

Moore v Colby Cab Corp.

2016 NY Slip Op 32057(U)

September 9, 2016

Supreme Court, Bronx County

Docket Number: 0303704/2013

Judge: Wilma Guzman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

Index No. 0303704/2013
Motion Calendar No. 14
Motion Date: 6/6/16

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ANUM MOORE,

Plaintiff,

-against-

COLBY CAB CORP. and MO ALOM HOSSAIN,

Defendants.
-----x

DECISION/ ORDER

Present:
Hon. Wilma Guzman
Justice Supreme Court

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion to dismiss the plaintiff's complaint:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Affirmation in Support,	
Exhibits Thereto	1
Affirmation in Opposition	2
Reply Affirmation	3

Motion decided as follows: Upon deliberation of the application duly made by defendants herein, by **NOTICE OF MOTION**, and all the papers in connection therewith, for an Order: (1) Pursuant to CPLR §§3211(a)(2), 3211(a)(7) and 3212, granting summary judgement and dismissing plaintiff's Complaint, upon the grounds that plaintiff's injuries do not constitute "serious injury" as defined by New York State Insurance Law §§5102(d) and 5104; and (2) pursuant to CPLR §3211(a)(7), dismissing plaintiff's claim for negligent entrustment against defendants, is heretofore granted in part and denied in part.

This action involves injuries suffered by plaintiff as a result of a November 16, 2012 motor vehicle accident. The motor vehicle of the then thirty four (34) year old plaintiff was allegedly rear ended by a motor vehicle owned by COLBY CAB CORP. (hereinafter "COLBY") and operated by MO ALOM HOSSAIN (hereinafter "HOSSAIN") while driving on the Grand Central Highway in Queens, NY. As a result of the accident, plaintiff claims numerous injuries, including, but not limited to, injuries to his neck, lower back and left knee. It is not disputed that plaintiff had sickle cell anemia at the time before, during and after the subject accident.

Defendants have made a *prima facie* showing of entitlement to summary judgement as a matter of law, that plaintiff did not sustain a serious injury within the meaning New York Sate Insurance Law §5102(d) and 5104. Defendants attach the reports of Dr. Radin, Dr. Nason, Dr. Elkin and Dr. Goodman to demonstrate that plaintiff did not suffer a permanent and consequential limitation of use of a body organ or member, and/or a significant limitation of a body or system, as a result of the accident in question.

Plaintiff presented to Dr. Arthur Radin on November 17, 2014. The doctor examined the plaintiff, reviewed his medical records dating back to the time of the accident and discussed with the patient his medical history. Although Dr. Radin found mild restrictions in the range of motion of plaintiff's right shoulder, hips bilaterally and left knee, he attributed them to being abnormalities that "are consistent with the effects of sickle cell anemia (which he has had since birth) and possibly, to prior traumatic injuries." The doctor found "no evidence that his [plaintiff's] arthritic changes are related to his motor vehicle accident; or that his accident has further impaired his ability to work or function independently." Moreover, Dr. Radin was skeptical that plaintiff was actually experiencing an increase in the frequency and/or severity of his sickle cell disease and his migraine headaches after the subject accident, as his medical records "numerous discrepancies, omissions, and misrepresentations in his account engender significant doubts as to the veracity of his claims." Finally, the doctor concluded that plaintiff could resume his pre injury activities.

Plaintiff presented to Orthopedist, Dr. Lisa Nason, on December 15, 2014 with complaints of pain in his cervical spine, lumbar spine and left knee. The doctor reviewed plaintiff's medical records dating back to the accident and some of the pleadings in connection to this matter. Upon examination of plaintiff, Dr. Nason found no restrictions in the plaintiff's cervical and lumbar spine, left knee or reflexes. According to Dr. Nason, plaintiff was "status post cervical and lumbar sprain/strain, resolved;" and "status post left knee sprain/contusion, resolved." Moreover, the doctor opined that "no orthopedic treatment inclusive of physical therapy was needed. The claimant may work and perform daily activities without restriction. There is no evidence of permanency in the claimant's condition."

