursuant to CPLR 3212.

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	___ 1-2 ___
Order to Show cause and Affidavits Annexed.....	_____
Answering Affidavits.....	___ 3 ___
Replying Affidavits.....	___ 4 ___
Exhibits.....	_____
Other.....	_____

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

Defendant Sahib Garna LLC (“Sahib Garna”), has moved (seq. 5), for an Order, pursuant to CPLR §3212, to dismiss the complaint of plaintiffs’ Dominga Almonte (“Ms. Almonte”) and Juan Carlos Santos (“Mr. Santos”), upon the grounds that the injuries alleged

Almonte”) and Juan Carlos Santos (“Mr. Santos”), upon the grounds that the injuries alleged by the plaintiffs do not satisfy the “serious injury” threshold requirement of CPLR §5102(d) of the New York Insurance Law and, as a result, the claim for non-economic loss is barred by §5104(1) of the statute.

Counsel for the plaintiffs oppose the relief sought in this motion upon the grounds that each of the plaintiffs sustained a serious injury, as defined by §5102(d) of the Insurance Law, and that there are issues of fact that must be resolved at trial.

Background:

The plaintiffs commenced the within action by the filing of a Summons and Complaint on or about June 1, 2015. Issue was joined by the service of an answer on behalf of the defendant Sahib Garna on or about February 24, 2016.

On or about August 24, 2016, the Law Offices of Beth J. Schlossman, substituted for the law office of Bisogno & Meyerson, as counsel for the plaintiff, Ms. Almonte. The office of Bisogno & Meyerson remained as counsel for the co-plaintiff, Mr. Santos.

The deposition of the plaintiff Ms. Almonte was conducted on November 18, 2019 and the EBT of plaintiff Mr. Santos was held on January 15, 2021.

A Note of Issue and Certificate of Readiness was filed on behalf of the plaintiffs on or about April 28, 2022.

Facts:

On December 24, 2015, the plaintiff, Ms. Almonte, (the driver) of a vehicle and her right front seat passenger, co-plaintiff Mr. Santos, were traveling in Queens, New York on Queens Blvd., and while turning onto Woodhaven Blvd., their vehicle was struck in the rear by the defendant’s vehicle. Plaintiff, Ms. Almonte, maintains that as a result of the impact, she sustained injuries to her back, neck, arms and left knee, and the injury to her left knee required surgical intervention. Co-plaintiff, Mr. Santos, alleges that as a result of the incident, he sustained injuries to his cervical and lumbar spine.

Defendant's contention:

In support of defendant's motion to dismiss were the findings of Dr. Jeffrey Guttman, an orthopedist, who performed an orthopedic examination of both of the plaintiffs. The examination of Ms. Almonte's left elbow and left knee revealed normal range of motion. The Spurling and Lachman tests as well as the Patellar Apprehension and Anterior Drawer tests were all negative. It was Dr. Guttman's impression that the "alleged injuries to her left knee post-arthroscopy and left elbow were fully resolved. There is no evidence of orthopedic disability, permanency or residuals". Dr. Guttman found full range of motion and opined that Ms. Almonte was able to perform her normal activities of daily living.

As to Mr. Santos, the examination by Dr. Guttman of his cervical and lumbar spine revealed full range of motion. The Spurling, Compression, as well as the Faber tests performed on Mr. Santos were negative. Dr. Guttman's impression was that the alleged injuries to Mr. Santos' cervical and lumbar spine were fully resolved. Dr. Guttman found full range of motion with no evidence of orthopedic disability, permanency or residuals. Dr. Guttman opined that Mr. Santos was able to work without restrictions and perform normal activities of daily living without limitations.

In addition, Michael Setton, D.O., performed a radiological evaluation of the MRI films of the lumbar and cervical spine of Mr. Santos. Dr. Setton opined that the MRIs revealed degeneration which predates the accident and found no posttraumatic changes causally related to the accident.

Defendant maintains that based upon the medical evidence as well as plaintiffs' testimony that was adduced during their depositions, that the allegations of injuries were not caused in this accident as no trauma was sustained and the alleged injuries do not rise to the level of impairment sufficient to qualify under any category of the no-fault statute.

Plaintiffs' contention:

In support of the opposition to the relief sought by defendant in their motion for summary judgment are the affirmations submitted by counsel for the respective plaintiffs as well as the medical reports issued by physicians who treated and/or evaluated said parties.

As to the plaintiff Ms. Almonte, she sought medical treatment at Englinton Medical, P.C. following the accident. After being examined and x-rayed, she was referred for a course of treatment by Arkadiy Shustermna, D.O., who specialized in orthopedics. The treatment included physical therapy, acupuncture and chiropractic care. On February 6, 2016, Ms. Almonte underwent a left knee MRI which revealed "Grade 2 intrameniscal tear, posterior horn of the medial meniscus and joint effusion".

Based upon the results of the left knee MRI, the plaintiff presented to Dr. Randall Ehrlich, an orthopedic surgeon. On March 3, 2016, the plaintiff underwent left knee arthroscopy with a partial medial meniscectomy and a chondroplasty of the medial femoral condyle and a major synovectomy. Following the procedure, the plaintiff underwent physical therapy.

It is alleged that as a result of her injuries, Ms. Almonte has continued to experience pain and limitations as she contends that she can no longer stand for extended periods of time, ride a bicycle, run, go dancing, wear heels and has difficulty with household chores such as doing laundry. Ms. Almonte asserts that she has sustained a serious injury, as defined by §5102 of the Insurance Law.

