

Hart v Fnu Kaiwan-Ullah
2016 NY Slip Op 30758(U)
April 27, 2016
Supreme Court, Queens County
Docket Number: 15843/2014
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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ANA HART and RUBY FRANCO, Index No.: 15843/2014
Plaintiffs, Motion Date: 4/18/16
- against - Motion No.: 79
FNU KAIWAN-ULLAH and KJI LIMO CORP., Motion Seq.: 1
Defendants.

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The following papers numbered 1 to 12 read on this motion by defendants for an order pursuant to CPLR 3212 granting defendants summary judgment and dismissing plaintiffs' complaint on the ground that plaintiffs did not sustain a serious injury within the meaning of Insurance Law §§ 5104(a) and 5102(d):

	<u>Papers</u> <u>Numbered</u>
Notice of Motion-Affirmation-Exhibits.....	1 - 4
Supplemental Affirmation in Support-Exhibits.....	5 - 7
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In this negligence action, plaintiffs seek to recover damages for personal injuries allegedly sustained as a result of a motor vehicle accident that occurred on February 14, 2014 on Woodhaven Boulevard at or near its intersection with Metropolitan Avenue in Queens County, New York.

In the verified bill of a particulars, plaintiff Ana Hart (Hart) alleges that she sustained serious injuries to her neck, back, knees, and right ankle. Plaintiff Ruby Franco (Franco) alleges that she sustained serious injuries to her neck, back, and chest.

Plaintiffs commenced this action by filing a summons and complaint on October 30, 2014. Issue was joined by service of defendants' answer dated December 10, 2014. Defendants now move for an order pursuant to CPLR 3212(b), granting summary judgment and dismissing plaintiffs' complaint on the ground that plaintiffs did not suffer a serious injury as defined by Insurance Law § 5102.

In support of the motion, defendants submit an affirmation from counsel, Stacy R. Seldin, Esq.; a copy of the pleadings; a copy of the transcripts of the examinations before trial of Hart and Franco; a copy of the verified bill of particulars; an independent radiology review report from Dr. David A. Fisher, M.D. regarding Hart; an independent neurological evaluation report from Dr. Jean-Robert Desrouleaux, M.D. regarding Hart; an independent orthopedic evaluation report from Dr. J. Serge Parisien, M.D. regarding Hart; an independent radiology review report from Dr. David A. Fisher, M.D. regarding Franco; an independent neurological evaluation report from Dr. Jean-Robert Desrouleaux, M.D. regarding Franco; and the affirmed medical reports of defendants' trauma expert Dr. Jay M. Walshon, M.D.

Plaintiffs assert that they sustained a serious injury as defined in Insurance Law § 5102(d) in that they each sustained a permanent consequential limitation of 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 plaintiffs from performing substantially all of the material acts which constitute their 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.

At her deposition taken on May 8, 2015, Hart testified that she had a prior accident in January 2013 in which she sustained injuries to her neck, back, left knee, and shoulder. She was still treating for her prior injuries at the time of the subject accident. She was treating with Dr. Kanter every seven weeks for her prior accident and was undergoing physical therapy twice a week. She had a standing appointment with Dr. Kanter prior to the subject accident. Hart did not miss any work as a result of the subject accident.

Dr. Fisher reviewed Hart's MRI of her left knee, cervical spine, and lumbar spine. Regarding the left knee, he found that there is no meniscal or ligament tear. As to the cervical and lumbar spine, he found mild degenerative changes and no herniations.

Dr. Desrouleaux examined Hart on June 8, 2015. Hart presented with complaints of neck, lower back, bilateral knee, and right ankle pain. Dr. Desrouleaux identifies the records he reviewed and performed objective range of motion testing with a goniometer on Hart's neck and lumbar spine. His report reveals all normal ranges of motion. All other objective tests were negative. He concludes that the alleged injury to Hart's cervical and lumbar spine is resolved, and there is no permanence or residual effect. Dr. Desrouleaux also states that Hart is able to function in her pre-accident capacity and carry out her work duties and day-to-day activities without neurological restriction.

