

Mia v Singh
2013 NY Slip Op 32183(U)
September 13, 2013
Sup Ct, Queens County
Docket Number: 17025/10
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

MOHAMMED M. MIA and TASPIA MIA, an
infant, by her mother and natural
guardian, SHAHIN MIA, and SHAHIN MIA,
individually,

Index No.: 17025/10
Motion Date: 07/12/13
Motion No.: 107
Motion Seq.: 3

Plaintiffs,
- against -

JACQUELINE SINGH,

Defendant.

- - - - - x

The following papers numbered 1 to 24 were read on this motion by
defendant, JACQUELINE SINGH, for an order pursuant to CPLR 3212
granting defendant summary judgment and dismissing the complaint
of plaintiffs MOHAMMED MIA and TASPIA MIA, on the ground that
each plaintiff did not sustain a serious injury within the
meaning of Insurance Law §§ 5102 and 5104; and the cross-motion
by plaintiff on the counterclaim MOHAMMED M. MIA, dismissing the
counterclaim and all cross-claims against him on the ground that
plaintiff TASPIA MIA did not sustain a serious injury:

Papers
Numbered

Defendant's Notice of Motion-Affirmations-Exhibits....1 - 7
Cross-Motion by Plaintiff on the Counterclaim.....8 - 13
Plaintiffs' Affirmation in Opposition.....14 - 20
Plaintiffs' Affirmation in Reply.....21 - 24

In this action for negligence, the plaintiffs, MOHAMMED M.
MIA, TASPIA MIA and SHAHIN MIA, seek to recover damages for
personal injuries they each sustained as a result of a motor
vehicle accident that occurred on August 9, 2009 on Hillside
Avenue between 189th and 190th Streets in Queens County, New York.
Plaintiffs allege that they each sustained injuries when their
vehicle, which was stopped in traffic, was struck in the rear by
the vehicle owned and operated by defendant, Jacqueline Singh.

This action was commenced by the plaintiffs by the filing of a summons and complaint on July 2, 2010. Issue was joined by service of defendant's verified answer with counterclaim against Mohammed M. Mia dated August 31, 2010. A reply to counterclaim was served by the plaintiff on the counterclaim on April 11, 2011. A note of issue was filed on May 31, 2012. The note of issue was vacated in the trial scheduling part on June 4, 2010 due to outstanding discovery.

By order dated June 4, 2013, this Court granted the plaintiff's motion for partial summary judgment on the issue of liability and also granted the motion of plaintiff on the counterclaim dismissing the counterclaim on the ground that the defendant, Jacqueline Singh was responsible for the causation of the accident and plaintiff driver Mohammed Mia was not comparatively liable.

Defendant Singh now moves for an order pursuant to CPLR 3212(b), granting summary judgment dismissing the complaint of plaintiffs MOHAMMED MIA and TASPITA MIA on the ground that each plaintiff did not suffer a serious injury as defined by Insurance Law § 5102. Plaintiff on the counter-claim, Mohammed Mia, cross-moves for summary judgment pursuant to CPLR 3212 dismissing the counterclaim and any and all cross-claims against him on the ground that Taspita Mia did not sustain a serious injury under Insurance Law § 5102(d). However, as the counterclaim was previously dismissed by prior order of this court dated June 4, 2013, the cross-motion is academic.

In support of the motion, defendants submit an affirmation from counsel, William B. Stock; a copy of the pleadings; a copy of plaintiffs' verified bill of particulars; the affirmed medical reports of board certified neurologist, Dr. Marianna Golden; board certified orthopedic surgeon, Dr. Thomas P. Nipper; radiologist, Dr. Jessica F. Berkowitz; and copies of the transcripts of the examinations before trial of plaintiffs, Taspita Mia and Mohammed Mia.

In his verified bill of particulars, plaintiff, Mohammed Mia, states that as a result of the accident, he sustained, inter alia, a tear of the supraspinatus muscle of the left shoulder; disc herniations of the cervical and lumbar spine at C3-4, C4-5, C5-6, L1-2, L2-3, L3-4 and L4-5 as well as disc bulges at C2-3 and C6-7. Plaintiff Taspita Mia states that as a result of the accident she sustained disc herniations of the cervical and lumbar spines at L5-S1, C2-C3 and C3-C4 as well as disc bulges at L2-3, L4-5, C2-C3 and C6-C7.

