

Ogeer v JTT Express Serv.

2013 NY Slip Op 32342(U)

October 1, 2013

Supreme Court, Queens County

Docket Number: 31155/2010

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

FAREED OGEER,

Plaintiff,

- against -

JTT EXPRESS SERVICE AND PAUL T.
CARLSON,

Defendant.

- - - - - x

The following papers numbered 1 to 13 were read on this motion by defendants, JTT EXPRESS SERVICE and PAUL T. CARLSON, for an order pursuant to CPLR 3212 granting defendants summary judgment and dismissing the complaint of FAREED OGEER on the ground that said 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 - 13

This is a personal injury action in which plaintiff, FAREED OGEER, seeks to recover damages for injuries he sustained as a result of a motor vehicle accident that occurred on July 1, 2010, at approximately 6:30 p.m. on Sunrise Highway near its intersection with Brookville Boulevard, Queens County, New York. At the time of the accident, the plaintiff's vehicle was struck in the rear by the vehicle owned by defendant, JTT Express Service and operated by defendant, Paul T. Carlson. As a result of the accident, the plaintiff suffered injuries to his neck and back.

The plaintiff commenced this action by filing a summons and complaint on December 15, 2010. Issue was joined by service of defendant's verified answer dated February 9, 2011. A note of issue was filed by the plaintiff on September 14, 2012. The matter is on the calendar in the Trial Scheduling Part for October 16, 2013. Defendant now moves 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, defendant submits an affirmation from counsel, James P. Gilroy, Esq; a copy of the pleadings; plaintiff's verified bill of particulars; the affirmed medical report of board certified orthopedic surgeon, Dr. Frank M. Hudak; a copy of the medical report of neurologist, Dr. Daniel J. Feuer; and a copy of the transcript of the examination before trial of the plaintiff, Fareed Ogeer.

In his verified Bill of Particulars, plaintiff, age 42, states that as a result of the accident he sustained, inter alia, disc protrusion at C3-C4, C4-C5, L4-L5 and L5-S1. He states that he was confined to his home and bed for fifteen weeks following the accident.

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; 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. Frank M. Hudak, a board certified orthopedic surgeon retained by the defendant, examined Mr. Ogeer on January 30, 2013. The plaintiff stated that when he was struck by the defendant's vehicle he injured his neck and lower back. At the time of the examination the plaintiff stated to the physician that his neck was "ok" and stated that he has a little bit of pain that occurs now and then in the area of the lumbosacral spine. He stated that he was unemployed at the time of the accident but is now working as a part time cab driver. Dr. Hudak performed objective and quantified range of motion tests and found that there were no significant limitations of range of

motion of the plaintiff's cervical spine, lumbosacral spine, left shoulder, elbows, wrists and hands. His impression was status post cervical sprain, resolved; status post left shoulder sprain, resolved; and status post lumbosacral sprain, resolved. He states that based upon his examination, "there are no objective findings to confirm any permanency or disability regarding the plaintiff's motor vehicle accident of July 1, 2010. The plaintiff is capable of normal activities of daily living without restrictions and can return to work full duty with no restrictions."

In his affirmed medical report, Dr. Feuer states that he examined the plaintiff on January 30, 2013. He told Dr Feuer his vehicle was struck in the rear at which time he injured his neck and lower back. When asked how he was feeling the plaintiff responded "I'm alright now." He denied any neck or back pain. He admitted to a prior motor vehicle accident approximately 10 years ago in which he sustained injury to the neck and lower back. Range of motion testing performed by Dr. Feuer indicated no loss of range of motion of the cervical and lumbosacral spines. He stated that the neurological examination of the plaintiff was normal and that the plaintiff did not demonstrate an objective neurological disability or neurological permanency. He states that the plaintiff is neurologically stable to engage in full active employment as a driver as well as full activities of daily living without restriction.

