Haile v Reynoso
2018 NY Slip Op 30768(U)
March 21, 2018
Supreme Court, Bronx County
Docket Number: 302538/2014
Judge: Howard H. Sherman
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MAR 2 7 2018

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

KEBEDE HAILE,

Plaintiff,

-against-

LUCIA REYNOSO and JOSE REYNOSO,

Defendants.

DECISION AND ORDER
Present: HON. HOWARD H. SHERMAN
Index No. 302538/2014

Recitation, as required by CPLR 2219(a), of the papers considered in the review of motion(s) and/or cross-motion(s), as indicated below:

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Opposition	2
Reply	3

The motion by defendants Lucia Reynoso and Jose Reynoso for summary judgment in their favor and the motion by plaintiff Kebede Haile, improperly denominated as a cross motion, are consolidated for purposes of this determination.

Defendants Lucia Reynoso and Jose Reynoso move for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined by Insurance Law § 5102 (d). Plaintiff submits written opposition to the motion. The motion is granted.

This is an action to recover damages for injuries allegedly sustained by plaintiff Kebede Haile as a result of a motor vehicle accident, which occurred on July 6, 2012, on Broadway, at or near its intersection with 207th Street, in New York County, New York. The accident allegedly occurred when a vehicle owned by defendant Lucia Reynoso and operated by defendant Jose Reynoso collided with the rear of plaintiff's vehicle. Plaintiff further alleges that as a result of the accident, he sustained serious injuries and conditions including disc bulges

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and herniations in his cervical and lumbar spine, and partial tears of the supraspinatus and infraspinatus tendons in his left shoulder.

In support of the motion, defendants submit copies of the pleadings, the bill of particulars, the note of issue, plaintiff's deposition testimony, the affirmed medical reports of neurologist, Dr. Nauhihal Singh, orthopedic surgeon Dr. J. Serge Parisien, and radiologist Dr. David Fisher.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*see Alvarez v Prospect Hosp.*, 68 N.Y.2d 320 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 N.Y.2d 851 [1985]). The movant has the initial burden of proving entitlement to summary judgment, and failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 N.Y.2d 851 [1985]). Once such proof has been offered, the burden then shifts to the opposing party who must proffer evidence in admissible form and must show facts sufficient to require a trial of any issue of fact to defeat the motion for summary judgment (CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 N.Y.2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Insurance Law § 5102 (d) defines "serious injury" as "a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; 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."

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred by the No-Fault Insurance Law bears the initial burden of establishing, prima facie, that the plaintiff did not sustain a "serious injury" (*see Toure v Avis Rent A Car Sys.*, 98 N.Y.2d 345 [2002]; *Gaddy v Eyler*, 79 N.Y.2d 955 [1992]). A defendant can demonstrate a plaintiff did not suffer "serious injury" within the meaning of Insurance Law § 5102 (d) by presenting affidavits or affirmations of medical experts who examined the plaintiff and determined that there is no objective medical evidence supporting the plaintiff's claims (*see Spencer v Golden Eagle, Inc.*, 82 A.D.3d 589 [1st Dept. 2011]; *Shinn v Catanzano*, 1 A.D.3d 195 [1st Dept. 2003]; *Grossman v Wright*, 268 A.D.2d 79 [2d Dept. 2000]). When a defendant seeking summary judgment based on the lack of a serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, i.e., affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (*Pagano v Kingsbury*, 182 A.D.2d 268, 270 [2d Dept. 1992]; *see Grossman v Wright*, 268 A.D.2d 79 [2d Dept. 2000]; *Rodriguez v Goldstein*, 182 A.D.2d 396 [1st Dept. 1992]). A defendant also may establish the lack of a serious injury by submitting unsworn medical reports and records prepared by the plaintiff's treating medical providers (*see Newton v Drayton*, 305 A.D.2d 303 [1st Dept. 2003]; *Lowe v Bennett*, 122 A.D.2d 728 [1st Dept. 1986]), or the plaintiff's own deposition testimony (*see Diaz v Almodovar*, 147 A.D.3d 654 [1st Dept. 2017]; *Bailey v Islam*, 99 A.D.3d 633 [1st Dept. 2012]). Once a defendant meets this burden, the plaintiff must present proof in admissible form which creates a material issue of fact (*see Gaddy v Eyler*, 79 N.Y.2d 955 [1992]; *see generally Zuckerman v City of New York*, 49 N.Y.2d 557 [1980]). Defendants met their prima facie burden (*see Dennis v New York City Tr. Auth.*, 84 A.D.3d 579 [1st Dept. 2011]).

