Gakou v Amaxas
2012 NY Slip Op 33111(U)
November 29, 2012
Sup Ct, Queens County
Docket Number: 27209/10
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 **Part 35**
Justice

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SALIOU GAKOU,
Plaintiff,

- against -

NIKOLAOS AMAXAS and EMMANUEL MELABIANAKIS,

Defendants.

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Index No.:27209/10
Mot. Date: 7/12/11
Mot. Cal. No.: 7
Motion Seq.: 2

The following papers numbered 1 to 9 read on this motion by defendants **NIKOLAOS AMAXAS and EMMANUEL MELABIANAKIS** for an order pursuant to CPLR 3212 and 3212 granting summary judgment in their favor and against plaintiff **SALIOU GAKOU** and dismissing the complaint and all cross-claims against them.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits..........................	1 - 4
Affirmation in Opposition-Exhibits.................................	5 - 7
Rely Affirmation..	8 - 9

Upon the foregoing papers it is ordered that this motion by the defendants **NIKOLAOS AMAXAS and EMMANUEL MELABIANAKIS** for an order pursuant to CPLR 3212 granting summary judgment in their favor and against plaintiff **SALIOU GAKOU** and dismissing the complaint and all cross-claims against them on the ground that the plaintiff did not sustain a "serious injury"under New York State Insurance Law § 5102(d) and 5104(a) is decided as follows:

This action arises from an automobile accident that occurred on November 27, 2007, on the Grand Central Parkway in Queens County, New York, wherein the plaintiff was the driver of a taxi which was struck in the rear by the defendant's vehicle. The plaintiff drove his vehicle to the taxi garage after the collision and sought medical

attention on the next day for alleged injuries he sustained during the accident to his neck, lower back, shoulders, and knees. Two months after the accident, the plaintiff went back to work part time as a taxi driver.

The defendants move for summary judgment claiming that the plaintiff has not sustained a serious injury under New York State Insurance Law §5102(d).

As the proponent of this summary judgment motion defendant 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 N. Y. 2d 320 (1986); Zuckerman v City of New York, 49 N.Y. 2d 557 (1980). Therefore, on this motion the defendants bear the initial burden establishing *prima facie* that the plaintiff 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). Additionally, the defendants must make a prima facie showing that the plaintiff's injury was not causally related to the accident. Elshaarawy v U-Haul Co., 72 AD3d 878 (2d Dept. 2010); Autiello v. Cummings, 66 AD3d 1072 (3d Dept. 2009.)

In support of their motion, the defendants submit the pleadings in this case, the deposition testimony of plaintiff Saliou Gakov taken on November 16, 2011, the affirmed report of Dr. Michael Baskies dated December 2, 2011 wherein Dr. Baskies personally examined plaintiff Gakou, and the affirmed radiological report from Dr. Sondra J. Pfeffer dated September 30, 2011 wherein Dr. Pfeffer independently reviewed the plaintiff's cervical MRI report from February 18, 2008.

Dr. Baskies examined the plaintiff on December 2, 2011, with regard to the plaintiff's complaints of pain to his neck, shoulders, lower back, and right knee. Dr. Baskies reviewed many of the plaintiff's prior medical reports dating back from January 29, 2007, including MRI reports of the plaintiff's cervical and lumbar spine from 2008. Upon examination and review of the plaintiff's prior medical records, Dr. Baskies found that the plaintiff's range of motion in his cervical spine, shoulders, lumbar spine, and right knee were within normal range and that there was no objective evidence of disability. Dr. Baskies also stated what the numerical findings were compared to and what his opinion is normal.

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Dr. Pfeffer reviewed the cervical MRI performed upon the plaintiff on February 18, 2008, approximately 2-3 months following the accident. Dr. Pfeffer concluded that the MRI was unremarkable and that there was no evidence whatsoever of a posterior disc herniation at the C5-6 as alleged by the plaintiff.

Therefore, the Court finds that the defendants have satisfied their burden through legally sufficient documentary evidence from the affirmed reports of Dr. Baskies and Dr. Pfeffer that the plaintiff did not meet the threshold requirement of Insurance Law §5102(d) in that plaintiff did not sustain serious injury" as the result of the subject accident. Oberly v Bangs, 96 NY2d 295(2001.)

Since the defendant have made a *prima facie* case, the burden of proof now shifts to the plaintiff to demonstrate that there are triable issues of fact with respect to whether or not he sustained "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, the plaintiff submits the pleadings in this case, his affidavit dated June 27, 2012, the affirmed report of Dr. Noel Fleischer, plaintiff's treating physician, dated June 27, 2012, who performed a recent physical examination of the plaintiff on May 16, 2012. The plaintiff also submits the affirmed report of radiologist Dr. Harold S. Parnes regarding the MRI of the plaintiff's cervical spine taken February 18, 2008 and the affirmed report of Dr. Harold Parnes regarding the MRI of plaintiff's lumbosacral spine taken on August 14, 2008.

Dr. Harold Parnes reviewed the MRI of the plaintiff's cervical spine and concluded that plaintiff had posterocentral disc herniation as noted at the C5-C6 level, which demonstrated ventral impingement on the thecal sac. Dr. Parnes opined that the cervical spine MRI taken of the plaintiff showed bulging discs at the C3-C4 and C4-C5 level, disc herniation at the C5-C6 level, scoloisis, and nueral components to be intact. Dr. Parnes reviewed the MRI of the plaintiff's lumbosacral spine taken on August 14, 2008 and concluded that the plaintiff had posterocentral disc herniations as noted at L4-L5 and L5-S1 levels, which demonstrated ventral impingement on the thecal sac and posterior disc bulging at the L3-L4 levels.

