

Ka v Bowman

2018 NY Slip Op 30382(U)

February 28, 2018

Supreme Court, New York County

Docket Number: 452767/14

Judge: Adam Silvera

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY
PRESENT: Hon. Adam Silvera **Part 22**

DEMBA DIOUMA KA,

Plaintiff,

-against-

**LAWSON D. BOWMAN IV, MARCOS
GRULLOS and CEPIN LIVERY CORP.,**

Defendants.

DECISION/ORDER

**INDEX NO. 452767/14
MOTION SEQ NO 001 & 002**

ADAM SILVERA, J. :

Upon the foregoing papers, it is ordered that Defendants Marcos Grulllos (Grulllos) and Cepin Livery Corp.'s (Cepin) motion for summary judgment is denied for the reasons set forth below. Defendant Lawson D. Bowman IV's (Bowman) motion for summary judgment is also denied for the reasons set forth below. All defendants move for summary judgment, pursuant to CPLR 3212, to dismiss plaintiff's complaint for failure to meet the serious injury threshold of Insurance Law § 5102 (the No-Fault Law). The motions are consolidated for disposition and decided as noted below.

BACKGROUND

Plaintiff alleges that, on September 21, 2013 at approximately 10:30 p.m., he was one of three passengers in a black livery cab (the Cab) driven by Grulllos and owned by Cepin, which was traveling on Seventh Avenue in Manhattan. He states that the Cab was driving at a moderate rate of speed and it was in the intersection of 119th Street and Seventh Avenue, when it was struck by a car (the Car) driven by Bowman. In his answer, Bowman admits owning and driving

the Car. Plaintiff asserts that he was wearing his seat belt, but that the force of the impact caused him to bump his head on the Cab's interior roof light, that he was bleeding from his head, left knee and shin and that he lost consciousness, all as a result of the collision. He further states that he went to the Harlem Hospital emergency room, where he was bandaged. Subsequently, he went to see Dr. Ciancimino a month after the accident, and a second time a month thereafter.

Plaintiff contends that he has continuing pain in his neck, back and left knee, and that he had to have surgery to repair the damage to his left knee. He has presented the affirmed report of Dr. Albert Ciancimino (the Ciancimino Report) dated October 16, 2013, which states that there were no fractures, but found that plaintiff had “[c]ervical sprain/strain, radiculitis [,] [l]umbar sprain/strain [and] [l]eft knee derangement” and restricted range of motion. Plaintiff has also presented the affirmed report of Dr. Douglas Schottenstein (the Schottenstein Report), which also found restriction of motion in the cervical spine C-3 to C-7 and in the lumbar spine L-3 to S-1. Plaintiff has also presented the affirmed reports of Dr. Maxim Tyorkin (the Tyorkin Reports). The Tyorkin Reports initially showed restricted range of motion, with the use of a goniometer, in plaintiff's neck, back and left knee. Dr. Tyorkin performed arthroscopic surgery on plaintiff's left knee on February 18, 2014, and his report dated April 10, 2014 indicated that plaintiff's left knee was “healing well . . . [with] mild pain with deep flexion” and the range of motion of the left knee was 0-130 degrees, with 0-140 degrees being normal. Dr. Tyorkin's last report dated October 20, 2016 (after the motions for summary judgment were made) found the same range of motion restriction and attributed plaintiff's left knee meniscal tears and other knee injuries to the accident. It also attributed plaintiff's cervical and lumbar spine injuries to the accident and ruled out age-related degeneration.

At his deposition, Grullos testified that the accident occurred on September 21, 2013, that he had picked up plaintiff and two other men in the Cab and that none of his passengers were using the seatbelts. He states that the Cab was traveling at approximately 10 miles per hour into the intersection of 119th Street and Seventh Avenue, when the Car went through a red light and crossed in front of the Cab, giving him insufficient time to stop or to turn before colliding with the Car. He further states that his passengers, including plaintiff, all said they were okay, that they walked away from the accident and that none of them were bleeding.

Bowman asserts that, on September 21, 2013, he was driving the Car on Seventh Avenue at 10 miles per hour, that he had the green light, that the Cab was speeding at more than 50 miles per hour and that it struck the Car at 118th Street and Seventh Avenue, causing property damage to the passenger side of the Car that cost \$4000 to repair. He states that he was not injured, but that his passenger, Keith Jackson, had to be taken away from the scene by ambulance and underwent surgery, due to the accident.

Defendants Grullos and Cepin proffer the affirmed report of Dr. Nicholas Caputo, a doctor board certified in emergency medicine (the Caputo Report), who opined that “there was no evidence to support” plaintiff’s claimed injuries. Defendants Grullos and Cepin also proffer the affirmed report of Dr. Michael Carriente, a neurologist, (the Carriente Report) whose opinion was that there were “no objective neurological findings.” They further provide the affirmed report of Dr. Barbara Freedman, an orthopedic surgeon (the Freeman Report), who found a normal range of motion and “preexisting degenerative change of the neck, back and knees [and] no causally related orthopedic disability”, and the affirmed report of Dr. Audrey Eisenstadt, a radiologist (the Eisenstadt Report), who found degenerative disc disease, rather than traumatic related injury. Lastly, defendants Grullos and Cepin proffer the affirmed report of Michael

Santare, a biomechanical engineer, who opined that “[t]here was no injury or loading mechanism” that would account for plaintiff’s disc herniations, bulges and meniscal tears.