In his examination before trial, taken on May 24, 2012, plaintiff testified that he is self-employed as a cab driver. On the date of the accident he was traveling on Sunrise Highway and stopped at a red traffic signal at Brookville Boulevard. He stated that his vehicle was struck from behind while he was waiting at the traffic light. An ambulance came to the scene but he declined to leave the scene by ambulance. He drove himself home and then was driven to the emergency room at Jamaica Hospital the same day at which time he made complaints of pain to his neck and lower back. He stated that he had a prior accident ten years ago where he injured his neck and back and received physical therapy. He stated that following this accident he was referred to Dr. McGee at Yellowstone Medical and Rehabilitation for a course of physical therapy. He testified that the physical therapy treatments to his neck, back and shoulder lasted for two or three months until his no-fault benefits were terminated. He did not have any further treatment for his injuries since that time. He stated that he worked part time in construction following the accident. He stated that he still feels pain to his neck and back on a daily basis.

Defendant's counsel contends that the medical reports of Drs. Feuer and Hudak together with the plaintiff's testimony that he worked part time following the accident, 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 Mark J. Linder, Esq., submits his own affirmation as well as the affidavit of the plaintiff dated May 31, 2013; the affirmed MRI reports of Dr. Bruce Campbell; the affirmed medical report of neurologist, Dr. Paul Lerner; records from plaintiff's treating physicians; and unaffirmed MRI reports from studies made after his 2003 accident.

In his affirmed report, Dr. McGee states that he was aware of the plaintiff's prior injury from the motor vehicle accident of 2003 from which he made a full recovery. He states that the plaintiff stopped receiving physical therapy from his facility because his no-fault benefits were terminated and he did not have private health insurance and could not afford to pay for treatment out of pocket. He states that on July 9, 2010, one week after the accident, he conducted computerized range of motion testing which showed significant limitations of range of motion of the plaintiff's cervical and lumbar spines. He states that in his opinion plaintiff's injuries to his cervical and lumbar spines are causally related to the accident of July 1, 2010.

In his affirmed report, Dr. Bruce Campbell, a board certified radiologist, states that on July 19, 2010, his office conducted MRI tests on plaintiff's cervical spine and lumbar spine. His review of the MRIs showed disc protrusions at C3-C4, C4-C5, L4-L5 and L5-S1.

Dr. Paul Lerner, examined the plaintiff on June 13, 2013. At that time his examination showed a loss of range of motion of the plaintiff's cervical spine and lumbar spine. He states that the plaintiff sustained a lumbar strain with disc herniations as well as cervical strain and radiculopathy with disc herniations. He states that his injuries result in a moderate degree of impairment and disability of the cervical

and lumbar spine including pain and loss of normal range of motion. He states that considering the duration his symptoms have persisted and lack of resolution, the conditions are considered permanent and are causally related to the subject automobile accident.

In his affidavit dated May 31, 2013, the plaintiff states that after the accident he received physical therapy for three months at Yellowstone Medical and Rehabilitation. Once payment by no-fault was terminated he stopped treating because he could not afford to pay out of pocket. He states that despite the physical therapy he still feels pain in his neck and back. He states that although he was involved in a prior automobile accident in 2003, in which he injured his neck and back, he was treated at that time and made a full recovery.

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 defendant, including the affirmed medical reports of Drs. Feuer and Hudak was sufficient for defendant 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]).

However, this Court finds that the plaintiff raised triable issues of fact by submitting the affidavits of Drs. Lerner, McGee and Campbell attesting to the fact that the plaintiff had sustained significant limitations in range of motion of the cervical spine and lumbar spine both

contemporaneous to the accident and in a recent examination, and concluding that the plaintiff's limitations were significant and permanent and resulted from trauma causally related to the accident (see Ortiz v. Zorbas, 62 AD3d 770 [2d Dept. 2009]; Azor v Torado, 59 ADd 367 [2d Dept. 2009]). As such, the plaintiff raised a triable issue of fact as to whether he 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 ADd 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 addition, the plaintiff adequately explained the gap in treatment by submitting his own affidavit as well as the affidavit of Dr. McGee stating that no-fault had stopped his benefits and he could not afford to pay for his treatments out-of-pocket (see Abdelaziz v Fazel, 78 AD3d 1086 [2d Dept. 2010]; Tai Ho Kang v Young Sun Cho, 74 AD3d 1328 [2d Dept. 2010]; Domanas v Delgado Travel Agency, Inc., 56 AD3d 717 [2d Dept. 2008]; Black v Robinson, 305 AD2d 438 [2d Dept. 2003]).

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

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

Dated: October 1, 2013
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.