Plaintiffs each contend that they sustained a serious injury as defined in Insurance Law § 5102(d) in that they 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 each plaintiff from performing substantially all of the material acts which constitute his or her 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. Marianna Golden performed an independent neurological examination of the plaintiffs on March 13, 2013. Dr. Golden states that Mr. Mia, age 59, stated that following the accident he suffered from headaches, pain in the neck and midback. At the time of the examination plaintiff had complaints of pain in the neck and lower back radiating to his left leg. Dr. Golden states that plaintiff's neurological examination was normal and that based upon her physical examination, it was her impression that there was no objective disability from a neurologic point of view and there was no objective evidence of any neurologic permanency.

Dr. Golden also examined Taspia Mia, age 20, on March 13, 2013. She was a seat belted front seat passenger in the vehicle that was struck in the rear. At the time of the examination this plaintiff complained of headaches, and pain in the neck and lower back. Dr. Golden states that Taspia's neurological examination was normal and that there are no objective neurological findings to substantiate the plaintiff's complaints. She states that based upon her physical examination, it was her impression that there was no objective disability from a neurologic point of view and there was no objective evidence of any neurologic permanency. She states that Ms. Mia is a student and she is capable of attending school and performing her normal activities without neurologic restrictions.

Dr. Nipper, an orthopedic surgeon, examined both plaintiffs on March 13, 2013. At the time of the evaluation, plaintiff Mohammed Mia, complained of pain in the neck and lower back. He made no complaints of pain to his left hip or left shoulder. Dr. Nipper performed objective and comparative range of motion testing and found that Mohammed Mia had no limitations of range of motion of the left shoulder, left hip, cervical spine, thoracic spine and lumbar spine. Dr. Nipper stated that it is his impression that there is no objective evidence of an orthopedic disability or permanency. Plaintiff is capable of working and performing all of his normal activities of daily living without limitations.

Dr. Nipper also examined plaintiff, Taspia Mia, on March 13, 2013. She complained of pain to the neck and lower back as well as having headaches. Range of motion testing on the plaintiff's cervical and lumbar spines showed no limitations at all. Dr. Nipper stated that Taspia showed no objective evidence of an orthopedic disability or permanency.

Dr. Berkowitz, a radiologist, reviewed the MRI studies of Taspia Mia's cervical spine and lumbar spine. Dr. Berkowitz found that there were no disc bulges or herniations present in either the cervical spine or lumbar spine. She concludes that Taspia Mia showed no evidence of acute traumatic injury to the cervical or lumbar spine.

Taspia Mia testified at an examination before trial on August 10, 2012. She stated that on the date of the accident, in August 2009, she was age 17 and was seated in the front passenger seat of her father's motor vehicle. She stated that her father's vehicle was completely stopped when it was struck in the rear by the defendant's vehicle at Hillside Avenue and 190th Street. As a result of the impact her left knee hit the dashboard. She testified that she and her father first sought treatment with Dr. Das the day following the accident. Taspia received physical therapy treatments with Dr. Das two times per week for six months for pain to her neck and back. At the time of the accident she was a student at Francis Lewis High School. The school was in summer recess in August but she returned to school in September without missing any days due to her injuries. She stated that she still experiences daily pain in her neck and back.

Mohammed Mia testified at an examination before trial on August 10, 2010. He stated that his vehicle was hit in the rear while he was stopped in traffic on Hillside Avenue between 189th and 190th Street. He stated that he went home following the accident but went for treatment with Dr. Das the next day. He stated that he treated with Dr. Das for a prior injury to his back and chest which he sustained in a motor vehicle accident in 2007. He stated that he treated with Dr. Das for six months following the 2007 accident. He stated that he did not have pain from the prior accident on the date of the subject accident. He stated when he first saw Dr. Das in 2009 he had pain to his neck, back and chest. He again treated for six months at a rate of twice a week for pain to his neck, back, chest and left shoulder. On the date of the accident he was employed by Kabco Pharmaceuticals. He testified that he only missed two or three days from work following the accident. He states that he still has pain in his neck back and left shoulder.