Dr. Parisien conducted an independent orthopedic medical examination of Hart on June 8, 2015. Dr. Parisien identifies the records he reviewed and performed objective range of motion testing with a goniometer on Hart's cervical spine, lumbar spine, bilateral knees, and right foot and ankle. His report reveals all normal ranges of motion. All other objective tests were negative. He concludes that the alleged injuries to Hart's cervical and lumbar spine, bilateral knees, and right ankle are resolved and there is no evidence of residuals or permanency. Dr. Parisien also states that Hart is able to perform her usual occupation, and may continue with her activities of daily living with no restrictions.

Defendants' trauma expert, Dr. Walshon, examined the bill of particulars, police accident report, and the EMS reports and Emergency Room records from Elmhurst Hospital Center with respect to both plaintiffs. Regarding Hart, Dr. Walshon observed that Hart did not have a head injury; there was full range of motion in her extremities; there was no documentation of injury to her neck, back, knees, or right ankle; no X-rays or Ct-Scans were ordered; and no immobilizing devices or consultations with a specialist were ordered.

Franco was deposed on May 8, 2015. Franco testified that she was confined to bed for three days following the subject accident. Her job duties did not change since the accident.

Dr. Fisher reviewed Franco's MRI of her cervical spine. He found degenerative changes throughout the cervical spine and no herniations.

Dr. Desrouleaux examined Franco on June 8, 2015. Franco presented with current complaints of neck and lower back pain. Dr. Desrouleaux identifies the records he reviewed and performed objective range of motion testing with a goniometer on Franco's

cervical spine, thoracic spine, and lumbar spine. His report reveals all normal ranges of motion. All other objective tests were negative. He concludes that the alleged injury to Franco's cervical, thoracic, and lumbar spine is resolved, and there is no permanence or residual effect. Dr. Desrouleaux opines that Franco is able to function in her pre-accident capacity, and carry out her work duties and day-to-day activities without neurological restriction.

Dr. Walshon reviewed Franco's emergency room records as well, and found that there was no evidence to her cervical, thoracic, or lumbar spines. X-rays of her chest were normal and she was diagnosed with low back pain. She was not given a further consultation, cervical collar or any immobilizing device, and advanced imaging studies were not ordered.

Defendants' counsel contends that the medical reports and plaintiffs' testimony are sufficient to demonstrate that plaintiffs have not sustained a permanent consequential limitation of 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 plaintiffs from performing substantially all of the material acts which constitute their 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 plaintiffs submit an affirmation from their counsel, Jennifer M. Ahlfeld, Esq.; the medical affirmation of Miriam Kanter, M.D. regarding Franco; the medical affirmation of Joon Kim, M.D. regarding Franco; MRI affirmations from David Payne, M.D. regarding Franco; the medical affirmation of Miriam Kanter, M.D. regarding Hart; and MRI affirmations from Alan Greenfield regarding Hart.

Hart sought treatment with Dr. Kanter following the subject accident on February 19, 2014. Hart presented with complaints of pain in her neck, low back, bilateral knees, and right ankle. Dr. Kanter notes that Hart was treating with her for a prior injury at the time of the subject accident. However, Dr. Kanter notes that the subject accident caused an exacerbation of her prior injuries. Dr. Kanter performed range of motion testing and found decreased range of motion in Hart's cervical spine and lumbar spine. Hart continued to treat with Dr. Kanter until December 3, 2014. Most recently, Dr. Kanter evaluated Hart on January 30, 2015. Dr. Kanter found continued limitations in range of motion of Hart's lumbar and cervical spine. Dr. Kanter opines that since

Hart continues to present with persistent radiating neck pain and low back pain as well as ongoing restricted range of motion of the cervical spine and lumbar spine, the subject injuries are permanent in nature. Dr. Kanter also opines that the injuries are caused by the subject accident.

