

Gutierrez v Albany Express Transp., Inc.
2018 NY Slip Op 32114(U)
July 10, 2018
Supreme Court, Bronx County
Docket Number: 302687/2013
Judge: Wilma Guzman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

Index No. 302687/2013
Motion Calendar No.20
Motion Date: 4/23/18

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JOMELL GUTIERREZ,

Plaintiff,

-against-

ALBANY EXPRESS TRANSPORTATION, INC.
CARLOS M. BAEZ, CARLOS M. BAEZ d/b/a
ALBANY EXPRESS and DIONICIO SUAREZ,

Decision/ Order

Present:

Hon. Wilma Guzman
Justice Supreme Court

Defendants.

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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

Motions decided as follows: Upon deliberation of the application duly made by defendants herein, **NOTICE OF MOTION**, and all the papers in connection therewith, for an Order, pursuant to CPLR 3212, dismissing the Complaint of plaintiff, JOMELL GUTIERREZ, for his failure to meet the "serious injury" threshold requirement under § 5102(d) of the Insurance Law, is heretofore denied.

This action involves injuries allegedly sustained by the then twenty four (24) year old plaintiff due to a motor vehicle accident that occurred on November 17, 2012 on Monroe Avenue at its intersection with Mt. Hope Place, Bronx, New York. As a result of the accident, plaintiff claims to have undergone a left knee arthroscopy performed on April 8, 2013, a left shoulder arthroscopy performed on August 12, 2013 and suffered various injuries to the lumbar and cervical spine. Morris specifically, with respect to his left knee plaintiff claims to have suffered a lateral meniscal tear, chondral injury of the medial femoral condyle and lateral tibial plateau and tricompartmental reactive villous hypertrophic synovitis. With respect to his left shoulder plaintiff claims to have suffered anterior labral partial tearing, traumatic subacromial impingement, acromioclavicular joint arthropathy, labral tear, rotator cuff tendinitis, joint confusion and edema. With respect to his lumbar spine, bulging at L1- L2, L2- L3, L3- L4, L4- L5, and L5- S1. With respect to his cervical spine plaintiff claims to suffered nerve root irritation at C5- C6. Plaintiff asserts an aggravation of a prior condition to his left knee and that all of the alleged injuries are permanent. Plaintiff alleges that the foregoing injuries confined him to his bed and/or home for approximately ten (10) months and that he was incapacitated from his employment at Fairway, Uptown, LLC for approximately ten (10) months.

A party seeking summary judgement must demonstrate, *prima facie*, entitlement to judgement as a matter of law by presenting sufficient evidence to negate any issue of material fact. See Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851 (1983). If the movement meets this burden, the opponent must rebut the *prima facie* showing by submitting evidence in admissible form demonstrating the existence of factual issues needing to be determined by a trier of fact. See Zukerman v. City of New York, 49 NY.2d 557 (1980). Otherwise, the motion must be denied, regardless of the sufficiency of the opposition. Winegrad, 64 N.Y.2d at 853.

Pursuant to Insurance Law § 5104(a), a person injured in an automobile accident caused by negligence may only recover non-economic loss if she sustained a serious injury. Pursuant to Law § 5102(d), a serious injury defined, in pertinent part, as: “a personal injury which results in... permanent loss of use of a body 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 day during the one hundred eighty days immediately following the occurrence of the injury or impairment.”

Defendant has not made a *prima facie* showing that the plaintiff did not sustain a serious injury within the meaning of the New York State Insurance Law § 5102, and as such their application must be denied. Defendant has not demonstrated, as a matter of law, that the plaintiff has not suffered a permanent and substantial limitation of use of a body organ or member, and/or a significant limitation of a body or system as result of the collision.

Defendant attaches in the Examination Before Trial (hereinafter “EBT”) testimony of the plaintiff. Plaintiff testified that after the accident his left knee hit the dashboard and his left shoulder contracted while holding the steering wheel so tightly and that the air bag pushed him back. Plaintiff stated that he immediately experienced pain in his left knee, left shoulder, neck and back. EMS personnel responded to the scene and apparently told him that he injured his left knee, left shoulder, neck and back. He was then taken by ambulance to Bronx Lebanon Hospital where he was treated and released. Defendant does not attach plaintiff’s Bronx Lebanon Hospital medical records.

Plaintiff testified that he was injured in two previous motor vehicle accidents that occurred in Queens and Manhattan and they happened in either 2006 or 2008. Lawsuits resulted and plaintiff received money to compensate him for his injuries. As a result of the Queens accident plaintiff testifies that he injured his back. As a result of the Manhattan accident plaintiff claims to injured his left knee. Plaintiff underwent a left knee surgery as a result of the accident. He also underwent a chiropractic treatment for his back.