On September 19, 2022, Ms. Almonte was examined by Dr. David Benatar, who issued a report (see NYSEF Doc. No. 85). Dr. Benatar's impression was that the results of the left knee arthroscopy as well as range of motion were poor, and it was likely that Ms. Almonte would have to undergo further treatment on her knee which includes injections. Dr. Benatar having reviewed the medical records of Ms. Almonte, found that there is a causal relationship as to the injuries sustained with the accident of December 24, 2015.

As to Mr. Santos, it is alleged that on the date of the accident, he struck his forehead

on the upper portion of the interior of the vehicle which resulted in bruising. Thereafter, on or about January 12, 2016 (two weeks following the accident), Mr. Santos presented to Dr. Shusterman with complaints of neck and lower back pain. At the time there was reduced range of motion in both the cervical and lumbar spine. There was paraspinal spasm noted in both the lumbar and thoracic spine. An MRI of the cervical spine dated February 27, 2016, revealed disc herniation at C5-C6 and disc bulges at C3-C4, C4-C5 and C5-C6. An MRI of the lumbar spine on March 4, 2016 revealed disc bulges at L4-L5. The injuries to his back were alleged to be so severe and debilitating that he was unable to return to work as a construction worker and dishwasher. (Mr. Santos allegedly missed approximately six (6) months of work immediately following the accident).

On July 22, 2022, Mr. Santos was once again examined by Dr. Shusterman, his treating physician. Dr. Shusterman performed an exam of his cervical spine and noted C2-C7 paraspinal spasm and some trigger points as well as reduced range of motion. Dr. Shusterman further noted that four years after the incident Mr. Santos continues to suffer from and complain of neck pain which is aggravated by rapid head movement and extended physical activity. The exam of the lumbar spine revealed L2-L5 midline tenderness with paraspinal spasm and multiple trigger points and reduced range of motion. Dr. Shusterman opined that Mr. Santos continues to suffer from cervical spine disc herniation at C5-C6. There were disc bulges noted at C3-C7 levels, cervical disc displacement and herniation, cervicalgia, cervical myofascitis, lumbar spine disc bulges at L4-D1 levels, lumbar spine displacement herniation and lower back syndrome lumbar sacral myofascitis. Dr. Shusterman opined that the limitations that plaintiff has endured is a direct consequence of the accident of December 24, 2015.

Discussion:

Insurance Law §5102(d) defines a serious injury as, including but not limited to, an injury resulting in:

“(vi) permanent and total loss of use of a body organ, member, function or

system; (vii) permanent consequential limitation of use of a body organ or member; (viii) significant limitation of use of a body function or system; or (ix) 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 90 days during the 180 days immediately following the occurrence of the injury or impairment."

Once the defendant establishes a prima facie case that the plaintiff's injuries are not serious, the burden shifts to the plaintiff to come forward with sufficient evidence to overcome defendant's motion by demonstrating that a serious injury was sustained within the meaning of the insurance law. Gorbas v. Dowgiallo, 287 AD2d 690, 732 NYS2d 80 [2nd Dept. 2001]; Gaddy v. Eyler, 79 NY2d 955, 582 NYS2d 990 [1992].

The Court of Appeals has held that "[w]hether a limitation of use or function is 'significant' or 'consequential' (i.e. important) relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part". Toure v. Avis Rent A Car Systems, Inc., 746 NYS2d 865, 869, 98 NY2d 345 [2002]. It is further required that such an opinion addressing the medical significance of the limitation is supported by objective medical evidence, including tests and reports. Toure v. Avis Rent A Car Systems, Inc., 746 NYS2d at 870.

This Court finds that the plaintiffs, Ms. Almonte and Mr. Santos, have satisfied the criteria as set forth in Toure v. Avis Rent A Car Systems, Inc., 746 NYS2d at 865, for opposing a summary judgment motion. As for Ms. Almonte, the plaintiff has submitted the details of her physical limitations, the procedure that she underwent to her left knee, the reduced range of motion and the continued pain that she endures. As to Mr. Santos, counsel has offered evidence of the injuries that were sustained to his cervical and lumbar spine, the reduced range of motion, and the continuing pain that he is experiencing.

This Court has considered the argument of defendant's counsel in which the defendant presented medical evidence that any injuries resulting from the accident of

December 24, 2015, were resolved. However, this Court finds that the plaintiffs presented competent medical evidence from doctors who have unequivocally stated that the condition of Ms. Almonte had not resolved, and she will have to continue to receive treatment for the injuries that she sustained as a result of the December 24, 2015 accident. As to Mr. Santos, the limitations that have resulted from the injuries to his cervical and lumbar spine are alleged to be directly attributable to the occurrence of December 24, 2015.


Since Ms. Almonte has provided objective evidence of her injury and medical experts reports confirming the extent or degree of the physical limitation resulting from the injuries as well as the arthroscopic surgery which resulted from the injury to plaintiff's right knee, Ms. Almonte has come forward with sufficient evidence to raise an issue of fact. Likewise, Mr. Santos has provided objective evidence of his injury and medical experts reports confirming the extent or degree of the physical limitation resulting from the injuries.

Here, the findings and opinions of the physicians for Ms. Almonte and Mr. Santos and the defendant with respect to the knee and back are in opposition to each other. Opposing affidavits give rise to questions of credibility which cannot be decided on a motion for summary judgment. Robbie v. Schweers, 146 AD2d 764 [2nd Dept. 1989]. The conflicting findings and opinions are sufficient to create a triable issue of fact and an award of summary judgment is therefore denied (see Pagano v. Kingsbury, 182 AD2d 268 [2nd Dept. 1992]). As such defendant's motion for summary judgment is denied as to both of the plaintiffs.

This shall constitute the decision and order of the Court.

Dated: November 30, 2022
Brooklyn, NY

ENTER


Hon. Bernard J. Graham, Justice
Supreme Court, Kings County

HON. BERNARD J. GRAHAM

7