The plaintiff also submits an affirmation from neurologist Dr. Noel Fleischer, who conducted an initial examination of plaintiff on November 29, 2007, in the following areas: palpitation, motor, sensory, reflexes, range of motion and orthopedic testing. Based upon Dr. Fleischer's examination, he concluded that the plaintiff had traumatic cervical radculopathy and traumatic lumbar radculopathy. Dr. Fleischer ruled out internal derangement of both shoulders, deemed plaintiff totally disabled with a guarded prognosis, and opined that due to the accident plaintiff was prevented from performing his usual and customary activities.

Dr. Fleischer examined the plaintiff again on January 25, 2008, February 29, 2008, March 27, 2008, May 7, 2008, August 6, 2008, and September 3, 2008 for follow-up examinations. Dr Fleischer concluded that after ten (10) months of aggressive therapy the plaintiff remained symptomatic and functionally impaired due to the accident in issue. Dr. Fleischer stated that the plaintiff sustained traumatic cervical radculopathy, secondary to disc herniation at C5-C6 with impingement confirmed by Dr. Fleischer's review of the plaintiff's MRI, traumatic disc bulges at C3-C5 confirmed, in Dr. Fleischer's opinion, by the plaintiff's MRI, C7 nerve root injury as per the EMG performed, traumatic lumber radculopathy at L5-S1 nerve root per EMG, secondary to disc herniations at L4-L5 and L5-S1 with impingement , traumatic disc bulge at L3-L4and contusions and derangements to both shoulders and plaintiff's right knee and that these injuries were causally related to the accident that occurred on November 27, 2007. Dr. Fleischer concluded that the plaintiff's injuries are permanent in nature and plaintiff is rendered permanently disabled.

On May 16, 2012, almost five (5) years after the accident, Dr. Fleischer conducted his most recent follow-up physical examination upon the plaintiff performing palpation, motor, sensory, reflex, orthopedic, and range of motion tests. Dr. Fleischer's final diagnosis was that the plaintiff suffered traumatic cervical radiculopathy, secondary to disc herniation at C5-C6 with impingement (confirmed by MRI); traumatic disc bulges at C3-C5 (confirmed by MRI); C7 nerve root injury (per EMG); traumatic lumbar radiculopathy at L5-S1nerve root (per EMG) secondary to disc herniations at L4-L5 and L5-S1 with impingement (confirmed by MRI); traumatic disc bulge at L-L4 9confirmed by MRI); and contusions and derangements to both shoulders and plaintiff's right knee

and that based upon quantifiable and objective medical evidence that the accident on November 27, 2007 was the primary competent producing cause of these injuries and that the plaintiff's is a chronic, disabling and permanent condition and that the plaintiff is permanently partially disabled.

The Court finds that the plaintiff has submitted legally sufficient documentary evidence which have raised triable issues of fact as to whether plaintiff has suffered a "serious injury" as to warrant trial of this matter on this issue. The documentation provided by the plaintiff from Dr. Fleischer and Dr. Parnes are legally sufficient to present the Court with triable issues of fact on the issue of whether or not the plaintiff suffered "serious injury" pursuant to Insurance Law §5102(d). The plaintiff's doctors concluded that the plaintiff's limitations were significant and permanent and in fact resulted from trauma which was caused by the accident in issue. Ortiz v Zorbas, 62 AD3d 770 (2d Dept. 2009); Azor v Torado, 59 AD3d 367(2d Dept. 2009.)

Therefore, the defendants motion for summary judgment pursuant to Insurance Law §5102(d) is denied. Noble v Ackerman, 252 AD2d 392 (1st Dept. 1998); Greene v Frontier Central School District, 214 Ad 2d 947 (4th Dept. 1995.)

Defendants also claim that they have established their entitlement to summary judgment as a matter of law under the 90/180 day category of Insurance Law §5104(a) arguing that the plaintiff failed to qualify his alleged injuries as serious under the 90/180 day category claiming that the plaintiff's claim for non-economic loss is barred by that statute. In the deposition testimony given by the plaintiff, he testified that he was confined to his home for about a month and a half following the accident but that two (2) months after the accident he went back to work as a taxi driver working 3-4 days a week for 30-35 hours a week and plaintiff stopped treatments on his own accord. This evidence sufficiently establishes the defendants' *prima facie* showing that plaintiff did not meet the requirements of New York State Insurance Law §5104(a). McConnell v Ouedraogo, 24 AD3d 423 (2d Dept. 2005.) Thus, the defendants have met their burden of showing that the plaintiff has not provided objective proof that he sustained serious injury under the definitions of the New York State Insurance Law § 5104(a).

The burden then shifts to the plaintiff to establish that there are triable issues of fact with respect to whether or not plaintiff suffered serious injury pursuant to New York

State Insurance Law §5104(a). The plaintiff must show objective medical evidence of the injury causing limitations. Objective medical proof ,whether qualitative or quantitative, is necessary to support the subjective claims of injury. According to plaintiff's opposition, he ceased treatments in September, 2008, on his own accord and not upon doctor's advice. The plaintiff failed to explain why he ceased with his treatments and why he failed to continue with treatments once he stopped. Here, the gap in treatment was a three (3) year gap which is unexplained. Thus, the branch of the defendants' motion for summary judgment in their favor and against plaintiff on the grounds that any claim by plaintiff for non-economic loss is barred by Insurance Law§5104(a) is granted.

Dated: November 29, 2012

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Timothy J. Dufficy, JSC