

Bastiampillat v Adisai
2012 NY Slip Op 31154(U)
April 24, 2012
Sup Ct, Queens County
Docket Number: 10801/2010
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

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JUSTIN BASTIAMPILLAT, Index No.:10801/2010
Plaintiff, Motion Date: 03/15/12
- against - Motion No.: 5
Motion Seq.: 4
MOTANMI L. ADISA, MUNINAT, INC., ELENA
BOCHIS and ELRAC, INC.,

Defendants.

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The following papers numbered 1 to 20 were read on this motion by defendants, MOTANMI L. ADISA and MUNINAT, INC., for an order pursuant to CPLR 3212 granting defendant summary judgment and dismissing the complaint of JUSTIN BASTIAMPILLAT on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law §§ 5102 and 5104:

	<u>Papers Numbered</u>
Notice of Motion-Affidavits-Exhibits.....	1 - 7
Co-defendants' Affirmation in Support.....	8 - 10
Affirmation in Opposition-Affidavits-Exhibits.....	11 - 16
Reply Affirmation.....	17 - 20

This is a personal injury action in which plaintiff, JUSTIN BASTIAMPILLAT, seeks to recover damages for injuries he sustained as a result of a motor vehicle accident that occurred on December 18, 2009, at or near the intersection of West 42nd Street and 8th Avenue, New York County, New York.

The accident in question involved three vehicles. The plaintiff, age 55, was the driver of a vehicle stopped at a red light which was struck in the rear by the vehicle driven by Elena Bochis and owned by ELRAC, Inc. The plaintiff was allegedly

injured as a result of the collision. The plaintiff commenced this action by filing a summons and complaint on April 13, 2010. Issue was joined by service of defendant Adisa and Muninat's verified answer dated June 29, 2010.

Defendants ADISA and MUNINAT, INC. 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, Alysse Dawn Hopkins, Esq.; a copy of the pleadings; plaintiff's verified bill of particulars; the affirmed medical reports of Dr. Robert S. April and Dr. William J. Kulak and a copy of the transcript of the examination before trial of plaintiff, Justin Bastiampillat.

In his verified Bill of Particulars, plaintiff states that as a result of the accident, he sustained, inter alia, bulging disc at L4-L5 and central disc herniation at C4-C5.

Plaintiff contends that he sustained a serious injury as defined in Insurance Law § 5102(d) in that she 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 her 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. Robert S. April, a neurologist, retained by the defendant, examined Mr. Bastiampillat on July 27, 2011. Dr. April performed quantified and comparative range of motion tests. He found that the plaintiff had no limitations of range of motion in the lumbar spine. He concluded that "the accident of record did not produce a neurological diagnosis, disability, limitation or need for further intervention.

Mr. Bastiampillat was also examined by Dr. William J. Kulak on July 21, 2011. In his affirmed report, he states that the plaintiff presented with complaints of pain in the lower back. In his examination, Dr. Kulak noted limitations of range of motion of the cervical spine and of the lumbar spine. With respect to those limitations the report states, "the claimant's alleged current areas of diminished sensation carries no credibility

whatsoever. It is felt to represent magnification and exaggeration on the part of the claimant unless he had sustained a subsequent injury or trauma. It is completely unsupported by the medical records and the diagnostic tests." The report also states that the origin of the disc herniation at C4-C5 is undetermined. "Based upon the absence of medical treatment for almost one month after the accident, it is however doubtful that it arose from this injury."

In his examination before trial, taken on December 14, 2010, plaintiff testified that at the time of the accident he was employed as a security guard with Con Edison. He stated that he returned to work two days after the accident and continued working full time after that with the exception of twenty days he missed from work in August 2010. The plaintiff testified that he commenced treatment for his injuries with Dr. David Lifschutz on January 11, 2010, approximately one month after the accident, and continued physical therapy with him for six months. He thereafter treated with Dr. Latugga who read his MRI and told him he had a herniated disc that might need surgery. He also continued his treatment from a chiropractor, Dr. Abessinio at Hillside Chiropractic Associates. He also had treatment with a neurologist.

Defendants' counsel contends that the medical reports of Drs. Kulak and April as well as 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 her 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.

Counsel for defendants Bochis and Elrac submits an affirmation in support adopting the arguments of Adisa and requesting summary judgment dismissing the complaint against defendants Elena Bochis and Elrac, Inc.

In opposition, plaintiff's attorney Dominick W. Lavelle, Esq., submits his own affirmation as well as the unaffirmed medical report of Dr. Lifschutz, the affirmed medical report of radiologist Dr. Khodadadi, the affirmed medical records of Dr. Lattuga and the affidavit of chiropractor Dr. Abessinio, and the unaffirmed medical report of neurologist, Dr. Alluri.

Dr. Khodadadi reviewed the plaintiff's MRI films and found a herniated disc at the C4-C5 level and disc bulging at the L4-L5 level with osteoarthritic changes at the L4-5 and L5-S1 levels.

Dr. Lifschutz, a neurologist, initially examined the plaintiff on January 11, 2010, and found that the plaintiff was suffering from neck pain and lower back pain. Although his report is unaffirmed, defendants's expert, Dr. Kulak, referenced the unaffirmed report utilized the results therein in formulating his opinion (see Amamedi v Archibala, 70 AD3d 449[2d Dept. 2010]). Dr. Lattuga first evaluated the plaintiff on April 22, 2010, approximately 4 months post-accident. At that time he found significant limitations of range of motion of the plaintiff's cervical and thoracolumbar spines. Dr Lattuga states that in a recent examination on January 26, 2012, plaintiff continued to complain of neck and back pain and continued to exhibit significant limitations of range of motion. Dr. Abessinio treated the plaintiff from May 19, 2010 until December 18, 2010 and found significant limitations of range of motion which he found to be a permanent condition causally related to the subject car accident.

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 reports of Drs. Kulak and April 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]). Although Dr. Kulak found limitations in plaintiff's range of motion, his report based upon his review of the plaintiff's prior treatment records adequately explained his opinion that the limitations were unsupported by the medical records and diagnostic testing (see Park v Shaikh, 82 ADd 1066 [2d Dept. 2011]; Gonzales v Fiallo, 47 AD3d 760 [2d Dept. 2008]; cf. Burns v Stranger, 31 AD3d 360 [2d Dept. 2006]).

However, this Court finds that the plaintiff raised triable issues of fact by submitting the medical reports of Drs. Lifschutz, Khodadadi, Lattuga and Abessinio attesting to the fact that the plaintiff had 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 Salman v Rosario, 87 AD3d 482 [1st Dept. 2011][plaintiff's objective evidence of injury, four months post-accident, was sufficiently contemporaneous to establish that plaintiff had suffered a serious injury within the meaning of the statute]; 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]).

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: April 24, 2012
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.