Jean-Baptiste v Rock Trans Inc.
2019 NY Slip Op 33159(U)
October 10, 2019
Supreme Court, Kings County
Docket Number: 515057/2015
Judge: Paul Wooten
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SUPREME COURT OF THE STATE OF NEW YORK
KINGS COUNTY

PRESENT: HON. PAUL WOOTEN **PART** 97
Justice

KLY JEAN-BAPTISTE,

Plaintiff,

INDEX NO. 515057/2015

MOT. SEQ NO. 3

- against -

ROCK TRANS INC., ROTHROCK MOTOR SALES, INC. and GENNADIY RAKHOVICH,

Defendants.

In accordance with CPLR 2219(a), the following papers were read on this motion by defendant for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	1
Answering Affidavits — Exhibits (Memo)	2
Replying Affidavits (Reply Memo)	3
Transcript	

This is a personal injury action relating to a motor vehicle accident that occurred on February 7, 2015, at approximately 1:45 p.m., on Rockaway Parkway at or near the intersection of Avenue J in Brooklyn, New York. On the date of the accident, Kly Jean-Baptiste (plaintiff) was driving in the vehicle when it came into contact with the car owned by defendant Rock Trans Inc., Rothrock Motor Sales, Inc. and operated by defendant Gennadiy Rakhovic. Plaintiff was transported via ambulance to Brookdale Hospital the same day for evaluation and treatment. He was later released from the hospital the same day. Plaintiff commenced this action via Summons and Verified Complaint on December 11, 2015, alleging that he sustained serious bodily injuries to the neck, upper back, shoulder and right knee as a result of the motor

vehicle accident caused by the defendants' negligence. More specifically, in his Verified Bill of Particulars and Verified Supplemental Bill of Particulars, plaintiff claims that as a result of the accident he sustained, *inter alia*, the following injuries: knee; lumbar, cervical and thoracic strain/sprain; cervical and intervertebral disc disorder and radiculopathy; and various disc bulges and herniations and knee strain (*see* Notice of Motion [MS 3], exhibit E, unnumbered pages 2-3 and 7-8).

Before the Court is a motion by defendant Rock Trans Inc., for summary judgment, pursuant to CPLR 3212, dismissing the Verified Complaint on the ground that the injuries claimed do not satisfy the "serious injury" threshold requirement of the New York Insurance Law §§ 5102(d) and 5104. Plaintiff is in opposition. Rock Trans Inc. submits a reply.

SERIOUS INJURY THRESHOLD

A party seeking damages for pain and suffering arising out of a motor vehicle accident must establish that he or she has sustained at least one of the nine categories of "serious injury" as set forth in Insurance Law § 5102(d) (*see Licari v Elliott*, 57 NY2d 230 [1982]). 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 loss]; permanent consequential limitation of use of a body organ or member [permanent consequential limitation]; significant limitation of use of a body function or system [significant limitation]; 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 [90/180].

The Court must determine whether, as a matter of law, plaintiff has sustained a "serious injury" under at least one of the claimed categories. "Serious injury" is a threshold issue, and thus, a necessary element of a plaintiff's prima facie case (*Licari*, 57 NY2d at 235; Insurance

Law § 5104[a]). The serious injury requirement is in accord with the legislative intent underlying the No-Fault Law, which was enacted to "'weed out frivolous claims and limit recovery to significant injuries'" (*Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d 345, 350 [2002], quoting *Dufel v Green*, 84 NY2d 795, 798 [1995]). As such, to satisfy the statutory threshold, the plaintiff is required to submit competent objective medical proof of his or her injuries (*id.* at 350). Subjective complaints alone are insufficient to establish a prima facie case of a serious injury (*id.*).

BURDEN OF PROOF

The issue of whether a claimed injury falls within the statutory definition of "serious injury" is a question of law for the Court, which may be decided on a motion for summary judgment (*see Licari*, 57 NY2d at 237). Where a defendant is the movant, the defendant, bears the initial burden of establishing, by the submission of evidentiary proof in admissible form, a prima facie case that plaintiff has not suffered a "serious injury" as defined in section 5102(d) (*see Toure*, 98 NY2d at 352; *Gaddy v Eyler,* 79 NY2d 955, 956-57 [1992]). Once the defendant has made such a showing, the burden shifts to the plaintiff to submit prima facie evidence, in admissible form, rebutting the presumption that there is no issue of fact as to the threshold question (*see Franchini v Palmieri*, 1 NY3d 536, 537 [2003]; *Rubensccastro v Alfaro*, 29 AD3d 436, 437 [1st Dept 2006]).

"In cases such as the present one, a defendant can establish that the 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, 83-84 [2d Dept 2000]). "This established, the burden shifts to the plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law" (*id.*; *see Gaddy v Eyler*, 79 NY

2d 955 [1992]). The plaintiff must present objective evidence of the injury. The mere parroting of language tailored to meet statutory requirements is insufficient (*see Grossman*, 268 AD2d at 84). Further, a plaintiff's subjective claim of pain and limitation of motion must be sustained by verified objective medical findings, which shall be based on a recent examination of the plaintiff (*see id.*; *Kauderer v Penta*, 261 AD2d 365 [2d Dept 1999]).

The 90/180 category requires a demonstration that plaintiff has been unable to perform substantially all of his or her usual and customary daily activities for not less than 90 days during the 180 days immediately following the injury *(see Licari*, 57 NY2d at 236). The words "substantially all" mean that the person has been "curtailed from performing his usual activities to a great extent rather than some slight curtailment" *(id.)*.

DISCUSSION

After reviewing the papers and hearing oral arguments on the record on May 22, 2019, the Court finds that Rock Trans Inc. fails to meet its prima facie burden of showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident on February 7, 2015 via the submission of medical reports from neurologist, Dr. Chandra M. Sharma (Dr. Sharma), dated May 23, 2018, and orthopedic surgeon, Dr. Pierce J. Ferriter (Dr. Ferriter), dated September 7, 2018 (*see Manton v Lape*, 173 AD3d 731 [2d Dept 2019]; *Rivas v Hill*, 162 AD3d 809 [2d Dept 2018]; *Gaddy*, 79 NY2d at 956–957). Rock Trans Inc. fails to submit competent medical evidence establishing, prima facie, that the injured plaintiff did not sustain a serious injury to the cervical and lumbar regions of his spine under either the permanent consequential limitation of use or significant limitation of use categories of Insurance Law § 5102(d). Specifically, Rock Trans Inc.'s expert, neurologist Dr. Sharma, found significant range of motion limitations to plaintiff's cervical spine (extension at 20degrees/60 degrees - 67% loss; flexion at 40 degrees/50 degrees - 20% loss; right and left rotation at 40 degrees/80 degrees - 50% loss; right and left flexion at 10 degrees/45 degrees - 78% loss) and

lumbar spine [extension and right and left flexion at 10 degrees/25 degrees - 60% loss] (*see Manton*, 173 AD3d at 732; *Mangione v Bua*, 148 AD3d 799 [2d Dept 2017]; *Mercado v Mendoza*, 133 AD3d 833 [2d Dept 2015]; *Miller v Bratsilova*, 118 AD3d 761 [2d Dept 2014]).

Additionally, the Court notes that the aforementioned findings in Dr. Sharma's report conflict with those in Dr. Ferriter's report, wherein Dr. Ferriter found no range of limitations to plaintiff's cervical or lumbar spine. The conflicting expert medical opinions submitted by the moving defendants requires denial of their motion for summary judgment (*see Johnson v Salaj*, 130 AD3d 502 [1st Dept 2015]).

Nevertheless, even assuming *arguendo* that Rock Trans Inc. had met its prima facie burden, plaintiff raises a triable issue of fact in opposition via the submission of plaintiff's affidavit, the affidavit of Dr. Kurt Schichtl (Dr. Schichtl), a licensed chiropractor in the State of Pennsylvania, an affirmation by Dr. Ji Han (Dr. Han) a medical doctor licensed in the State of New York, and an affidavit from Dr. Joel Swartz (Dr. Swartz), a radiologist licensed in the State of Pennsylvania. Plaintiff first presented for examination and treatment by Dr. Schichtl, on February 16, 2016. Dr. Schichtl examined, treated, and performed medical tests on plaintiff multiple times and most recently on December 10, 2018. During plaintiff's treatment, Dr. Schichtl was also aware of plaintiff's previous neck and lower back injuries that plaintiff suffered in a motor vehicle accident on January 18, 2008 as well as prior treatments for same. Dr. Schichtl concluded that "following his course of treatment for the January 2008 accident, the pain to the patient's neck and low back had resolved and he was able to perform his daily and customary activities" (*see* Affirmation in Opposition, exhibit B, Affidavit of Dr. Schichtl ¶ 4).

On December 10, 2018, Dr. Schichtl performed an extensive physical examination of plaintiff including, *inter alia*, range of motion testing, Straight Leg Raised Test, a bilateral Shoulder Depression Test, a bilateral Foraminal Compression Test, and a bilateral Soto-Hall Test. He concluded that based upon: (1) his two-year treatment of plaintiff, where he treated

plaintiff at the rate of 2-3 times a week until his no fault insurance benefits expired; and (2) a review of the medical records of Dr. Joon Kim (Dr. Kim), a pain management specialist who treated plaintiff with epidural steroids injections under anesthesia on March 17 and 28, 2016, September 9, 2016 and November 14, 2016, that plaintiff sustained significant ligamentous injuries to his neck and back, which have produced a permanent proportional use of the cervical and lumbar spine directly caused by the motor vehicle accident of February 7, 2015. He further noted that plaintiff's "customary activities of daily living have been consequentially inhibited" and "increased levels of structural and muscular stress either at home or work will ultimately lead to the progressive deterioration of the patient's condition" (*see id.* at ¶¶ 15, 26, 27).

Moreover, Dr. Han examined plaintiff on January 17, 2019 upon plaintiff's presentation to him for consultation. He performed range of motion tests using a hand-held goniometer on plaintiff's cervical and lumbar spine that indicated significant limitations (cervical flexion at 35 degrees/45 degrees - 23% loss; cervical extension and right and left lateral flexion at 30 degrees/45 degrees - 33.4% loss; and cervical right and left rotation at 40 degrees/60 degrees - 33.4% loss; lumbar flexion at 60 degrees/90 degrees - 33.4% loss; lumbar extension and right and left rotation at 20 degrees/30 degrees - 33.4% loss; and lumbar right and left lateral flexion at 35 degrees/45 degrees - 23% loss) (*see* Affirmation in Opposition, exhibit C, Aff of Dr. Ji Han ¶¶ 19, 20). Dr. Han concluded that the injuries sustained to plaintiff's cervical and lumbar spine were causally related to the motor vehicle accident of February 7, 2015 and that his injuries were significant and permanent in nature (*see id.* at ¶¶ 14, 22).

Given the foregoing, the Court finds that the conflicting medical reports of the parties raise triable issues of fact as to whether plaintiff sustained serious injuries within the meaning of Insurance Law § 5102(d) (*see Pommells v Perez*, 4 NY3d 566, 576 [2005]; *see also Wilcoxen v Palladino*, 122 AD3d 727, 728 [2d Dept 2014]).

However, the Court also finds that the defendants have demonstrated, prima facie, via

submission of plaintiff's deposition testimony, that plaintiff, who testified that he only missed one week of work after the accident, did not sustain a serious injury under the 90/180 category of Insurance Law § 5102(d) (*see Broadwood v Bedoya*, 170 AD3d 795 [2d Dept 2019] [finding that defendants demonstrated that plaintiff did not sustain a serious injury under the 90/180-day category with the submission of plaintiff's deposition testimony wherein he testified he missed only one week of work following the accident]; *McFarlane v Klein*, 131 AD3d 1139 [2d Dept 2015]; *Pryce v Nelson*, 124 AD3d 859 [2d Dept 2015]; *Lanzarone v Goldman*, 80 AD3d 667, 669 [2d Dept 2011]; *Jean v Labin-Natochenny*, 77 AD3d 623 [2d Dept 2010]). Plaintiff fails to raise a triable issue of fact in opposition.

CONCLUSION

Accordingly it is hereby,

ORDERED that defendant Rock Trans Inc.'s motion for summary judgment dismissing the Verified Complaint on the ground that the injuries claimed do not satisfy the "serious injury" threshold requirement of the New York Insurance Law §§ 5102(d) and 5104 is denied, except as to plaintiff's claims under the 90/180 category of Insurance Law § 5102(d), which are dismissed; and it is further,

ORDERED that counsel for plaintiff is directed to serve a copy of this Order with Notice of Entry upon the defendants.

This constitutes the Decision and Order of the Court.

Dated: 10/10/19

PAUL WOOTEN J.S.C.

2019 OCT 18 AM 8:19
KINGS COUNTY CLERK
FILED