The affirmed medical report of Dr. Singh states, in relevant part, that during his examination, plaintiff exhibited normal joint function in his cervical and lumbar spine, and that

no tenderness or spasm was detected upon palpation. Dr. Singh concludes that the alleged injuries to plaintiff's cervical and lumbar spine are resolved, and that plaintiff has no neurological disability.

Dr. Parisien states that during his examination, plaintiff exhibited normal joint function in his cervical spine, lumbar spine, and left shoulder. Plaintiff tested negative in the objective tests of his cervical spine (foraminal compression, shoulder depression, Soto Hall, cervical distraction, and Spurling tests), his lumbar spine (Lasegue's, straight leg, Waddell's, and Kernig tests), and left shoulder (impingement sign, Hawkin's, apprehension, and supraspinatus tests). Dr. Parisien notes that no tenderness was detected upon palpation of plaintiff's spine or left shoulder. He concludes that the alleged injuries to plaintiff's cervical spine, lumbar spine, and left shoulder are resolved, and that there is no evidence of residuals or permanency.

In his affirmed medical report, Dr. Fisher opines that the magnetic resonance imaging ("MRI") examination of plaintiff's left shoulder conducted approximately three months after the accident is normal and shows no rotator cuff or labral tear. Dr. Fisher further opines that the MRI examination of plaintiff's lumbar spine conducted approximately six and a half weeks after the accident shows mild degenerative changes, which explain a mild disc bulge and small annular tear, but he notes that no herniations are seen. Dr. Fisher states that there is "no radiographic evidence of traumatic or causally related injury" to plaintiff's left shoulder or lumbar spine.

Defendants also established a prima facie case that plaintiff does not have a 90/180 claim (*see Fernandez v Hernandez*, 151 A.D.3d 581 [1st Dept. 2017]; *Rose v Tall*, 149 A.D.3d 554 [1st Dept. 2017]; *Nakamura v Montalvo*, 137 A.D.3d 695 [1st Dept. 2016]). By his bill of particulars and deposition testimony, plaintiff admitted that he was not confined to bed or home and did not miss any time from work following the accident.

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The burden shifted to plaintiff to raise a triable issue of fact (*see Gaddy v Eyler*, 79 N.Y.2d 955 [1992]). A plaintiff claiming injury within the "limitation of use" categories must substantiate his or her complaints of pain with objective medical evidence showing the extent or degree of the limitation of movement caused by the injury and its duration (*see Adu v Kirby*, 132 A.D.3d 517 [1st Dept. 2015]; *Vasquez v Almanzar*, 107 A.D.3d 538 [1st Dept. 2012]). To prove significant physical limitation, a plaintiff must present either objective quantitative evidence of the loss of range of motion and its duration based on a recent examination of the plaintiff or a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (*see Perl v Meher*, 18 N.Y.3d 208 [2011]; *Toure v Avis Rent A Car Systems, Inc.*, 98 N.Y.2d 345 [2002]; *Kang v Almanzar*, 116 A.D.3d 540 [1st Dept. 2014]; *Vega v MTA Bus Co.*, 96 A.D.3d 506 [1st Dept. 2012]; *Martinez v Goldmag Hacking Corp.*, 95 A.D.3d 682 [1st Dept. 2012]; *Spencer v Golden Eagle, Inc.*, 82 A.D.3d 589 [1st Dept. 2011]). In opposition, plaintiff submits the affirmations of Dr. Narayan Paruchuri, Dr. Aric Hausknecht, and Dr. Vadim Lerman; and the affirmed medical reports of Dr. Hausknecht. Plaintiff failed to raise a triable issue of fact.

Plaintiff submits Dr. Paruchuri's affirmation with accompanying reports. Dr. Paruchuri states that the MRI examination of plaintiff's lumbar spine conducted approximately six and a half weeks after the accident shows disc bulges, reduction in disc signal intensity, and impingement. Dr. Paruchuri opines that the MRI examination of plaintiff's cervical spine conducted approximately six and a half weeks after the accident shows disc bulges and herniations, impingement, and endplates changes. Dr. Paruchuri further opines that the MRI examination of plaintiff's left shoulder conducted approximately three months after the accident shows an "intersittal tear of the supraspinatus tendon" and an "articular surface tear in the infraspinatus tendon." However, such reports are insufficient to raise a triable issue of

fact, as the mere existence of a herniated disc or tear does not constitute a serious injury without objective proof of significant restriction in range of motion and its duration (*see Perl v Meher*, 18 N.Y.3d 208 [2011]; *Pommells v Perez*, 4 N.Y.3d 566 [2005]; *Rose v Tall*, 149 A.D.3d 554 [1st Dept. 2017]; *Corporan v Erichsen*, 148 A.D.3d 549 [1st Dept. 2017]; *Green v Domino's Pizza, LLC*, 140 A.D.3d 546 [1st Dept. 2016]; *Luetto v Abreu*, 105 A.D.3d 558 [1st Dept. 2013]; *Wetzel v Santana*, 89 A.D.3d 554 [1st Dept. 2011]; *Rubencamp v Arrow Exterminating Co., Inc.*, 79 A.D.3d 509 [1st Dept. 2010]; *Simms v APA Truck Leasing Corp.*, 14 A.D.3d 322 [1st Dept. 2005]).

