

Kossaris v Nikos Barkas Taxi Inc.

2012 NY Slip Op 32761(U)

September 28, 2012

Supreme Court, Queens County

Docket Number: 11057/10

Judge: Timothy J. Dufficy

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SHORT FORM ORDER

NEW YORK SUPREME COURT-QUEENS COUNTY

**P R E S E N T : Hon. Timothy J. Dufficy
Justice**

Part 35

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**PREDROMOS KOSSARIS and
MICHAEL MICALLEF,
Plaintiffs,**

**Index No.: 11057/10
Motion Date: 6/21/12
Mot. Cal. No. 14
Mot. Seq.: 2**

- against -

**NIKOS BARKAS TAXI INC. and
JONG CHUN LEE,
Defendants.**

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The following papers numbered 1 to 9 read on this motion by defendants **NIKOS BARKAS TAXI INC. and JONG CHUN LEE** for an order pursuant to CPLR 3211 and 3212 granting summary judgment in their favor and dismissing the plaintiffs' complaint.

	<u>PAPERS NUMBERED</u>
Notice of Motion-Affidavit of Service-Affirmation- Exhibits.....	1 - 4
Affirmation in Opposition-Exhibits.....	5 - 7
Reply Affirmation.....	8 - 9

Upon the foregoing papers it is ordered that this motion by defendants **NIKOS BARKAS TAXI INC. and JONG CHUN LEE** for an order pursuant to CPLR 3211 and 3212 granting summary judgment in their favor for failure to state a cause of action pursuant to New York State Insurance Law 5102(d) in that the plaintiffs did not sustain serious injury as required by New York State Insurance Law 5102(d) and dismissing the plaintiffs' complaint is decided as follows:

As an initial matter, the plaintiffs contend that the defendants' motion for summary judgment should be denied because it was not made in a timely fashion pursuant to CPLR 3212(a). However, the Court finds that the defendants' motion for summary judgment is timely pursuant to CPLR §3212(a). The Note of Issue was filed on October 11, 2011, and the defendants' motion was served on February 7, 2012. Hence 119 days elapsed

between filing the Note of Issue and the filing of the instant motion. Therefore, the defendants' motion was timely in that it was filed within the 120 day requirement allowed for the filing of this motion. *see*, CPRL 3212(a); Brill v City of New York, 2 NY3d 648 (2004).

This action arises from an automobile accident wherein defendant Jong Chun Lee, a taxi cab driver who was driving a Crown Victoria, had just dropped off a customer at LaGuardia Airport. As defendant Lee was traveling westbound on the Grand Central Parkway, in what he testified was "stop and go" traffic, the instant automobile accident occurred.

The defendants now move for summary judgment claiming that neither plaintiff Prodomos Kossaris nor plaintiff Michael Micallef sustained a serious injury under New York State Insurance Law §5102(d).

As the proponent of the summary judgment motion, the defendants must make a *prima facie* showing of entitlement to summary judgment as a matter of law by offering sufficient evidence to demonstrate the absence of any material issues of fact. Alvarez v Prospect Hospital, 68 NY 2d 320 (1986); Zuckerman v City of New York, 49 NY 2d 557 (1980). Therefore, on this motion the defendants bear the initial burden establishing *prima facie* that plaintiff as a result of the accident at issue did not sustain a "serious injury" within the meaning of insurance Law §5102(d). Gaddy v Eyler, 79 NY2d 955 (1992); Licari v Elliot, 57 NY2d 230 (1982), 268 Ad2d 79 (2d Dept. 2000).

In support of their motion, the defendants submit the pleadings in this case, the deposition testimony of plaintiff Prodomos Kossaris, taken January 24, 2011, the deposition testimony of plaintiff Michael Micallef, taken January 24, 2011, and the deposition testimony of defendant Jong Chun Lee, taken September 2, 2011.

Additionally, the defendants submit the affirmed report of Dr. Julio Westerband, dated April 1, 2011, wherein Dr. Westerband examined plaintiff Prodomos Kossaris, the affirmed report of Dr. Iqbal Merchant, dated April 1, 2011, wherein Dr. Merchant examined plaintiff Prodomos Kossaris, and the affirmed report of Dr. Julio Westerband, dated April 1, 2011, who examined plaintiff Michael Micallef.