Defendant's counsel contends that the medical reports of Drs. Nipper, Golden and Berkowitz as well as each plaintiff's deposition testimony are sufficient to establish, prima facie, that each 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 each plaintiff from performing substantially all of the material acts which constitute his or her 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, Daniel Davidovic, Esq., submits his own affirmation as well as the affidavits of Taspia Mia and Mohammed Mia, the affirmed medical reports of Dr. Pradip Das and the unaffirmed radiological reports of Dr. Richard A. Heiden with respect to MRIs of Taspia Mia.

In his affidavit dated June 28, 2013, Mr. Mohammed Mia states that despite wearing a seat belt, when his vehicle was struck in the rear he experienced pain in his neck and back. He commenced treatment with Dr. Das, a physician specializing in pain management, two days following the accident due to pain in his neck, back, left shoulder and left hip. Dr. Das prescribed physical therapy which plaintiff attended for six months. He states that MRI studies showed that he sustained a partial tear of the tendon in the left shoulder, joint effusion of the left hip, and multiple herniations and disc bulges of the cervical and lumbar spines. He stated that his chest and back injuries sustained in the prior accident in 2007 were resolved by the time of the subject accident in 2009. He states that presently he still experiences severe pain on a daily basis in his back, neck, left shoulder and left hip. He states that the pain has severely restricted his ability to move.

In her affidavit dated June 28, 2013, Ms. Taspia Mia states that despite wearing a seat belt when her vehicle was struck in the rear, she felt pain to her neck and back. On August 11 2009, two days following the accident, she sought medical treatment for pain management with Dr. Das. She attended physical therapy with Dr. Das for six months. She states that her MRI studies indicated multiple disc herniations in the cervical and lumbar spines. She states that she still experiences pain on a daily basis in her back and neck.

Dr. Das submits two affirmed medical reports dated June 27, 2013, one for each plaintiff. With respect to Mr. Mia he states that on August 11, 2009 he examined Mr. Mia and found that he had severe neck pain, back pain and left shoulder pain. Her examined Mr. Mia again on May 19, 2012 and found that Mr. Mia had significantly diminished range of motion of the cervical spine, lumbar spine and left shoulder. He states that the injuries sustained by Mr. Mia are of a chronic nature and that as a result of the motor vehicle accident of August 2009, he has suffered a permanent consequential limitation of use of a body function system.

With respect to Taspia Mia, Dr. Das states that he first examined her two days following the accident. At that time he found that she had pain to her neck and back as a result of the accident. He examined Taspia again on May 19, 2012 and found that she had significant restrictions of range of motion of the cervical and lumbar spines. He diagnosed her as suffering from cervico-brachial plexopathy and lumbosacral derangement syndrome which was causally related to the accident of August 2009. Dr. Das states that her injuries are chronic and in his opinion, Taspia suffered a permanent consequential limitation of use of a body function system.

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 competent proof submitted by the defendant, including the affirmed medical reports of Drs. Nipper, Golden and Berkowitz as well as the examinations before trial of each plaintiff indicating that they did not miss more than three days from work or school is sufficient to meet defendant' prima facie burden by demonstrating that each 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]).

This Court finds, however, that the proof submitted by plaintiffs in opposition to the motion is insufficient to rebut defendant's prima facie showing, as it fails to contain medical evidence sufficient to raise a triable issue of fact regarding each plaintiff's claim of serious injury.

The affirmed contemporaneous reports of Dr. Das are sufficient to provide evidence in admissible form show that soon after the accident each plaintiff sustained causally related injuries (see Perl v Meher, 18 NY3d 208 [2011]). However, plaintiff failed to provide any evidence in admissible form that the defendant had limitations of range of motion in a recent examination. The most recent examination performed by Dr. Das was in May 2012, although his affirmations were written in June 2013 one year later. Without a medical report indicating the plaintiff's current physical condition, the plaintiff's submissions were insufficient to raise a triable issue of fact as to whether each plaintiff sustained a serious injury (see Sham v. B&P Chimney Cleaning & Repair Co., Inc., 71 AD3d 978 [2d Dept. 2010][any projections of permanence have no probative value in the absence of a recent examination]; 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]).

