

Molai v Abraham

2013 NY Slip Op 31013(U)

May 7, 2013

Supreme Court, Queens County

Docket Number: 11496/2011

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

- - - - - x

ALBERT MOLAI, Index No.: 11496/2011
Plaintiff, Motion Date: 04/25/13
- against - Motion No.: 112
Motion Seq.: 1

SONIA ABRAHAM and ABRAHAM P. KURIAN,
Defendant.

- - - - - x

The following papers numbered 1 to 15 were read on this motion by defendants, SONIA ABRAHAM and ABRAHAM P. KURIAN, for an order pursuant to CPLR 3212 granting defendants summary judgment and dismissing the plaintiff's complaint against them on the ground that the plaintiff did not sustain a serious injury within the meaning of Insurance Law §§ 5102 and 5104:

Papers
Numbered

Notice of Motion-Affidavits-Exhibits-Memorandum of Law...1 - 5
Affirmation in Opposition-Affidavits-Exhibits.....6 - 10
Reply Affirmation.....11 - 15

This is a personal injury action in which plaintiff, ALBERT MOLAI, seeks to recover damages for injuries he sustained as a result of a motor vehicle accident that occurred on May 27, 2009 in the vicinity of 224th Street and 93rd Road, Queens County, New York. Plaintiff claims that his vehicle was struck broadside on the passenger side because the defendant driver, Sonia Abraham, allegedly ran a stop sign at the intersection. As a result of the impact plaintiff's vehicle spun around and hit a telephone pole.

The plaintiff commenced this action by filing a summons and complaint on April 14, 2011. Issue was joined by service of the defendants' verified answer on September 13, 2011. A note of

issue was filed by the plaintiff on October 19, 2012. The matter is presently on the calendar in the Trial Scheduling Part for May 23, 2013. Defendants now move for an order pursuant to CPLR 3212(b), granting summary judgment dismissing the plaintiff's complaint on the ground that plaintiff did not suffer a serious injury as defined by Insurance Law § 5102.

In support of the motion, defendants submit an affirmation from counsel, Jerome D. Patterson, Esq; a copy of the pleadings; the affirmed medical report of orthopedist, Dr. John M. Lloyd; the affirmed medical report of neurologist, Dr. Daniel Feuer; and a copy of the transcript of the plaintiff's examination before trial.

Plaintiff contends that as a result of the accident he sustained disc herniations at C4-5, C5-6 and C6-7 as well as a disc protrusion at L4-L5. Plaintiff asserts 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; and 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.

Dr. Daniel Feuer, a board certified neurologist retained by the defendant, examined Mr. Molai, age 46, on April 17, 2012. The plaintiff reported to Dr. Feuer that as a result of the accident he sustained injuries to his head, neck, back and shoulders. On the date of the examination he presented with recurrent low back pain. Dr. Feuer conducted objective and comparative range of motion testing and found that the plaintiff showed no loss of range of motion of the cervical and lumbosacral spines. Based upon his physical examination and review of the records of the plaintiff's MRIs and medical records, he concludes that the neurological examination was normal and that, "based on a reasonable degree of clinical certainty, the plaintiff does not demonstrate any objective neurological disability or neurological permanency which is causally related to the accident of May 27, 2009. Dr. Feuer reports that plaintiff is neurologically able to engage in full active employment, as well as full activities of daily living without restriction.

Dr. John M. Lloyd, an orthopedist retained by the defendants examined the plaintiff on April 17, 2012. At the time of the examination the plaintiff reported occasional low back pain with

no radiation of symptoms to the legs. He did not have any neck pain nor any symptoms in the left wrist. He told Dr. Lloyd that following the accident he did not miss any time from work. Dr. Lloyd's physical examination revealed no loss of range of motion of the cervical spine, shoulders, left wrist, knees and lumbar spine. Based upon his review of the plaintiff's medical records and his physical examination he stated that the orthopedic examination was normal. His diagnosis was cervical sprain superimposed upon preexisting degenerative disc disease of the cervical spine resolved; left wrist sprain, resolved; and lumbar sprain, superimposed upon preexisting degenerative disc disease lumbar spine, resolved. Dr Lloyd states that there are no disc herniations reported by the radiologist. He states that he does not find any objective evidence of orthopedic disability related to the subject accident and that any abnormalities shown on the cervical and lumbar MRI scans are most probably mild degenerative changes not related to the accident.

In his examination before trial taken on March 2, 2012, the plaintiff testified that he presently works as an ink technician at Bemis Packaging. He stated that he could not work through October 2009 as a result of the accident. Immediately following the accident he was removed from the scene by ambulance and was transported to the emergency room at North Shore-LIJ Hospital where he reported chest pains and pain to his neck and left wrist. He was treated at the emergency room and then released. He subsequently began physical therapy treatments for his neck, shoulder back and right leg at Avenue Medical. He treated there for three and a half months and then stopped. He stated that he had a prior accident in 1987 where he also injured his neck and back.

