

Johnson v Marfarr Cab Corp.

2023 NY Slip Op 33272(U)

September 19, 2023

Supreme Court, New York County

Docket Number: Index No. 155535/2020

Judge: James G. Clynnes

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JAMES G. CLYNES PART 22M

Justice

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SHAUN JOHNSON,

Plaintiff,

- v -

MARFARR CAB CORP., CHECKER MANAGEMENT CORP.,
JOHN KAPELONIS, CISSE VASSIRIKI

Defendant.

-----X

INDEX NO. 155535/2020

MOTION DATE 01/11/2023

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, the motion by Defendants John Kapelonis and Cisse Vassiriki for summary judgment and dismissal of the Complaint on the grounds that Plaintiff fails to meet the serious injury threshold under Insurance Law 5102 (d) is decided as follows:

Plaintiff seeks recovery for injuries allegedly sustained as a result of a May 31, 2019 motor vehicle accident between a taxi owned and operated by Defendants within which Plaintiff was a passenger. The Bill of Particulars includes the following injuries claimed by Plaintiff: left cubital tunnel syndrome; significant left ulnar neuropathy; significant left ulnar neuropathy by the left elbow; left upper extremity ulnar neuropathy status post crush injury; left hand and upper extremity wasting and atrophy; left hypothenar atrophy, left interosseous atrophy; left arm crush injury; decreased sensation in the left hand and digits; and scarring and deformity to left arm.

In support of their motion, Defendants rely on the affirmed medical examination of Plaintiff by Dr. Salvatore Corso, an orthopedic specialist, who examined Plaintiff on behalf of Defendants on August 23, 2022. The examination of Plaintiff's left elbow revealed the following

range of motion, as measured by a goniometer: flexion to 150 degrees (150 degrees normal); extension to -5 degrees (0 degrees normal); supination to 80 degrees (80 degrees normal); pronation to 80 degrees (80 degrees normal). The examination of Plaintiff's left wrist/hand revealed the following range of motion: dorsiflexion to 60 degrees (60 degrees normal); volar flexion of 60 degrees (60 degrees normal); ulnar flexion of 30 degrees (30 degrees normal); radial deviation of 20 degrees (20 degrees normal); digits have full range of motion. The following tests were deemed negative: Tinel's test, Bursitis test, Phalen's test, Finkelstein's test, Wetson test and Schuck test.

Dr. Corso concluded that Plaintiff had fully recovered from the accident, that he did not suffer permanent or significant injuries, and that he could pursue a normal, active life.

Defendants also rely on the examination before trial (EBT) testimony of Plaintiff, who was deposed on November 11, 2021. Plaintiff testified that he went to the hospital following the accident but was released after a few hours. Plaintiff stated that he did not seek further treatment until a month later. He had physical therapy for 1 and a half to 2 months. He testified that his last medical appointment was approximately a year or two ago. He is presently employed, and he had missed about a week's work within a six-month period after the accident.

Defendants contend that based on the evidence, this action must be dismissed. They aver that this Court is obligated to dismiss frivolous cases like this one so that genuine lawsuits are attended to. Defendants contend that as Plaintiff does not suffer a serious injury based on the definitions provided in section 5102 (d), they are entitled to summary judgment as a matter of law.

In opposition to Defendants' motion, Plaintiff contends that he is suffering serious injuries under categories seven and eight of section 5102 (d) of Insurance Law; specifically, he sustained

a significant limitation of the use of his left hand/wrist/elbow and a permanent consequential limited use of his left hand/wrist/elbow as a result of the accident on May 31, 2019.

Plaintiff relies on affirmations from his treating surgeon, orthopedic specialist Dr. Vipal Patel, as well as medical reports and records, including an operative report, a nerve conduction study, an electromyography examination and clinical examinations.

Plaintiff underwent surgery on December 6, 2019. He submits ten photographs of his left hand/wrist/elbow that were taken immediately after the accident, and three photographs of his left hand/wrist/elbow taken after the operation.

Plaintiff discusses the history of his medical experience. About a month after the accident, Plaintiff went to Hudson Medical and Wellness for an initial evaluation and treatment and spoke to Dr. Jean Patrick Pierre. Plaintiff complained about left elbow pain and a numbness in some of his left fingers. After an examination, Dr. Pierre recommended physical therapy for Plaintiff. On November 21, 2019, Plaintiff returned to Hudson Medical and Wellness for a follow up examination. The examination revealed further atrophy in the left arm.

On November 25, 2019, Plaintiff visited Downtown Neurology and Pain Medicine, PLLC for an electromyography examination. The examination revealed a severe left sided ulnar neuropathy up to the Axilla. On December 2, 2019, Plaintiff went to Dr. Patel for another examination. On December 3, 2019, Plaintiff underwent a nerve conduction study performed by Dr. Kiril Kiproviski. On December 6, 2019, Dr. Patel operated on Plaintiff's left arm.

On February 22, 2023, over three years after the operation, Plaintiff was examined by Dr. Patel. Plaintiff complained of continued sensations in his left fingers and dexterity issues. The examination revealed the following: Range of motion of the left wrist limited to 25 % in extension (60 degrees out of 80 degrees); 14% in flexion (60 degrees out of 70 degrees). Range of motion

of the left elbow was limited to 16% (15-140 degrees out of 0-150 degrees). Dr. Patel concluded from the examination that Plaintiff sustained a serious injury, a significant and permanent limitation in the use of his left arm as a result of the accident.

Plaintiff contends that based on the evidence submitted, he has raised an issue of fact as to the extent of his injuries, precluding the granting of summary judgment.

Defendants have not submitted any reply papers.

“The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in a dispute, and that it is entitled to judgment as a matter of law” (*Dallas-Stephenson v Waismann*, 39 AD3d 303, 306 [1st Dept 2007], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Upon the submission of evidence establishing a prima facie case by the movant, “the party opposing a motion for summary judgment bears the burden of produ[cing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact” (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008], quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (*see Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

Plaintiff refers to categories seven and eight of section 5102 (d) in serious injury definitions. Those are “permanent consequential limitation of use of body organ or member” and “significant limitation of use of a body function or system.” In this situation, both sides have submitted medical proof containing quantitative evidence with respect to range of motion in order to demonstrate Plaintiff’s current limitations, if any, to the normal function and use of Plaintiff’s body part, in this case, his left arm.

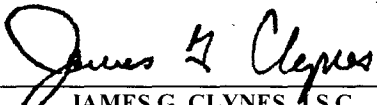
The Court notes that Dr. Corso, Defendants' physician, did not have the opportunity to examine Plaintiff's prior medical records, nor was he aware of Plaintiff's operation. He mentions this in his affirmation. Dr. Patel affirms that Plaintiff has continual issues with his left arm, concerning numbness and atrophy. The contrasting range of motion findings and conclusions of the clinical examinations, performed years after the accident, raise an issue of fact as to the actual state of Plaintiff's injuries, precluding summary judgment. The motion is denied.

Accordingly, it is

ORDERED that Defendants' summary judgment motion is DENIED; and it is further **ORDERED** that within 30 days of entry, Plaintiff shall serve a copy of this Decision and Order upon Defendants with Notice of Entry.

This constitutes the Decision and Order of the Court.

9/19/2023
DATE


JAMES G. CLYNES, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: