Adegoke v Gutierrez
2018 NY Slip Op 32947(U)
November 27, 2018
Supreme Court, Kings County
Docket Number: 502493/16
Judge: Debra Silber

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9

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KEHINDE ADEGOKE,

Plaintiff,

-against-

NOVELITA GUTIERREZ, PIERRE BADETTE, and SENSATIONAL SERVICE, INC.,

Defendants.

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DECISION / ORDER

Index No.502493/16
Motion Seq. No.4 & 5
Date Submitted: 10/18/18
Cal. No. 1 & 2

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendants' motion and cross-motion for summary judgment.

Papers	NYSCEF Doc.
Motion and Cross-Motion and Exhibits Annexed.....	44-53, 54-56
Affirmation in Opposition and Exhibits.....	64-70 (& 57-63)
Affirmation in Reply	71

Upon the foregoing cited papers, the Decision/Order on these motions is as follows:

This is a personal injury action arising out of a motor vehicle accident. Defendants Pierre Badette and Sensational Service Inc. move (Mot. Seq. 4) and defendant Novelita Gutierrez cross-moves (Mot. Seq. 5) for summary judgment dismissing the plaintiff's complaint, pursuant to CPLR 3212, on the ground that he did not sustain a "serious injury" under Insurance Law § 5102(d).

On September 16, 2015, plaintiff, who was approximately 42 years old at the time, was a rear seat passenger in a vehicle owned by defendant Sensational Service, Inc. and operated by defendant Badette, which was hit on the right passenger side by defendant Gutierrez' vehicle, while Sensational's vehicle was traveling on Jericho

Turnpike near the intersection of North 6th Street, in Nassau County, New York. Plaintiff states he was wearing his seatbelt and was seated behind the driver.[1] After the police came, he declined an ambulance and the taxi driver took him to the Long Island Rail Road station, where he called his son to tell him that he was not coming to visit him, and went home on the train. A few days later, he went to the doctor, who referred him for physical therapy. He claims he injured his neck and lower back as well as both knees, and that, as a result of the accident, he had arthroscopic surgery to his left knee on January 6, 2016, to repair the torn lateral meniscus he sustained as a result of the accident.

Defendants submit an affirmation of counsel, the pleadings, plaintiff's EBT transcript and affirmed reports from their examining orthopedist Edward A. Toriello, M.D., from A. Robert Tantleff, M.D. (a radiologist) and from Michael Carciente, M.D. (a neurologist) (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 956-957 [1992].)

Dr. Toriello examined plaintiff on March 28, 2018. Plaintiff still complained of pain in his neck, lower back and both knees. He told Dr. Toriello that he had gone to physical therapy for eight months. The results of the doctor's range of motion testing was not normal. For example, in plaintiff's cervical spine, bilateral rotation was 45 degrees when 70 to 80 is normal, and flexion was 20 degrees when normal is 45-50 degrees. In plaintiff's lumbar spine, flexion was 20 degrees when normal is 60-75. Dr. Toriello obtained abnormal results in testing plaintiff's knees as well. He states that he

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[1]Plaintiff's friend, who was seated next to him in the car, also brought an action, which has been settled and discontinued, under index number 506895/2016.

reviewed the report of Dr. Tantleff, the defendants' radiologist, who found that all of the abnormalities on the MRI films were degenerative, and the intra-operative photos from the surgery to plaintiff's knee, which he states were of poor quality. Dr. Toriello then states that range of motion is a subjective test, affected by a person's age, weight, conditioning and effort, and in any event, the radiologist's report indicates that plaintiff had three herniations and two bulges in his cervical spine, two herniations and a bulge in his lumbar spine, swelling and displacement of the patella in his right knee, along with a degenerative flap tear of the medial meniscus and degenerative changes in the lateral meniscus. Dr. Toriello then concludes that, as a result of the accident, plaintiff sustained strains to his cervical and lumbar spine, which have resolved, and contusions to his knees, which have resolved. He opines that the plaintiff had a pre-existing degenerative condition in both of his knees prior to the accident, "which is not causally related to this accident, nor was the condition exacerbated by the accident." He concludes that the MRIs "demonstrates extensive degenerative condition that antedated this accident and was unrelated to the accident." Dr. Toriello does not explain the losses in plaintiff's range of motion which he observed.

A. Robert Tantleff, M.D., a radiologist, reviewed the MRI films of plaintiff's cervical and lumbar spine, right knee and left knee, all of which were taken approximately two months after the accident. He provides four separate affirmed reports, all of which conclude that while the films indicate a number of abnormalities, the films indicate only degenerative changes which were not traumatically induced, and states that there "are no markers of acute or recent injury."

