

Peterson v Alijaj

2016 NY Slip Op 32085(U)

September 6, 2016

Supreme Court, Queens County

Docket Number: 13267/2014

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

GARY PETERSON, Index No.: 13267/2014
Plaintiff, Motion Date: 8/12/16
- against - Motion No.: 95
FATMIRA ALIJAJ, JOHN DOE, GLOBAL Motion Seq.: 2
GALAKTIKA CORP. and SARVAR
ABDURAZAKOV,

Defendants.

- - - - - x

The following papers numbered 1 to 11 read on this motion by
defendants GLOBAL GALAKTIKA CORP. and SARVAR ABDURAZAKOV for an
order pursuant to CPLR 3212 granting defendant summary judgment
and dismissing plaintiff's complaint on the ground that there are
no triable issues of fact and that liability has failed to be
established on the part of defendants GLOBAL GALAKTIKA CORP. and
SARVAR ABDURAZAKOV, and/or in the alternative, plaintiff did not
sustain a serious injury within the meaning of Insurance Law §§
5104(a) and 5102(d); and on this cross-motion by defendant
FATMIRA ALIJAJ for an Order dismissing plaintiff's complaint and
granting summary judgment to defendant FATMIRA ALIJAJ on the
ground that plaintiff did not sustain a serious injury within the
meaning of Insurance Law §§ 5104(a) and 5102(d):

Notice of Motion-Affirmation-Exhibits.....1 - 4
Notice of Cross-Motion-Affirmation-Exhibit.....5 - 8
Affirmation in Opposition-Exhibits.....9 - 11

In this negligence action, plaintiff seeks to recover
damages for personal injuries allegedly sustained as a result of
a motor vehicle accident that occurred on March 8, 2014 on
Webster Avenue at or near its intersection with East Gun Hill
Road, in Bronx County, New York. At the time of the accident,
plaintiff was a passenger in a taxi operated by defendant Sarvar
Abdurazakov and owned by defendant Global Galaktika Corp. In the
verified bill of particulars, plaintiff alleges that he sustained
serious injuries to his cervical and lumbar spine.

Plaintiff commenced this action by filing a summons and complaint on September 5, 2014. Issue was joined by defendants Global Galaktika Corp. and Sarvar Abdurazakov (collectively hereinafter defendants) serving an answer on November 10, 2014. Defendant Fatmira Alijaj (hereinafter co-defendant) served an answer on October 8, 2014. Defendants now moves for an order pursuant to CPLR 3212(b), granting summary judgment and dismissing plaintiff's complaint on the ground that there are no triable issues of fact and/or plaintiff did not suffer a serious injury as defined by Insurance Law § 5102. Co-defendant cross-moves to dismiss 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, Alexander Perchekly, Esq.; a copy of the Police Accident Report (MV-104AN); a copy of the pleadings; a copy of the verified bill of particulars; a copy of the transcript of the examination before trial of plaintiff taken on August 5, 2015; a copy of the transcript of the examination before trial of co-defendant taken on September 22, 2015; a copy of the Note of Issue; a copy of the affirmed medical report of Dr. Edward M. Weiland; and a copy of the affirmed MRI examination report of Dr. Audrey Eisenstadt.

At his deposition, plaintiff testified that on the date and time of the accident he was traveling with his mother in a taxi. He was 42 years old. Prior to the accident, co-defendant's vehicle was traveling for approximately three minutes alongside defendants' taxi. Both vehicles came to a stop at a traffic light. Co-defendant's vehicle was traveling in the middle lane and defendants' taxi was in the right lane. When both vehicles started to move for the green light, they both traveled for a quarter block when the accident occurred. Plaintiff testified that co-defendant's vehicle was trying to cut in front of defendants' taxi. As a result of the accident, he was not confined to bed or home.