The defendants also submit the affirmed report of Dr. Iqbal Merchant, dated April 1, 2011, wherein Dr. Merchant examined plaintiff Michael Micallef, and an affirmed report

from radiologist Dr. Sheldon Feit, dated November 20, 2011, who performed an independent radiological exam of plaintiff Prodomos Kossaris' MRI's, and an affirmed report from radiologist Dr. Sheldon Feit, dated November 20, 2011, who performed an independent radiological exam of plaintiff Michael Micallef's MRI's.

All of the defendants' examining doctors have set forth in their affirmed medical reports that the plaintiffs had full and normal range of motion based upon objective range of motion tests. They also stated what the numerical findings were compared to and what in their opinion is normal. Contrary to the plaintiffs' contentions that this evidence is contradictory and legally insufficient, the Court finds that these findings are acceptable under the law. *See, Layne v. Drouillard*, 65 AD2d 1197 (2d Dept. 2009).

Therefore, the Court finds that the defendants have satisfied their burden through legally sufficient documentary evidence from the affirmed reports of Drs. Westerland and Merchant, as well as the affirmed report of Dr. Feit, that the plaintiffs did not meet the threshold requirement of Insurance law §5102(d) in that the plaintiffs did not sustain a "serious injury" as a result of the subject accident. *Oberly v. Bangs*, 96 NY2d 295 (2001).

The burden then shifts to the plaintiffs to demonstrate that there are triable issues of fact which show that the plaintiffs have sustained a "serious injury" within the meaning of Insurance Law §5102(d) and that these injuries were sustained as a result of the subject accident. *Gaddy v Eyler*, *supra*; *Hildenbrand v Chin*, 52 AD3d 1164 (3d Dept. 2008).

In opposition to the defendants' motion, the plaintiffs submit the affirmed report of radiologist Dr. Charles Demarco, dated March 26, 2012, regarding plaintiff Prodomos Kossaris, the affirmed report of radiologist Dr. Charles Demarco, dated March 26, 2011, regarding plaintiff Michael Micallef, an unaffirmed MRI report of plaintiff Prodomos's lumbar spine, an unaffirmed MRI report of plaintiff Michael Micallef's lumbar spine, and the unaffirmed reports of Dr. Arden Kaisman regarding Dr. Kaisman's examination of the plaintiff Prodomos Kossaris, dated April 22, 2010.

The defendants further argue that the documentary evidence presented by both of the plaintiffs is legally insufficient to defeat the defendants' motion for summary judgment because the doctors' reports are unsigned, unsworn, and that the plaintiffs failed to submit any record of a recent physical examination substantiating the extent and degree of their alleged injuries.

The plaintiffs contend that their moving papers establish that both plaintiff Kossaris and plaintiff Micallef have suffered “serious injury” within the meaning of New York State Insurance Law §5102(d) and that there are factual issues presented here which preclude summary judgment.

Here, the Court finds that the plaintiffs have failed to come forward with legally admissible documentary evidence to contradict the defendants’ evidence. The two unaffirmed MRI reports submitted by the plaintiffs in opposition to the motion for summary judgment and the unaffirmed report of Dr. Arden Kaisman are insufficient to rebut the defendants’ evidence and are legally insufficient to raise a triable issue of fact. The Court also notes that since Dr. Demarco is not a treating physician nor an examining physician, his affirmed opinion is insufficient to rebut defendants’ experts’ examinations and opinions. Further, the plaintiffs have failed to submit any doctor’s records regarding any recent physical examination conducted substantiating the extent and degree of the plaintiffs’ alleged injuries . Ranford v Tim’s Tree and Lawn Service, Inc., 71 AD2d 973(2d Dept. 2010). Thus, the plaintiffs have failed to present legally sufficient documentary evidence to raise any triable issues of fact. The Court finds that neither plaintiff Prodomos Kossaris nor plaintiff Michael Micallef sustained a serious injury under New York State Insurance Law §5102(d).

Accordingly, the defendants’ motion for summary judgment is granted.

Dated: September 28, 2012

Timothy J. Dufficy, J.S.C.