Plaintiff testified that he returned to work about four (4) to (5) days following the accident in question. During those days he was confined to his home. Plaintiff stated he went back to work but it is not clear for how long. Plaintiff testified that he missed approximately ten (10) to (11) months of work as a result of the accident.

After the initial emergency room visit, plaintiff returned to the emergency room and thereafter went to the Essential Therapy clinic for chiropractic, acupuncture and physical therapy. From Essential he was referred to Dr. Ehrlich for his left knee and eventually his left shoulder.

Plaintiff testified that he continued to experience pain in his shoulder and knee and that pain disturbs his sleep sleep, that he can no longer play basketball or baseball, play with his son like he could before the accident and can no longer help his mom with the groceries.

Defendants attach the April 7, 2017 Independent Medical Examination (IME) Report of Orthopedist, Dr. Eial Faierman. On April 7, 2017, the doctor took a history of the plaintiff, examined the then 28-year-old plaintiff, and reviewed various medical records relating to the accident question the 2006 accident and the 2008 accident. The doctors examination of the cervical spine was normal with full range of motion. The examination of the lumbar spine was normal with full range of motion. The doctors examination of the bilateral shoulders are normal with full range of motion. Portal scars were noted on the left shoulder. The examination of the bilateral knees were normal with full range of motion. Portal scars are noted on the left knee. The doctor's assessment was a recurrent cervical spine strain resolved, recurrent lumbosacral spine strain resolved, recurrent left knee complaints status post arthroscopy resolved, and recurrent left shoulder complaints status post arthroscopy resolved.

Although the doctor notes that he reviewed records from various providers, it is not clear what records the doctor is basing his opinions on and the defendants have not attached any medical records whatsoever to their application.

Dr. Faierman concludes that if the history given by the plaintiff is accurate, there is a causal relationship between the accident and the injury described by the claimant. However the doctor states that there is no objective physical findings of any significant pathology on examination of cervical spine, lumbar spine, bilateral shoulders or bilateral knees. Doctor notes that the plaintiff does not need any further treatment as a result the accident in question. The doctor concludes by stating at the claimant sustained an aggravation of his symptoms after the accident of November 17, 2012. The doctor states that there is no objective evidence of any new dramatic pathology related to the accident of November 17, 2012 and that there is extensive pre-existing injuries to the neck lower back left shoulder and left knee. The doctor states that he would be happy to review the MRI films and all of the operative photographs to confirm his beliefs. This indicates that the doctor did not review or may not have reviewed all the MRI films and relevant medical records.

Based on the evidence presented by the defendants to support their application for summary judgement, defendants did not meet their *Prima Facie* burden of establishing that plaintiff did sustain a serious injury as defined by the Insurance Law. The plaintiff testified that he underwent two (2) surgeries as a result of subject accident, and that he was forced to miss work for approximately ten (10) to (11) months. Moreover, plaintiff testified that he continued to experience pain as a result of the accident and that his activities of daily living were limited.

The report from Dr. Faierman is not supported by any attached medical records and specifically states that if the plaintiff's history is accurate, there is a causal relationship between the accident

and injury described. This court cannot determine based on the evidence presented by the defendants what injuries, if any, were actually sustained by the plaintiff in the previous accidents and it appears that this issue has become one of credibility, which is an issue fact for the jury to determine. The defendant does not even attach any medical records pertaining to the surgeries which occurred allegedly as a result of the accident in question, which Dr. Fairman attempts to refute.

As the defendants have failed to meet their burden, this court need not even consider the sufficiency of the plaintiff's papers. However it appears that the evidence submitted in opposition to the application to dismiss is sufficient to demonstrate, at the very least, an issue of fact with respect to the serious nature of the plaintiff's injuries with respect to his claimed shoulder and knee injuries. More specifically the Operative Reports by Dr. Randall Ehrlich, as well as the Narrative Report by Dr. Ehrlich, have sufficiently set forth issues the fact as to the permanent consequential injuries to plaintiff's left knee and left shoulder or impairment of a non-permanent 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 (90) days during the one hundred eighty (180) days immediately following the occurrence of accident. Moreover the injuries claimed were directly attributable to the accident question.

Accordingly, it is:

ORDERED that the Motion by defendants, seeking to dismiss the Complaint of plaintiff for failure to meet the threshold limits set by the New York State Insurance Law § 5102, is heretofore denied. 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: 7/10/18

7/10/18



WILMA GUZMAN
J.S.C