Moreover, in his report concerning Mr. Mia, Dr. Das did not acknowledge or address the significance of the fact that the Mr. Mia sustained injuries to his chest and back in a motor vehicle accident two years prior to the subject accident. Dr. Das did not provide evidence ruling out the prior accident as the cause of plaintiff's limitations (see Wallace v Adam Rental Transp., Inc., 68 AD3d 857 [2d Dept. 2009]; Joseph v A & H Livery, 58 AD3d 688 [2d Dept. 2009]; Yun v. Barber, 63 AD3d 1140 [2d Dept. 2009]; Penaloza v Chavez, 48 AD3d 654 [2d Dept. 2008]), and therefore Dr. Das's conclusion that the plaintiff, Mohammed Mia, sustained significant limitations of a permanent nature as a result of the subject accident are merely speculative (see Yunatanov v

Stein, 69 AD3d 708 [2d Dept. 2010]; Cantave v Gelle, 60 AD3d 988 [2d Dept. 2009]; Silla v Mohammad, 52 AD3d 681 [2d Dept. 2008]; Rabolt v Park, 50 AD3d 995 [2d Dept. 2008]; cf. Keum Lee Jeong v Imperial Contract Cleaning, Inc., 63 AD3d 795 [2d Dept. 2009]).

Further, each plaintiff failed to explain why they did not have any treatment for their injuries since the time they stopped going for physical therapy six months after they began treatments with Dr. Das. Neither plaintiff provided an explanation as to why they stopped treatment after six months and have failed to explain why they have not have any subsequent treatment for their injuries in the past four years. Further, their treating provider did not submit any explanation as to why treatment was stopped after six months (see Pommells v Perez, 4 NY3d 566 [2005][plaintiff failed to provide an adequate explanation as to why he failed to pursue any treatment for his injuries after the initial six-month period, nor did his doctors]). This court finds that the plaintiffs have not provided any competent medical evidence of any treatment during the past four years other than six months of physical therapy.

Accordingly, as there was no adequate explanation for the lengthy gap in treatment, this court finds that the plaintiffs failed to raise a question of fact as to whether they each sustained a serious injury within the meaning of Insurance Law § 5102(d). The gap in treatment renders their medical expert's opinion on causation speculative (see Hackett v AAA Expedited Frgt. Sys., Inc., 54 AD3d 721 [2d Dept. 2008]; Singh v DiSalvo, 48 AD3d 788 [2d Dept. 2008]; Ning Wang v Harget Cab Corp., 47 AD3d 777 [2d Dept. 2008]; King v. Islam, 43 AD3d 1001 [2d Dept. 2007]; Mahabir v Ally, 26 AD3d 314 [2d Dept. 2006]; Faroze v. Kamran, 22 AD3d 458 [2d Dept. 2005]; Ersop v Variano, 307 AD2d 951 [2d Dept. 2003]).

Lastly, neither plaintiff has presented competent medical evidence sufficient to create issues of fact as to whether they suffered a "serious injury" under the "90/180" category set forth in Insurance Law § 5102(d). Mr. Mia testified that he returned to full time work three days after the accident and Ms. Mia testified that she did not miss any days from school as a result of the accident (see Sham v B&P Chimney Cleaning & Repair Co., Inc., 71 AD3d 978 [2d Dept. 2010]; Pacheco v Connors, 69 AD3d 818 [2d Dept. 2010]).

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

ORDERED, that the defendant's motion for summary judgment pursuant to CPLR §3212 dismissing the complaint of plaintiffs MOHAMMED M. MIA and TASPIA MIA, an infant, by her mother and natural guardian, SHAHIN MIA, on the grounds that each plaintiff failed to sustain a "serious injury" within the meaning of Insurance Law §5102(d) is granted.

The clerk is directed to enter judgment accordingly.

Dated: September 13, 2013
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C.