Dr. Payne reviewed the MRI films of Hart's cervical and lumbar spine and found, inter alia, bulging discs at C3-4, C4-5, C5-6, C6-7, and L5-S1.

After the subject accident, Franco presented to Dr. Kanter on February 19, 2014 with complaints of severe neck pain with radiation down the left upper extremity to the hand as well as severe low back pain. She also had pain in her chest wall and in her breast. Dr. Kanter performed range of motion testing and found decreased range of motion in Franco's cervical spine and lumbar spine. Dr. Kanter diagnosed Franco with cervical radiculitis, lumbar sprain/strain, cervical and thoraco-lumbar myofascitis. Dr. Kanter's plan for Franco included x-rays of the cervical and lumbar spine as well as physical therapy and trigger point injections. Dr. Kanter reviewed Franco's MRIs of the cervical spine and lumbar spine and found bulging discs and herniations. Franco continued to treat with Dr. Kanter until December 17, 2014 when Dr. Kanter noted that Franco had reached her maximum medical improvement. She advised Franco to continue with a home exercise program.

On November 11, 2014, Franco began treating with Dr. Kim. Dr. Kim also found herniations after reviewing Franco's MRIs. Dr. Kim performed range of motion testing and found limited range of motion and positive objective tests. Dr. Kim's diagnosis was cervical and lumbar radiculopathy, resulting from cervical and lumbar disc displacements. Dr. Kim recommended that Franco receive lumbar epidural steroid injections, which were performed on December 1, 2014, April 24, 2015, and June 26, 2015. A cervical epidural injection was administered on January 5, 2015. Dr. Kim also performed a discectomy on August 17, 2015. Dr. Kim most recently examined Franco on December 1, 2015 and found continued limitations in ranges of motion regarding both Franco's lumbar and cervical spine. Dr. Kim opines that the injuries sustained to Franco's cervical and lumbar spine are causally related to the subject accident, are permanent in nature, are not subject to resolution without further surgical intervention, and have rendered Franco permanently partially disabled. Dr. Kim further states that Franco is still exhibiting limitations of cervical and lumbar radiculopathies and that the injuries inhibit her ability to carry out her normal activities of daily living.

Dr. Payne reviewed the MRI of Hart's cervical spine taken on March 25, 2014 and found, inter alia, herniations at C3-4, C4-5, C5-6, and C6-7. As to the lumbar spine MRI, Dr. Payne found a bulging disc at L3-4 and herniations at L4-5 and L5-S1.

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]).

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 competent proof submitted by defendants, including the affirmed medical reports and plaintiffs' deposition testimony, is sufficient to meet defendant's prima facie burden by demonstrating that plaintiffs 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]; Carballo v Pacheco, 85 AD3d 703 [2d Dept. 2011]; Ranford v Tim's Tree & Lawn Serv., Inc., 71 AD3d 973 [2d Dept. 2010]).

However, this Court finds that plaintiffs raised triable issues of fact by submitting the affirmed medical reports attesting to the fact that each plaintiff sustained injuries as a result of the subject accident, finding that each plaintiff had significant limitations in ranges of motion both contemporaneous to the accident and in recent examinations, and concluding that their limitations are permanent and causally related to the accident (see Perl v Meher, 18 NY3d 208 [2011]; David v Caceres,

96 AD3d 990 [2d Dept. 2012]; Martin v Portexit Corp., 98 AD3d 63 [1st Dept. 2012]; Ortiz v Zorbas, 62 AD3d 770 [2d Dept. 2009]; Azor v Torado, 59 AD2d 367 [2d Dept. 2009]).

As such, plaintiffs demonstrated issues of fact as to whether they 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 AD3d 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 light of this finding, the court need not address the 90/180 category.

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

ORDERED, that the motion by defendants for an order granting summary judgment dismissing plaintiffs' complaint is denied; and it is further

ORDERED, that this matter remains on the calendar of the Trial Scheduling Part for May 19, 2016.

Dated: April 27, 2016
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.