At her deposition, co-defendant testified that she wanted to make a right turn, but defendants' taxi was traveling in a bus lane to the right of her vehicle. She testified that defendants were traveling in the bus lane to pass her vehicle as she was making a right-hand turn. She was more than half way done with the right-hand turn when the taxi struck the rear door on the passenger side of her vehicle. She further testified that the lane she was traveling in was a designated right turn only lane with an arrow painted on the road.

Based on the submitted deposition testimony, counsel for defendants contends that plaintiff's complaint should be dismissed as against defendants because co-defendant made a right turn from the left lane.

In opposition, counsel for co-defendant, Anne L. Vicory, Esq., contends that there are genuine issues of material fact including whether the taxi was impermissibly driving in a bus lane, whether co-defendant was turning from a designated right turn lane, whether the taxi was trying to pass co-defendant's vehicle, and whether the driver of the taxi failed to yield and to observe what was there in the roadway to be seen. Counsel further contends that the motion is premature as the driver of the taxi, defendant Sarvar Abdurazakov, has not yet been deposed. Plaintiff's counsel, Andrey Tikhomirov, Esq., opposes the motion for the same reasons.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form in support of his or her position (see Zuckerman v. City of New York, 49 NY2d 557[1980]). "A court deciding a motion for summary judgment is required to view the evidence presented in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and proof submitted by the parties in favor of the opponent to the motion" (Myers v Fir Cab Corp., 64 NY2d 806 [1985]).

Viewing the evidence submitted in the light most favorable to the nonmoving parties, this Court finds that there are factual issues concerning whether both drivers met their respective duty to observe what should have been observed and the duty to exercise reasonable care under the circumstances. Additionally, there are issues of credibility that must be determined by the trier of fact rather than on a motion for summary judgment. "A court may not weigh the credibility of witnesses on a motion for summary judgment, unless it clearly appears that the issues are not genuine, but feigned" (Conciatori v Port Auth. of N. Y. & N. J., 46 AD3d 501 [2d Dept. 2007]). Here, the parties have presented differing versions as to how the accident occurred, including whether defendants' taxi was traveling in a bus lane, thus there are triable issues of fact (see Boockvor v Fischer, 56 AD3d 405 [2d Dept. 2008]; Makaj v Metropolitan Transp. Auth., 18 AD3d 625 [2d Dept. 2005]).

Regarding that branch of the motion and the cross-motion seeking dismissal of plaintiff's complaint on the ground that plaintiff did not sustain a serious injury, plaintiff appeared for an independent neurologic examination on September 22, 2015. Plaintiff presented to Dr. Weiland with current complaints of thoracolumbar pain radiating to the posterior aspect of his hips. Dr. Weiland identifies the medical records he reviewed and performed objective range of motion testing using a goniometer. He found full range of motion in plaintiff's cervical spine, thoracic spine, lumbar spine, and bilateral shoulders. All other objective tests were negative. Dr. Weiland concludes that there is no evidence of any neurological deficits and maximum medical improvement has been obtained with rehabilitation treatments being offered to plaintiff. He states that there is no reason why plaintiff should not be able to perform activities of daily living, there is no neurologic disability, permanency, or residual.

Dr. Eisenstadt performed an examination of plaintiff's cervical and lumbar spine MRIs both taken on April 5, 2015. She found, *inter alia*, degenerative changes, anterior osteophyte formation and left uncinat/facet joint hypertrophy. She states that such changes could not have developed in less than six months time and have no traumatic etiology.

Defendants' counsel and co-defendant's counsel contend that the medical reports and plaintiff's testimony are sufficient to demonstrate that plaintiff did not sustain a fracture; a significant disfigurement; a permanent loss of use of a body, organ, member, function or system; a permanent consequential limitation of 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 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 submits a copy of the certified records from Bronx Chiropractic Care, P.C.; a copy of the certified records from Intermed Medical Care, P.C.; a copy of the certified records of Victory Rehab P.T., P.C.; a copy of the certified records of Dr. Arden M. Kaisman; a copy of the medical affirmation of Dr. Allen Rothpearl; a copy of the certified records from Dr. Arden M. Kaisman; a copy of the certified records of Queens Surgery Center; a copy of the certified records of New York Orthopaedic Surgery and Rehabilitation; and a copy of the affirmed medical report of Dr. Arden M. Kaisman.

