

Jay v Abubakar

2016 NY Slip Op 32625(U)

December 7, 2016

Supreme Court, Bronx County

Docket Number: 300307/2010

Judge: Robert T. Johnson

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 12**

KEVIN JAY,

Plaintiff,

DECISION AND ORDER

Index No. 300307/2010

**ABDULLAH ABUBAKAR, NINI LIMO SERVICES,
PAUL FIELDS AND RAYLENA FIELDS,**

Defendants.

The following papers, numbered 1-7 were considered on this motion for summary judgment and cross-motion for summary judgment:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion and annexed Exhibits and Affidavits.....	1
Memoranda in Support of Motion.....	2,3
Notice of Cross Motion and Partial Opposition and Exhibit.....	4
Affirmation in Opposition.....	5
Reply Affirmations.....	6, 7

Upon the foregoing papers, it is ordered that Defendants Abubakar and Nini Limo Services' motion for summary judgment is granted in part, and Defendants Paul and Raylena Fields' cross motion for summary judgment is denied.

This motion stems from a negligence action for personal injuries arising from an incident which occurred on March 15, 2009 on the Major Deegan Expressway Southbound entrance ramp, just South of Fordham Road in Bronx County (the "Accident"). Plaintiff, Kevin Jay ("Plaintiff"), claims that he was a passenger in the rear seat of a vehicle operated by Defendant Abdullah Abubakar ("Defendant Abubakar") and owned by Defendant Nini Limo Services ("Defendant Nini Limo") when said vehicle attempted to avoid stopped vehicles which were involved in a prior accident. Plaintiff further alleges that Defendant Nini Limo's vehicle was

then struck in the rear by a vehicle which was operated by Paul Fields and owned by Raylena Fields (collectively “Defendant Fields”).

Defendants Abubakar and Nini Limo move for summary judgment pursuant to CPLR §3212 dismissing the complaint on the ground that Plaintiff’s injuries do not satisfy the “serious injury” threshold requirement of Insurance Law §5102(d); and summary judgment dismissing the complaint on the ground that there is no issue of fact as to their liability, as the accident was the result of Defendant Fields’ vehicle striking the Nini Limo vehicle in the rear.

In opposition, Plaintiff and Defendant Fields argue that Defendants Abubakar and Nini Limo did not establish a prima facie case of entitlement to judgment as a matter of law.

Defendants Fields cross-move for summary judgment dismissing the complaint on the ground that Plaintiff did not sustain serious injuries as a result of the accident.

It is well settled that the proponent of a summary judgment motion must make a prima facie case showing of entitlement to judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). The court’s role is “issue-finding, rather than issue determination” (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957] [internal quotations omitted]).

“[I]n any action by . . . a covered person against another covered person for personal injuries arising out of negligence in the use or operation of a motor vehicle . . . there shall be no

right of recovery for non-economic loss, except in the case of a serious injury.” Insurance Law §5104. Accordingly, the court must consider the threshold inquiry of whether plaintiff suffered serious injuries within the meaning of Insurance Law §5102(d). Such statute defines serious injury as:

“a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person’s 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.”

Insurance Law § 5102(d).

As a preliminary matter, while Plaintiff is not specific as to which of the categories under which he claims to have sustained a personal injury, a review of Plaintiff’s pleadings, bill of particulars, as well as the various medical records, reports, and affirmations submitted in support of and in opposition to the instant motion, do not support the death, dismemberment, significant disfigurement, fracture, loss of fetus, permanent loss of use of a body organ or member nor the 90/180 categories. The court finds that these categories are inapplicable. Accordingly, the court will only address the remaining two categories.

Defendant Abubakar and Nini Limo assert that based upon their physician’s affirmed report, the deposition testimonies and pleadings, it is clear that Plaintiff did not suffer serious injuries pursuant to Insurance Law §5102(d).

In opposition, Plaintiff contends that Defendant failed to establish a prima facie case that Plaintiff did not sustain a serious injury. Additionally, Plaintiff asserts that the affirmed report of Plaintiff’s treating chiropractor, Dr. Walter J. Cesarski, along with the affirmed report of

Plaintiff's treating orthopedic surgeon, Dr. Gabriel L Dassa, and other medical evidence, is sufficient to establish issues of material fact pursuant to the permanent consequential limitation of use and significant limitation of use of a body function categories.