Plaintiff presented to Neurologist, Dr. Rene Elkin, on September 19, 2014, for an independent neurological examination. The doctor reviewed plaintiff's medical records dating back to the accident and some of the pleadings in connection to this matter. According to the doctor, since the accident, plaintiff had complaints of increased frequency of sickle cell crises; pain in the left knee that interfered with ambulation; lower back pain that prevented him from sitting or standing; stiffness and restriction of range of motion of his neck, as well as "tingling and burning in his fingers and also in his feet lasting five-to-ten minutes;" and weekly headaches. Upon examination of plaintiff, Dr. Elkin found no limitations in plaintiff's neck. Examination of plaintiff's lumbar spine revealed mild restriction in the lower back of forward flexion "associated with back pain and also pain in the hip," however, retroflexion as well as lateral bending and lateral rotation were normal. The doctor found no restrictions in plaintiff's knee. According to Dr. Elkin, plaintiff's examination revealed "no objective evidence for any structural neurologic injury attributed to this accident." The doctor notes that the reported findings of plaintiff's MRI's of his cervical and lumbosacral spines are "unlikely to have been caused by the accident." Moreover, the doctor notes that the "ongoing subjective complaints in the neck and lower back may be explained on the basis of non specific age related cervical and lumbar degenerative spondylosis, independent and unrelated to the subject accident." Moreover, the "observed mild restriction of range of motion of the lower back may also be attributed to the degenerative changes in the lumbar spine."

On October 21, 2014, Dr. Robert Goodman performed an independent Radiology review on plaintiff who had an MRI of the left knee on December 12, 2012, approximately three and a half (3 ½) to four (4) weeks following the injury. The doctor notes that the “bone marrow demonstrates some heterogeneous signal within the distal femur probably representing prior infarcts. Moreover, he finds “chondral thinning involving the articular surface of the medial femoral condyle consistent with degenerative change. A degenerative tear is identified within the posterior horn of the medial meniscus.” Accordingly, the doctor’s impression was “degenerative change and probable degenerative tear of the posterior horn of the medial meniscus.” Furthermore, he notes that “there is no evidence of acute edema or injury.”

On October 21, 2014, Dr. Robert Goodman performed an independent Radiology review on plaintiff who had an MRI of the cervical spine on December 19, 2012. The doctor found degenerative changes involving plaintiff’s C3/4, C4/5, C5/6 and C6/7 discs. C5/C6 did not demonstrate significant stenosis or herniation. C6/7 disc demonstrated a left sided osteophyte or herniation extending into the neural foramen. The C7/T1 demonstrated degenerative change. The doctor concludes the findings “are related to degenerative disease and not to an acute event. The herniation on the left at C6/7 could also represent a bone ridge or osteophyte.”

Similarly, on October 21, 2014, Dr. Robert Goodman performed an independent Radiology review on plaintiff who had an MRI of the lumbar spine on December 27, 2012. The doctor’s impression was that of a normal MRI of the lumbar spine with no herniations. Dr. Goodman specifically disagreed with the report performed at Aris Diagnostic Medical. According to Dr. Goodman, “[t]he outside report states a 2 mm broad based central disc herniation at L5/S1. I [Dr. Goodman] did not see herniation at this level.”

As defendants have established a *prima facie* entitlement to summary judgement, the burden shifts to plaintiff to demonstrate a material issue of fact that he suffered a permanent and consequential limitation of use of a body organ or member, and/or a significant limitation of a body or system, as a result of the accident in question. Furthermore, plaintiff must demonstrate an issue of fact that as a result of his injuries, he was not able perform his usual or customary activities for 90 to 180 days following the subject accident. This Court finds that plaintiff has set forth sufficient issues of fact to warrant denying this application by defendants herein.

Plaintiff has demonstrated an issue of fact that he suffered a permanent and consequential limitation of use of a body organ or member, and/or a significant limitation of a body or system, as a result of the accident in question.

On October 27, 2014, plaintiff presented to Orthopedist, Dr. Gabriel Dassa, for an evaluation for injuries sustained as a result of the November 16, 2012 motor vehicle accident. Plaintiff complained of persisting pain in his left knee associated with swelling and restrictive range of motion as well as persistent radiating neck and back pain. The doctor reviewed plaintiff’s medical records, including, but not limited to: (1) an MRI of his cervical spine on December 19, 2012, which documented C5-C6 and C6-C7 disk herniation with C3-C4 disk bulge; (2) an MRI of lumbar spine

on December 27, 2012, which documented a disk herniation at L5-S1; (3) an MRI of the lumbar spine on December 27, 2012, which documented a disk herniation at L5-S1; and (4) a December 12, 2012 MRI of the left knee, which documented a flap tear involving the posterior horn of the medial meniscus with joint effusion. The doctor performed range of motion tests on plaintiff's cervical and thoracolumbar spine as well as his bilateral knee and indicated the normal ranges, actual ranges and the tests performed. Dr. Dassa notes that plaintiff's examination revealed restricted range of motion to the cervical and thoracolumbar spine as well as the left knee. The examination also revealed findings of persistent cervical and lumbar nerve root irritation and inflammation as evidenced by positive straight leg raising and positive Spurling test. The exam also revealed findings of persistent internal derangement to the left knee associated with swelling, loss of normal range of motion, and positive McMurray and Apley's compression. The doctor concluded that the evaluation and findings "represent objective evidence of a persistent orthopedic impairment to the left knee, cervical spine and back that was chronic and permanent in nature." The doctor further concluded that the injuries were a direct result of the underlying accident. Moreover, the doctor notes that plaintiff would benefit from interventional pain management to the neck and back and would "absolutely" need left knee arthroscopic surgery.