Plaintiff first presented to Bronx Chiropractic Care, P.C. two days after the accident with complaints of back pain. He was prescribed physical therapy and underwent physical therapy at Victory Rehab P.T., P.C. for six sessions before he was referred to Dr. Kaisman. A lumbar MRI was taken on April 5, 2014. The MRI indicated disc herniation at L5-S1 encroaching on the thecal sac right S1 nerve root and right neural foramen. Dr. Kaisman performed an initial evaluation on May 15, 2014. He performed range of motion testing and found decreased range of motion in plaintiff's lumbar spine. He diagnosed plaintiff with herniated disc at L5-S1 with lumbar radiculopathy and myofascial pain syndrome. Dr. Kaisman performed a percutaneous lumbar discectomy and decompression of the L5-S1 disc on June 18, 2014. Plaintiff continued with post-operative physical therapy from April 2015 through September 2015.

Most recently, on May 19, 2016, plaintiff presented to Dr. Kaisman with complaints of both right and left-sided low back pain. Dr. Kaisman found continued decreased range of motion in plaintiff's lumbar spine. Dr. Kaisman opined that the injuries are causally related to the subject accident and that a permanent disability is present in the lumbar spine. He recommended continued physical therapy, use of muscle relaxants as well as possible future trigger point injections.

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 the defendant's 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 defendants, including the affirmed medical reports of Drs. Weiland and Eisenstadt and plaintiff's deposition testimony, is sufficient to meet defendants' prima facie burden by demonstrating that 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]; Carballo v Pacheco, 85 AD3d 703 [2d Dept. 2011]; Ranford v Tim's Tree & Lawn Serv., Inc., 71 AD3d 973 [2d Dept. 2010]).

In opposition, this Court finds that plaintiff raised triable issues of fact as to whether he sustained a serious injury to his lumbar spine by submitting the affirmed medical report of Dr. Kaisman attesting to the fact that plaintiff sustained injuries as a result of the subject accident, finding that plaintiff had significant limitations in ranges of motion both contemporaneous to the accident and in a recent examination regarding his lumbar spine, and concluding that the limitations are permanent and causally related to the accident (see Perl v Meher, 18 NY3d 208 [2011]; David v Caceres, 96 AD3d 990 [2d Dept. 2012]; Martin v Portexit Corp., 98 AD3d 63 [1st Dept. 2012]; Ortiz v Zorbas, 62 AD3d 770 [2d Dept. 2009]; Azor v Torado, 59 AD2d 367 [2d Dept. 2009]).

As such, plaintiff demonstrated issues of fact as to whether he sustained a serious injury to his lumbar spine 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 AD3d 606 [2d Dept. 2011]; Compass v GAE Transp., Inc., 79 AD3d 1091 [2d Dept. 2010]; Evans v Pitt, 77 AD3d 611 [2d Dept. 2010]).

However, plaintiff failed to raise a triable issue of fact as to a serious injury of his cervical spine since there was no evidence of a contemporaneous or a recent range of motion deficit or qualitative limitation of use in the cervical spine (see Luetto v Abreu, 105 AD3d 558 [1st Dept. 2011]).

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

ORDERED, that the motion by defendants, GLOBAL GALAKTIKA CORP. and SARVAR ABDURAZAKOV, for an order granting summary judgment dismissing plaintiff's complaint is denied in its entirety; and it is further

ORDERED, that the cross-motion by defendant, FATMIRA ALIJAJ, for an order granting summary judgment dismissing plaintiff's complaint is likewise denied in its entirety; and it is further

ORDERED, that this matter remains on the calendar of the Trial Scheduling Part for October 6, 2016.

Dated: September 6, 2016
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C