

Levitt v Gothera

2012 NY Slip Op 30844(U)

April 3, 2012

Supreme Court, Queens County

Docket Number: 26340/2010

Judge: Robert J. McDonald

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commenced this action by filing a summons and complaint on August 5, 2010. Issue was joined by service of defendants' verified answer dated October 28, 2010.

Defendants now move for an order pursuant to CPLR 3212(b), granting summary judgment dismissing the complaint of plaintiff Avi Fattal on the ground that he did not suffer a serious injury as defined by Insurance Law § 5102.

In support of the motion, defendant submits an affirmation from counsel, Brian J. McCall, Esq.; a copy of the pleadings; plaintiff's verified bill of particulars; the affirmed medical report of orthopedic surgeon, Dr. Paul J. Miller and a copy of the transcript of the examination before trial of Avi Fattal.

In his verified bill of particulars, plaintiff states that as a result of the accident, he sustained, inter alia, facial scarring; loss of range of motion in the left shoulder; loss of range of motion in the neck from C2-C5; and loss of cervical lordosis between C2 and C7.

Plaintiff contends that he sustained a serious injury as defined in Insurance Law § 5102(d) in that he 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; a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute his 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; and a significant disfigurement. At his examination before trial Mr. Fattal testified that he presently has a crescent shaped half-inch scar as a result of the accident.

Dr. Paul J. Miller, a board certified orthopedic surgeon, retained by the defendant, examined Mr. Fattal on October 7, 2011. At the time of the examination, the plaintiff presented with pain in the neck, bilateral shoulders, bilateral hands and bilateral knees. Dr. Miller performed quantified and comparative range of motion tests. He found that the plaintiff had no limitations of range of motion in the cervical spine, right shoulder, left shoulder, right wrist/hand, left wrist/hand, right hip, left hip, right knee and left knee. His impression was a normal examination of the cervical spine, bilateral shoulders, bilateral wrist/hands, right and left hips and bilateral knees. He stated that his examination did not reveal objective evidence

of a disability/residual impairment resulting from the accident of December 19, 2008.

Defendants' counsel contends that the medical report of Dr. Miller as well as the deposition testimony of Mr. Fattal are sufficient to establish, prima facie, that plaintiff Avi Fattal has not sustained significant disfigurement; 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 his 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, plaintiff's attorney, Eric E. Rothstein, Esq., submits an affirmation in which he contends that the defendants failed to establish their prima facie entitlement to summary judgment because the motion does not address the "significant disfigurement" serious injury category. Counsel asserts that although the motion addresses the plaintiff's claim for orthopedic injuries, the defendants have not presented any medical evidence or photographs to demonstrate, prima facie, that there are no material issues of fact regarding the plaintiff's facial scar and as a result they are entitled to judgment as a matter of law.

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 report of Dr. Miller and the plaintiff's deposition testimony, were insufficient to meet its prima facie burden by demonstrating that the plaintiff did not sustain all of the serious injuries claimed in the bill of particulars 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. Miller's affirmation indicates that the plaintiff does not have any limitations of range of motion at the present time with respect to his claimed orthopedic injuries, the defendants have failed to present any medical evidence or photographs to rebut the plaintiff's claim that as a result of the accident he suffered a significant facial disfigurement. Although counsel asserts that the standard by which significant disfigurement is to be determined is whether a reasonable person would view the condition as unattractive or objectionable (citing Priestin v Massaro, 107 AD2d 742 [2d Dept. 1985]; also see Peterson v Cellery, 2012 NY Slip Op 1533 [3rd Dept. 2010]), defendants have not presented any evidence and thus have not satisfied their burden to show, prima facie, that the plaintiff's scar does not rise to this standard (see Licygiewicz v Stearns, 61 AD3d 1254 [3rd Dept. 2009]; Monkhouse v Maven Limo, Inc., 44 AD3d 630 [2d Dept. 2007]).

Therefore, since the defendants failed to meet their initial burden with respect to all of the plaintiff's alleged injuries, the burden does not shift to the plaintiffs to demonstrate material issues of fact (see Newman v Surf Glass Corp., 2012 NY Slip Op 2290 [2d Dept. 2012]; Bitterman v Dennis, 78 AD3d 627 [2d Dept. 2010]; Safer v Silbersweig, 70 AD3d 921 [2d Dept. 2010]; Hughes v Cai, 31 AD3d 385 [2d Dept. 2006]).

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

ORDERED, that the defendants' motion for an order granting summary judgment dismissing the complaint with respect to plaintiff AVI FATTAL is denied.

Dated: April 3, 2012
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.