Medina v Arcos
2012 NY Slip Op 30168(U)
January 20, 2012
Supreme Court, Queens County
Docket Number: 26827/10
Judge: Robert J. McDonald
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

- - - - - - - - - - - - - - - - - - - x

FABIO N. MEDINA,

Plaintiff,

- against -

GEAN PAUL ARCOS and GUADALUPE Y. ARCOS,

Defendants.

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Index No.: 26827/10

Motion Date: 01/12/2011

Motion No.: 23

Motion Seq.: 1

The following papers numbered 1 to 12 were read on this motion by defendants, GEAN PAUL ARCOS and GUADALUPE Y. ARCOS for an order pursuant to CPLR 3212 granting defendants summary judgment and dismissing the complaint of FABIO N. MEDINA on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law §§ 5102 and 5104:

	Papers Numbered
Notice of Motion-Affidavits-Exhibits-Memorandum of Law...	1 - 5
Affirmation in Opposition-Affidavits-Exhibits............	6 - 10
Reply Affirmation......................................	11 - 12

This is a personal injury action in which plaintiff, FABIO N. MEDINA, seeks to recover damages for injuries he sustained as a result of a motor vehicle accident that occurred on January 27, 2010, on Roosevelt Avenue, Queens County, New York. At the time of the accident, the plaintiff was pulling into a parking spot on Roosevelt Avenue when the front of the defendants vehicle struck the rear door of plaintiff's vehicle on the driver's side.

The plaintiff commenced this action by filing a summons and complaint on October 22, 2010. Issue was joined by service of defendants' verified answer dated December 14, 2010.

Defendants now move for an order pursuant to CPLR 3212(b), granting summary judgment dismissing the plaintiff's complaint on the ground that plaintiff did not suffer a serious injury as defined by Insurance Law § 5102.

In support of the motion, defendant submits an affirmation from counsel, Edward B. Suh, Esq.; a copy of the pleadings; plaintiff's verified bill of particulars; the affirmed medical report of orthopedist, Dr. Jacquelin Emmanuel and a copy of the transcript of the examination before trial of Fabio Medina.

In his verified Bill of Particulars, plaintiff, age 28, states that as a result of the accident he sustained, inter alia, a bulging disc at C4-C5 and herniated discs at C5-6 and L5-S1. At the time of the accident, plaintiff was employed by a construction company which provided and installed construction materials. Plaintiff states in the bill of particulars that he was home for approximately two months immediately following the accident and was confined to bed for approximately two weeks immediately following the accident.

Plaintiff contends that he sustained a serious injury as defined in Insurance Law § 5102(d)in that he sustained a permanent loss of use of a body organ, member function or system; a permanent consequential limitation or use of a body organ or member; a significant limitation of use of a body function or system; and a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute his 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.

Dr. Jacquelin Emmanuel, an orthopedist retained by the defendants, examined Mr. Medina on May 23, 2011. Plaintiff reported that as a result of the accident he injured his neck, lower back and left shoulder. Dr. Emmanuel performed quantified and comparative range of motion tests. She found that the plaintiff had no limitations of range of motion in the cervical spine, lumbar spine and bilateral shoulders. She concluded that the plaintiff had a resolved sprain/strain of the cervical spine, resolved sprain/strain of the lumbosacral spine and a resolved left shoulder sprain/contusion. She states that based upon her examination, the plaintiff has no objective evidence of any disability.

In his examination before trial, held on April 7, 2011, the plaintiff stated that he began physical therapy treatments

approximately one week after the accident and continued for several months. He was treated about three times per week. He stopped when his no fault benefits were denied. He stated that he still has lower back pain, left shoulder pain and neck pain several times per week.

Defendant's counsel contends that the medical report of Dr. Emmanuel together with the transcript of the plaintiff's examination before trial are sufficient to establish, prima facie, that the plaintiff has not sustained a permanent consequential limitation or use of a body organ or member; a significant limitation of use of a body function or system; or a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute his 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.

In opposition, plaintiff's attorney Peter M. Zirbes, Esq., submits his own affirmation as well as the affidavit of radiologist, Dr. Mark Shapiro; the affidavit of chiropractor, Dr. Kris Rusek; the affidavit of plaintiff's treating physician, Dr. Ricardo Galdamez; and the affidavit of plaintiff Fabio Medina dated October 11, 2011 together with copies of the No-Fault Denial of benefits form.

Dr. Mark Shapiro, a board certified radiologist, reviewed the MRI studies of the of the plaintiff's cervical spine, lumbar spine and left shoulder. He found that the MRIs revealed a focal bulge at C4-5 and a central herniation at C5-6 and L5-S1 with impingement on the neural canal.