In his affirmation, Dr. Lerman states that plaintiff exhibited significant restriction in the joint function of his cervical and lumbar spine in September 2014, March 2015, and April 2015, and that such conditions are causally related to the subject accident. However, Dr. Lerman's affirmation and accompanying medical records fail to identify the tests utilized to measure plaintiff's joint function (*see Nguyen v Abdel-Hamed*, 61 A.D.3d 429 [1st Dept. 2009]). Dr. Hausknecht's report dated approximately three months after the accident is also insufficient to raise a triable issue of fact, as he fails to provide an objective quantitative assessment of plaintiff's injuries (*see Callahan v Shekhman*, 149 A.D.3d 454 [1st Dept. 2017]).

In his affirmed medical report dated approximately two months after the accident, Dr. Hausknecht states, in relevant part, that plaintiff tested positive in the straight leg raising test bilaterally and exhibited significant restriction in the joint function of his cervical and lumbar spine. Dr. Hausknecht opines that such conditions are causally related to the subject accident. Similarly, Dr. Kaisman states in his affirmed report that approximately six months after the subject accident, plaintiff exhibited significant restriction in the joint function of his lumbar spine. Dr. Kaisman opines that based on plaintiff's physical examination and his review of the MRI examination, plaintiff's condition as to his lumbar spine was caused by the subject accident. However, such reports are insufficient to raise a triable issue of fact, as they fail to

provide objective quantitative evidence based on a recent examination evidencing the duration of the alleged injuries (*see Perl v Meher*, 18 N.Y.3d 208 [2011]; *Callahan v Shekhman*, 149 A.D.3d 454 [1st Dept. 2017]; *Adu v Kirby*, 132 A.D.3d 517 [1st Dept. 2015]; *cf. Diaz v Almodovar*, 147 A.D.3d 654 [1st Dept. 2017]; *Dennis v New York City Tr. Auth.*, 84 A.D.3d 579 [1st Dept. 2011]).

CPLR 3212 (a) provides that if no date for making a summary judgment motion has been set by the Court, such a motion "shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown." Absent a showing of good cause for the delay in filing a summary judgment motion, a court lacks the authority to consider even a meritorious, non-prejudicial application for such relief (*see Miceli v State Farm Mut. Auto. Ins. Co.*, 3 N.Y.3d 725 [2004]; *Brill v City of New York*, 2 N.Y.3d 648 [2004]). The "good cause" requirement set forth in CPLR 3212 (a) "requires a showing of good cause for the delay in making the motion – a satisfactory explanation for the untimeliness – rather than simply permitting meritorious, non-prejudicial filings, however tardy" (*Brill of City of New York*, 2 N.Y.3d 648, 652 [2004]).

Here, the statutory 120-day period for making a summary judgment motion expired on Wednesday, December 30, 2015. However, plaintiff Kebede Haile's motion, improperly denominated as a cross motion, was made on March 17, 2016, the date it was served (*see* CPLR 2211). Plaintiff's counsel has provided no explanation or "good cause" for serving the motion late, and thus, the Court has no discretion to entertain it on the merits (*see* CPLR 3212 [a]; *Brill v City of New York*, 2 N.Y.3d 648 [2004]; *Kershaw v Hospital for Special Surgery*, 114 A.D.3d 75 [1st Dept. 2013]).

Accordingly, it is

ORDERED that the motion by defendants Lucia Reynoso and Jose Reynoso for summary judgment dismissing the complaint is granted; and it is

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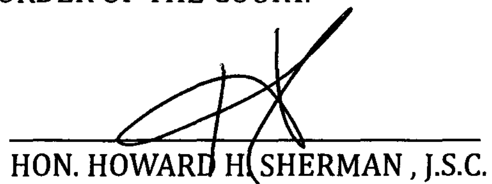
ORDERED that the motion by plaintiff Kebede Haile for summary judgment in his favor is denied; and it is further

ORDERED that the movant shall serve on all parties a copy of this Order with Notice of Entry.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.



Dated: 3/21, 2018

HON. HOWARD H. SHERMAN, J.S.C.