Furthermore, the plaintiff attaches his medical records from Mt. Sinai Hospital, his physical therapy records from Cedars Medical/Preferred Care Physical Therapy for injuries to his neck, back and left knee, which he claims to have sustained from the underlying accident. Notably, plaintiff presented to Cedars Medical/Preferred Care Physical Therapy no fewer than forty eight (48) times from November 28, 2012 to July 10, 2013. His treating doctor there, Dr. Erie Agustin, Affirmed that plaintiff was receiving treatment for injuries sustained in the subject motor vehicle accident. The doctor noted plaintiff's limited range of motion in his cervical and lumbar spine (tests that were performed during his physical therapy treatment), as well as the disc herniation and medial meniscus tear, which, the doctor concludes, were all traumatic in nature and caused by the subject accident.

The report from Dr. Dassa, plaintiff's testimony, the medical records from Mt Sinai Hospital, the physical therapy records from Cedars Medical/Preferred Care Physical Therapy and the Affirmation by Dr. Agustin clearly demonstrate, at the very least, an issue of fact that plaintiff suffered a permanent and consequential limitation of use of a body organ or member, and/or a significant limitation of a body or system, as a result of the accident in question.

Moreover, plaintiff's medical records, including but not limited to, records from Cedars Medical/Preferred Care Physical Therapy, as well as his own sworn testimony, clearly create a material issue of fact as to whether plaintiff was able to perform his usual and customary activities for 90 days out of 180 days following the accident. As indicated above, plaintiff presented to Cedars Medical/Preferred Care Physical Therapy no fewer than forty eight (48) times from November 28, 2012 to July 10, 2013. The records contain numerous references to plaintiff's physical limitations and describe how his injuries interfered with his usual and customary activities. Further, plaintiff testified that due to his injuries in connection to the accident, he could no longer play sports, walk more than four blocks, or stand, sit or lay down for long periods of time.

As such, defendants' application to dismiss plaintiff's Complaint, upon the grounds that plaintiff's injuries do not constitute "serious injury" as defined by New York State Insurance Law §§5102(d) and 5104 is heretofore denied.

Defendant's application to dismiss plaintiff's claim for negligent entrustment is heretofore granted. In order to establish a claim for negligent entrustment, plaintiff must demonstrate that COLBY had "some special knowledge concerning a characteristic or condition peculiar to the person, which renders a person's use of chattel unreasonably dangerous... or some special knowledge as to a characteristic or defect peculiar to the chattel, which renders it unreasonably dangerous." Zara v. Perzan, 185 A.D.2d 236, 586 N.Y.S.2d 139 (1992). Plaintiff has failed to offer any evidence to demonstrate liability under the theory of negligent entrustment. It appears that the vehicle owned by COLBY was operated by HOSSAIN, an individual who had a valid Class E New York State driver's license and a valid hack license. As plaintiff has not set forth any evidence to demonstrate that COLBY had some special knowledge concerning a characteristic or condition peculiar to HOSSAIN, which rendered HOSSAIN's use of the cab unreasonably dangerous, or some special knowledge as to a characteristic or defect peculiar to the cab itself, plaintiff's claim for negligent entrustment must be dismissed.

Accordingly, it is:

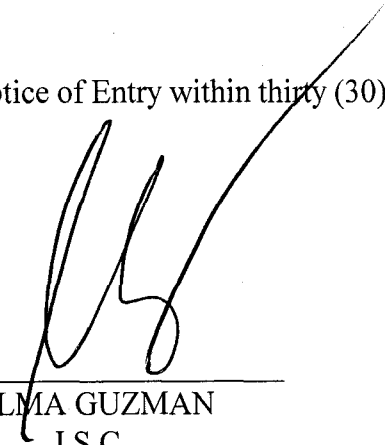
ORDERED that the Motion by defendants, seeking to dismiss plaintiffs' Complaint for failure to meet the threshold limits set by New York State Insurance Law § 5102(d) and 5104, is heretofore denied. It is further

ORDERED that the Motion by defendants seeking to dismiss plaintiff's claim for negligent entrustment is heretofore granted. It is further

ORDERED that defendants shall serve a copy of this Order with Notice of Entry within thirty (30) days of entry of this Order.

The forgoing constitutes the Decision and Order of the Court.

Dated: 9/9/16



WILMA GUZMAN
J.S.C.