Dr. Rusek examined the plaintiff on August 22, 2011. He performed objective and quantified range of motion testing and found that the plaintiff had significant limitations of range of motion in the cervical spine, lumbar spine and left shoulder. Based upon the MRI findings and the limitations in range of motion, Dr. Rusek concludes, that in his opinion, the plaintiff has sustained both a permanent consequential limitation to his cervical and lumbar spine and significant limitation of use of same. He states that based upon the permanent nature of the injuries that he reached the maximum medical benefit from his treatment at the time his no fault benefits were terminated and any further treatment would have only been palliative in nature. He also states that all positive findings and symptoms are causally related to the accident of January 27, 2010.

In his affidavit, Mr. Medina states that in August 2010 he was told by his treatment facility Reg Flushing Medical, that his no fault benefits had been terminated and he would have to stop treating unless he paid for the treatments himself. He states that as he did not have private health insurance he could not afford to continue treatments.

The plaintiff was first examined by Dr. Galdamez on February 2, 2010. Dr Galdamaz performed computerized range of motion testing on February 24, 2010 and found that the plaintiff was suffering from range of motion limitations of the cervical and lumbar spine and left shoulder at that time which he found were permanent in nature

On a motion for summary judgment, where the issue is whether the plaintiff has sustained a serious injury under the no-fault law, the defendant bears the initial burden of presenting competent evidence that there is no cause of action (Wadford v. Gruz, 35 AD3d 258 [1st Dept. 2006]). "[A] defendant can establish that a 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 conclude that no objective medical findings support the plaintiff's claim" (Grossman v Wright, 268 AD2d 79 [1st Dept. 2000]). Whether a plaintiff has sustained a serious injury is initially a question of law for the Court (Licari v Elliott, 57 NY2d 230 [1982]).

Initially, it is defendant's obligation to demonstrate that the plaintiff has not sustained a "serious injury" by submitting affidavits or affirmations of its medical experts who have examined the litigant and have found no objective medical findings which support the plaintiff's claim (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]). Where defendants' motion for summary judgment properly raises an issue as to whether a serious injury has been sustained, it is incumbent upon the plaintiff to produce evidentiary proof in admissible form in support of his or her allegations. The burden, in other words, shifts to the plaintiff to come forward with sufficient evidence to demonstrate the existence of an issue of fact as to whether he or she suffered a serious injury (see Gaddy v. Eyler, 79 NY2d 955 [1992]; Zuckerman v. City of New York, 49 NY2d 557[1980]; Grossman v. Wright, 268 AD2d 79 [2d Dept 2000]).

Here, the proof submitted by the defendants, including the affirmed medical report of Dr. Emmanuel was sufficient to meet its prima facie burden by demonstrating that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler,79 NY2d 955 [1992]).

However, this Court finds that the plaintiff raised triable issues of fact by submitting the affidavits of Drs. Shapiro, Galdamez and Rusek attesting to the fact that the plaintiff had sustained several herniated and bulging discs and significant limitations in range of motion both contemporaneous to the accident and in a recent examination, and concluding that the plaintiff's limitations were significant and permanent and resulted from trauma causally related to the accident (see Ortiz v. Zorbas, 62 AD3d 770 [2d Dept. 2009]; Azor v Torado,59 ADd 367 [2d Dept. 2009]). As such, the plaintiff raised a triable issue of fact as to whether he sustained a serious injury under the permanent consequential and/or the significant limitation of use categories of Insurance Law § 5102(d) as a result of the subject accident (see Khavosov v Castillo, 81 AD3d 903[2d Dept. 2011]; Mahmood v Vicks, 81 ADd 606[2d Dept. 2011]; Compass v GAE Transp., Inc., 79 AD3d 1091[2d Dept. 2010]; Evans v Pitt, 77 AD3d 611 [2d Dept. 2010]; Tai Ho Kang v Young Sun Cho, 74 AD3d 1328 743 [2d Dept. 2010]).

In addition, the plaintiff adequately explained the gap in his treatment by submitting his own affidavit, saying that no-fault had stopped his benefits. In addition Dr. Rusek opined that any further treatments would be palliative in nature(see Abdelaziz v Fazel, 78 AD3d 1086 [2d Dept. 2010]; Tai Ho Kang v Young Sun Cho, 74 AD3d 1328 [2d Dept. 2010]; Domanas v Delgado Travel Agency, Inc., 56 AD3d 717 [2d Dept. 2008]; Black v Robinson, 305 AD2d 438 [2d Dept. 2003]).

Accordingly, for the reasons set forth above, it is hereby,

ORDERED, that the defendants' motion for an order granting summary judgment dismissing plaintiff's complaint is denied.

Dated: January 20, 2012
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C.