Bowman presented the affirmed report of Dr. Alan Zimmerman, an orthopedic surgeon (the Zimmerman Report), who found a normal range of motion in plaintiff’s neck, back, knees and wrist, that his injuries were resolved and that the bulging and herniation in plaintiff’s back was “degenerative, preexisting and not causally related” to the accident. Bowman also presented the affirmed report of Dr. Robert April, a neurologist, (the April Report), who found a normal range of motion and opined that there was no “neurology diagnosis, disability, limitation or need for further intervention.” Based upon these medical reports, defendants assert that plaintiff has not suffered a serious injury under the No-Fault Law, that plaintiff’s injuries were degenerative in nature and not causally related to the accident and, that consequently, the complaint should be dismissed.

DISCUSSION

A party seeking summary judgment must make a prima facie case showing that it is entitled to judgment as a matter of law by proffering sufficient evidence to demonstrate the absence of any material issue of fact. *See Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). If the movant fails to make such a showing, the motion must be denied. *See id.* Once the movant meets its burden, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to raise a triable issue of material fact. *See Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

In deciding the motion, the court must draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact. *See Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012); *Branham v*

Loews Orpheum Cinemas, Inc., 8 NY3d 931, 932 (2007). “Where different conclusions can reasonably be drawn from the evidence, the motion should be denied”. *Sommer v Federal Signal Corp.*, 79 NY2d 540, 555 (1992). “[I]ssues as to witness credibility are not appropriately resolved on a motion for summary judgment”. *Santos v Temco Serv. Indus.*, 295 AD2d 218, 218-219 (1st Dep’t 2002); *Santana v 3410 Kingsbridge LLC*, 110 AD3d 435, 435 (1st Dep’t 2013).

The No-Fault Law provides, in pertinent part:

“‘Serious injury’ means a personal injury which results in . . . a fracture; . . . permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person’s 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.”

“[T]he ‘legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries’ . . . [by] requir[ing] objective proof of a plaintiff’s injury in order to satisfy the statutory serious injury threshold”. *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350 (2002) (internal citations omitted). Objective proof sufficient to sustain a claim is “an expert’s designation of a numeric percentage of a plaintiff’s loss of range of motion . . . [or] [a]n expert’s *qualitative* assessment . . . , provided that the evaluation has an objective basis and compares the plaintiff’s limitations to the normal function, purpose and use of the affected body organ, member, function or system”. *Id.* at 350; *Gorden v Tibulcio*, 50 AD3d 460, 463 (1st Dep’t 2008). Minor limitations of movement in a plaintiff’s neck and back are insufficient to be considered a serious injury. *See Gaddy v Eyler*, 79 NY2d 955, 957 (1992). Rather, plaintiff must present “objective evidence” in the form of tests indicating a significant limitation to satisfy the

No-Fault Law. See *Toure*, 98 NY2d at 350-351; *Reyes v Esquilin*, 54 AD3d 615, 615-616 (1st Dep't 2008); *Brown v Achy*, 9 AD3d 30, 31-32 (1st Dep't 2004).

Defendants assert that the medical reports they proffered show that plaintiff's injuries were minor and do not meet the serious injury threshold of the No-Fault Law. They point to plaintiff's delay in going to a doctor for treatment and the allegedly degenerative condition of the disc herniations and bulges of plaintiff's cervical and lumbar spine. Plaintiff, in opposition, raises questions concerning the findings in such medical reports. However, "the affirmed reports of medical experts who, upon examination, found that plaintiff had full range of motion in his . . . cervical and lumbar spine [and knee]" meet defendants' burden of establishing a prima facie case that plaintiff did not suffer a serious injury under the No-Fault Law. See *Williams v Perez*, 92 AD3d 528, 528 (1st Dep't 2012); *Santana v Centeno*, 140 AD3d 437, 437 (1st Dep't 2016); *Jallow v Siri*, 133 AD3d 1391, 1391 (1st Dep't 2015).

Plaintiff has opposed this showing by presenting his own medical reports, which assert that plaintiff has shown restricted range of motion. Of particular note are the Tyorkin Reports, which are by Dr. Tyorkin, the orthopedic surgeon who performed arthroscopic surgery to repair the meniscal tears in plaintiff's left knee. He states that plaintiff's injuries are causally related to his accident and not due to age-related degeneration. "Plaintiff's orthopedic surgeon, who performed arthroscopic surgery on him . . . , observed the relevant musculature with his own eyes, and opined that plaintiff suffered from a torn [meniscus in his left knee] and impingement causally related to the accident . . . [and thus, raised an issue of fact as to a] causal connection to the accident". *Calcano v Rodriguez*, 103 AD3d 490, 490-491 (1st Dep't 2013); *Jallow v Siri*, 133 AD3d at 1392 (1st Dep't 2015); *Vargas v Moses Taxi, Inc.*, 117 AD3d 560, 560 (1st Dep't 2014). Consequently, there is a dispute as to the degree and severity of plaintiff's injuries. "[A]ny

questions about the credibility of the conflicting doctors' opinions are for the jury to resolve". *Ocean v Hossain*, 127 AD3d 402, 403 (1st Dep't 2015); *Perl v Meher*, 18 NY3d 208, 218-219 (2011). Accordingly, Grullos and Cepin's motion for summary judgment dismissing plaintiff's complaint and Bowman's motion for summary judgment dismissing plaintiff's complaint are denied.

Accordingly, it is

ORDERED that the motion of Marcos Grullos and Cepin Livery Corp. for summary judgment, pursuant to CPLR 3212, to dismiss plaintiff's complaint for failure to meet the serious injury threshold of the No-Fault Law is denied; and it is further

ORDERED that the motion of Lawson D. Bowman IV for summary judgment, pursuant to CPLR 3212, to dismiss plaintiff's complaint for failure to meet the serious injury threshold of the No-Fault Law is denied; and it is further

ORDERED that, within thirty days of entry, plaintiff shall serve a copy of this order upon all parties, together with notice of entry.

Dated: February 28, 2018

ENTER:



Hon. Adam Silvera, J.S.C.