In support of their position, defendants Abubakar and Nino Limi submit, *inter alia*, the affirmed reports of Drs. A. Robert Tantleff, Jean - Robert Desrouleaux, and J. Serge Parisien, a radiologist, neurologist, and orthopedic surgeon respectively. Here, Defendants Abubakar and Nini Limo have satisfied their initial burden of demonstrating entitlement to judgment as a matter of law pursuant to permanent consequential limitation and significant limitation of use, thereby shifting the burden to Plaintiff to establish the existence of issues of material fact.

Dr. Tantleff reviewed M.R.I.s, from May and June of 2009, of Plaintiff's cervical and lumbar spine and his left knee. Dr. Tantleff concluded that there were degenerative changes to the cervical spine which required years and decades to develop, and discogenic changes of the lumbar spine. Similarly, he observed degenerative changes of the left knee, consistent with age. With respect to each of the three areas, he averred that they were unrelated to the March 15, 2009 accident.

In a neurological examination of Plaintiff on April 23, 2012, Dr. Desrouleaux found full range of motion in the neck and lumbar spine with normal bending, rotation, and flexion. His impression was that any "alleged injury" to the cervical and lumbar spine was resolved with no permanence or residual effect. On May 22, 2012, Dr. Parisien conducted an examination of Plaintiff's cervical and lumbar spine, and left knee, hand and shoulder. He indicates that the tests which he performed revealed full range of motion in the lumbar sacral spine with normal

flexion, extension and right and left lateral bending. He further indicates full flexion, extension, rotation and bending in the cervical spine.

Dr. Parisen's position is that the left knee showed healed arthroscopic scars and full range of motion. He concluded that alleged injuries of the left knee, shoulder and hand, and of the cervical and lumbar spine were all resolved.

To demonstrate permanent consequential limitation or a significant limitation of use, plaintiff must present medical evidence that contains objective, quantitative proof with respect to diminished range of motion or a qualitative assessment comparing plaintiff's current limitations to the normal function, purpose and use of the affected body organ, member, function or system (*see Toure v. Avis Rent A Car Sys. Inc.*, 98 NY2d at 350). Plaintiff relies, *inter alia*, on the affidavit of Dr. Walter J. Cesarski and affirmation of Dr. Gabriel L. Dassa, a chiropractor and orthopedic surgeon respectively, as his primary sources of proof. It is the opinion of Dr. Cesarski, who examined plaintiff in March of 2009 and 2010 and on October 12, 2013, that there is permanent and serious injury to the cervical and lumbar spine, as well as to the left knee. While he found diffuse degenerative disc disease and spondylosis in the cervical and lumbar spine, Dr. Cesarski directly refutes Dr. Tantleff, stating that "[t]o suggest that multiple disc herniations supported with positive nerve impingement findings....is purely age related is wrong." Dr. Cesarski reports arthrodiagonal protractor measurements from the October 12, 2013 examination with decreases in range of motion in the cervical spine of 37.5% to 50% and in the lumbar spine of 50%.

Dr. Dassa describes the injury to Plaintiff's left knee as a permanent orthopedic condition, with permanent pain and restriction of motion. He attests to having found "a partial

medial and lateral meniscus tear, severe synovitis, patellofemoral joint, and medial femoral chondral injuries with loose fragments in the knee” when he performed surgery on Plaintiff’s left knee on June 1, 2011. Dr. Dassa had first seen Plaintiff on May 6, 2010. At that time, using a goniometer, he noted a 14% decrease in flexion. After physical therapy did not improve the knee, surgery was performed. On December 20, 2013, he performed a follow up examination and noted a continued limp, dysfunctional quadriceps on the left side with atrophy measured to be two inches less than on the right, and an 11% decrease in flexion. Dr. Dassa’s opinion is that the injuries were directly caused by the March 15, 2009 accident. Accordingly, the court finds Plaintiff’s evidence is sufficient to raise issues of fact (*see Perl v. Meher*, 18 NY3d 208 [2011]). This court cannot state as a matter of law that the Plaintiff did not suffer a serious injury under the “permanent consequential limitation” or a “significant limitation of use” categories of Insurance Law § 5102 (d) (*Fuentes v Sanchez*, 91 AD3d 418 [1st Dept. 2012]; *see generally Stillman v. Twentieth Century-Fox Film Corp.*, 3NY2d 395 [1957] [summary judgment should be denied if existence of triable issue is arguable]).