Defendant's counsel contends that the medical report of Drs. Feuer and Lloyd together with the plaintiff's testimony is sufficient to demonstrate that the plaintiff has not sustained 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 Paul G. Vesnaver, Esq., submits his own affirmation as well as a copy of the police accident report (MV104); a copy of the complaint; the affirmed medical report of Dr. Miriam Kanter; the unaffirmed radiological reports of Richard J. Rizzuti; the unaffirmed

medical report of neurologist Dr. F. David Hannanian; and the affidavit of the plaintiff dated March 22, 2013. As the reports of Dr. Rizzuti and Dr. Hannanian were not affirmed they are not in admissible form for purposes of opposing the motion for summary judgment.

In his affidavit plaintiff states that shortly after the accident he began treatment and continued in treatment including physical therapy, acupuncture and chiropractor for nearly four months. He states that despite the treatment his pain, stiffness, and discomfort continue unabated. He states that at the time of the accident he was unemployed but due to his injuries from the accident he has not been able to return to work at the same level and earning capacity.

Dr. Miriam Kanter submits an affirmed report dated March 27, 2013. She states that plaintiff was originally referred to her on June 17, 2009 in connection with injuries he sustained in the motor vehicle accident of May 27, 2009. She states that as a result of the accident, Mr. Molai was confined to his home and lost work time for several weeks immediately following the accident. His initial complaints in June 2009 were non-radiating neck pain, low back pain and left wrist pain. She states that he was involved in a prior accident in 1997 wherein he sustained injuries to his neck, low back and left shoulder which resolved within a year after the accident. Her physical examination revealed significant limitations of range of motion of the cervical spine and lumbar spine. Following the initial examination, the plaintiff underwent four months of physical therapy for his injuries. Dr. Kanter concludes that plaintiff sustained disc herniations at C4-5, C5-6 and C6-7 which were caused by his accident of May 2009. Dr. Kanter conducted follow-up examinations on July 1, 2009, July 13, 2009, July 21, 2009, August 10, 2009 and September 14, 2009. She concludes that he sustained permanent consequential limitations of use, of his cervical spine and lumbar spine.

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 proof submitted by the defendants, including the affirmed medical reports of Drs. Feuer and Lloyd were sufficient to meet its prima facie burden by demonstrating that the plaintiff 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]).

In opposition to the motion, the plaintiff failed to provide any proof in admissible form which would raise a question of fact as to whether the plaintiff sustained permanent injuries which were causally related to the accident (see Choi v Guerrero, 82 AD3d 1080 [2d Dept. 2011]; Srebnick v Quinn, 75 AD3d 637[2d Dept. 2010]). Here, although plaintiff provided sufficient evidence from Dr. Kanter demonstrating that the plaintiff sustained injuries soon after the accident (see Perl v Meher, 18 NY3d 208 [2011]), plaintiff failed to provide any evidence in admissible form that the defendant had any limitations of range of motion in a recent examination. Dr. Kanter's affirmation indicates that her last examination of the plaintiff was on September 14, 2009. Without a medical report in admissible form indicating the plaintiff's current physical condition, the plaintiff's submissions are insufficient to raise a triable issue of fact as to whether the plaintiff sustained a serious permanent injury (see Harris v Ariel Transp. Corp., 55 AD3d 323[2d Dept. 2008]; Sullivan v Johnson, 40 AD3d 624 [2d Dept. 2007]; Barrzey v Clarke, 27 AD3d 600 [2d Dept. 2006]; Farozes v Kamran, 22 AD3d 458 [2d Dept. 2005][in order to raise a triable issue of fact the plaintiff was required to come forward with objective medical evidence, based upon a recent examination, to verify his subjective complaints of pain and limitation of motion]; Ali v Vasquez, 19 AD3d 520 [2d Dept. 2005]).

Further, the plaintiff testified that he stopped treatment after three and a half months with no plans to return for further treatment, but neither he nor Dr. Kanter offered no explanation as to why he did not receive any further treatment sustained in the accident for the next three years (see Smyth v McDonald, 101 AD3d 1789 [4th Dept. 2012][the 31-month gap in treatment fatally undermines plaintiffs' claim of serious injury with respect to the permanent consequential limitation of use and significant limitation of use categories of serious injury]; Ayala v Katsionis, 67 AD3d 836 [2d Dept. 2009]; Maffei v Santiago, 63 AD3d 1011 [2d Dept. 2009]).

However, a failure to raise a question of fact as to whether the plaintiff sustained a permanent consequential limitation or use of a body organ or member or a significant limitation of use of a body function or system and that the plaintiff did not sufficiently explain a significant gap in treatment is not dispositive of the claim of a nonpermanent injury under the 90/180 day category. Here, the plaintiff testified that he did not return to work until October, 2009 five months after the accident and Dr. Kantor substantiated his claim stating in her report that in her opinion the injuries suffered by the plaintiff prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than 90 of the 180 days following the subject accident (see Chunn v Carman, 8 AD3d 745 [3rd Dept. 2004]).

Accordingly, the evidence relied upon by plaintiff is sufficient to create a triable issue of fact with respect to whether plaintiff sustained 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.

Therefore, for all of the above-stated reasons, it is hereby,

ORDERED, that the defendants' motion for an order granting summary judgment dismissing the plaintiff's complaint is denied.

Dated: May 7, 2013
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.