In addition, Michael J. Carciente, M.D., a neurologist, examined the plaintiff on

February 6, 2018. He reports that plaintiff had a normal neurological exam. He did not test the plaintiff's range of motion. He states "there was no correlation between the findings allegedly found in the spine MRI reports and today's exam. As it is well known, bulges and herniations may also be seen in completely asymptomatic and atraumatic individuals. Based on today's evaluation and review of available information, I find no evidence of an ongoing neurological injury or disability."

Plaintiff's deposition testimony (taken 1/18/18) indicates that he went home after the accident and went to the doctor a few days later, who told him he needed to have physical therapy. He testified that he went to physical therapy three times a week for six months. He was sent for MRIs. He had never had an MRI before. He had arthroscopic surgery to his left knee. He is a manager at K & F Auto Body [Page 77]. He has worked there for ten years [Page 9]. He missed six months of work as a result of the accident [Page 9]. Or maybe it was nine months [Page 11]. He could not remember.

With this testimony from the plaintiff and no medical exam in defendants' motion papers which took place during the first six months after the accident, defendants do not make a prima facie showing that plaintiff was not prevented from performing substantially all of his daily activities for 90 out of the first 180 days after the accident (*see Strenk v Rodas*, 111 A.3d 920 [2d Dept 2013]; *Hamilton v Rouse*, 46 AD3d 514, 516 [2d Dept 2007]).

The defendants have not made out a prima facie case for dismissal of the complaint by establishing 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, 956-957 [1992].

Since the defendants have failed to meet their burden of proof as to all claimed injuries and applicable categories of injury, the motion must be denied. It is unnecessary to consider the papers submitted by the plaintiff in opposition. See, *Yampolskiy v Baron*, 150 AD3d 795 [2d Dept 2017]; *Valerio v Terrific Yellow Taxi Corp.*, 149 AD3d 1140 [2d Dept 2017]; *Koutsoumbis v Paciocco*, 149 AD3d 1055 [2d Dept 2017]; *Aharonoff-Arakanchi v Maselli*, 149 AD3d 890 [2d Dept 2017]; *Lara v Nelson*, 148 AD3d 1128 [2d Dept 2017]; *Sanon v Johnson*, 148 AD3d 949 [2d Dept 2017]; *Weisberg v James*, 146 AD3d 920 [2d Dept 2017]; *Marte v Gregory*, 146 AD3d 874 [2d Dept 2017]; *Goeringer v Turrisi*, 146 AD3d 754 [2d Dept 2017]; *Che Hong Kim v Kossoff*, 90 AD3d 969 [2d Dept 2011].

Even if the defendants did make a prima facie showing of their entitlement to summary judgment, plaintiff has raised an issue of fact sufficient to defeat summary judgment, based upon the affirmations of Aron Rovner, M.D, [Exhibit 5], Gideon Hedrych, M.D., [Exhibits 2 and 6] and David Payne, M.D. [Exhibit 3], a radiologist (*see White v Dangelo Corp.*, 147 AD3d 882 [2d Dept 2017]; *Young Chan Kim v Hook*, 142 AD3d 551, 552 [2d Dept 2016]; *Khaimov v Armanious*, 85 A.D.3d 978, 978–79 [2d Dept 2011]; *Duarte v Ester*, 247 AD2d 356, 357 [2d Dept 1998]). Their affirmations provide descriptions of both an exam contemporaneous with the accident (Dr. Rovner) and a recent exam (Dr. Hedrych), and indicate significant restrictions in plaintiff's range of motion in his cervical and lumbar spine and in both knees. Dr. Hedrych states that the accident of September 16, 2015 caused plaintiff's injuries, and his injuries are

permanent. He opines that plaintiff has "objective clinical evidence of a lumbar radiculopathy . . . cervical radiculopathy . . . a tear of the posterior horn of the medial meniscus and a tear of the anterior horn of the lateral meniscus [of the right knee] . . . and a tear of the anterior horn of the lateral meniscus, for which he underwent arthroscopic surgery [left knee] directly attributable to the trauma of September 16, 2015."

Accordingly, it is

ORDERED that the defendants' motion and cross motion for summary judgment are denied.

This shall constitute the decision and order of the court.

Dated: November 27, 2018

ENTER:

Hon. Debra Silber, J.S.C.

Hon. Debra Silber
Justice Supreme Court