With respect to the issue of liability, in general, a rear-end collision involving a stopped or slowing vehicle creates a presumption of negligence on the part of the operator of the second vehicle (*See Mitchell v. Gonzalez*, 269 AD2d 250 [1st Dept. 2000]). “This rule has been applied when the front vehicle stops suddenly in slow-moving traffic” (*Johnson v. Phillips*, 261 AD2d 269, 271 [1st Dept. 1999]).

In support of their motion, Defendants Abubakar and Nini Limo offer the deposition testimony of Plaintiff, Defendant Abubakar and Defendant Paul Fields, who allege that the automobile driven by Defendant Abubakar and carrying Plaintiff was stopping in an attempt to

avoid stopped vehicles in front. They averred that the Nini Limo vehicle only came in contact with Defendant Field's vehicle when Defendant Field's vehicle struck it in the rear. Defendants Abubakar and Nino Limo further offer Defendant Fields' testimony that he was not looking straight ahead, in the direction of the Nini Limo vehicle, and was therefore, not sure whether the Nini Limo was stopped or moving when he rear-ended it.

Defendants Abubakar and Nini Limo contend that since their vehicle was rear-ended, there is no liability on their part. Defendants Abubabar and Nini Limo cite *Rue v. Stokes*, 191 AD2d 245 (1st Dept. 1993), where the court found that there was "unrebutted sworn testimony that [defendant's] vehicle was at a complete stop for several seconds when it was struck in the rear," for this proposition. Likewise, in *Barnes v. Lee*, 158 AD2d 414 (1st Dept. 1990), summary judgment was granted where the vehicle was brought to a complete stop behind a disabled vehicle before the accident occurred. Defendants Abubakar and Nini Limo have established their prima facie entitlement to summary judgment thereby placing the burden on Defendant Fields to provide a non-negligent explanation for the accident (*Dattilo v. Best Transp. Inc.*, 79 AD3d 432 [1st Dept. 2010]).

In opposition, Defendant Fields claims that the Nini Limo vehicle was only stopped approximately 1-2 seconds prior to the impact and that he was unable to stop in time to avoid hitting the rear of the Nini Limo vehicle. In order to rebut the presumption of negligence, it is incumbent on Defendant Fields to provide a non-negligent explanation for the failure to maintain a safe distance (*See LaMasa v. Bachman*, 56 AD3d 340 [1st Dept. 2008]). Here, Defendant Fields fails to proffer a non-negligent reason for the rear-end collision. Defendant Fields' own deposition testimony indicates that he failed to keep a safe distance and avoid colliding with the

vehicle in front of him. Additionally, Plaintiff's affidavit attesting that the Nini Limo vehicle was moving and swerved is not sufficient to defeat summary judgment as Defendant Fields' deposition testimony acknowledges that the Nini Limo vehicle was in front of his own and that he had been looking over his left shoulder in an attempt to merge onto the roadway seconds before the collision.

Accordingly, it is hereby ORDERED that the portion of Defendants Abubakar and Nini Limo's motion for summary judgment as to the issue of liability is granted in favor of Defendants Abubakar and Nini Limo, and the complaint and all cross-claims are dismissed against Defendants Abubakar and Nini Limo; and it is further

ORDERED, that the portion of Defendants Abubakar and Nini Limo's motion for summary judgment with respect to the issue of serious injury is deemed moot; and it is further

ORDERED, that Defendant Fields' cross-motion for summary judgment with respect to serious injury is denied;

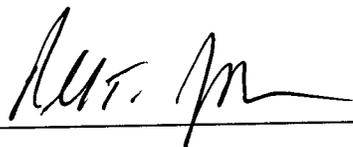
ORDERED, upon a search of the record, the Court grants summary judgment in favor of Plaintiff on the issue of liability against the remaining defendants, Defendants Paul Fields and Raylena Fields; and it is further

ORDERED, that this matter is set down for an assessment of proximate cause and damages.

Movant is directed to serve a copy of this order with notice of entry upon all parties within twenty (20) days of entry and file proof thereof with the clerk's office.

This reflects the decision and order of this court.

Dated: December 7, 2016



Hon. Robert T. Johnson