Wilson v Scorpio Limo, Inc.

2021 NY Slip Op 33941(U)

November 22, 2021

Supreme Court, Queens County

Docket Number: Index No. 707826/2018

Judge: Robert J. McDonald

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This opinion is uncorrected and not selected for official publication.

Short Form Order

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

- x

JOHANTZ C. WILSON,

Plaintiff,

- against -

SCORPIO LIMO, INC., JUAN M. DUTAN, MICHELLE L. RIVERA and JORGE LUIS ORTIZ,

Defendants.

- x

Index No.: 707826/2018

Motion Date: 11/18/21

Motion No.: 56

Motion Seq No.: 1

FILED
1/12/2022
COUNTY CLERK
QUEENS COUNTY

The following electronically filed documents read on this motion by defendants SCORPIO LIMO, INC. and JUAN M. DUTAN for an Order pursuant to CPLR 3212, granting defendants summary judgment and dismissing the complaint of plaintiff on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law §§ 5104(a) and 5102(d); and on this cross-motion by defendants MICHELLE L. RIVERA and JORGE LUIS ORTIZ for same:

	Papers Numbered
Notice of Motion-Affirmation-Exhibits	EF 18 - 27
Notice of Cross-Motion-Affirmation	EF 28 - 30
Affirmation in Opposition-Exhibits	EF 35 - 46

This is a personal injury action in which plaintiff seeks to recover damages for injuries allegedly sustained in a motor vehicle accident that occurred on February 19, 2016. As a result of the accident, plaintiff alleges that he sustained serious injuries to his lumbar spine, cervical spine, bilateral elbows, and bilateral knees.

Plaintiff commenced this action by filing a summons and complaint on May 21, 2018. Defendants Rivera and Ortiz joined issue by service of an answer on December 4, 2018. Defendants Scorpio Limo and Dutan also joined issue by service of an answer on December 4, 2018. All defendants now move for an order

pursuant to CPLR 3212, dismissing the complaint on the grounds that the injuries claimed fail to satisfy the serious injury threshold requirement of Section 5102(d) of the Insurance Law.

Plaintiff appeared for an examination before trial on August 11, 2020 and testified that he was involved in the subject accident. Following the accident, he missed approximately one month of work. No surgeries or injections were recommended.

Joseph C. Elfenbein, M.D. performed an independent orthopedic medical examination on plaintiff on November 19, 2019. Dr. Elfenbein identifies the records reviewed prior to rendering the report. Plaintiff reported that he was involved in a prior accident three to four years ago, and sustained head, back, hip, and left leg injuries. He was involved in a subsequent accident and sustained hip and left leg injury. Plaintiff presented with current complaints of pain in his neck, mid back, low back, bilateral elbows, bilateral hips, and bilateral knees. Dr. Elfenbein performed range of motion testing with a goniometer. Restricted ranges of motion were recorded regarding plaintiff's cervical spine, thoracic spine, lumbar spine, and right knee. All other objective testing was negative and ranges of motion were normal. Dr. Elfenbein concludes that there is no evidence of an orthopedic disability, permanency, or residuals. There are no positive findings to substantiate plaintiff's subjective complaints of pain. Plaintiff is capable of working without restrictions. Plaintiff can perform his activities of daily living as he was doing prior to the accident.

Defendants contend that the evidence submitted is sufficient to establish, prima facie, that plaintiff has not sustained a serious injury.

On a motion for summary judgment, where the issue is whether the plaintiff has sustained a serious injury under the no-fault law, the defendant bears the initial burden of presenting competent evidence that there is no cause of action (Wadford v Gruz, 35 AD3d 258 [1st Dept. 2006]). "[A] defendant can establish that a 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 [1st Dept. 2000]). Whether a plaintiff has sustained a serious injury is initially a question of law for the Court (Licari v Elliott, 57 NY2d 230 [1982]).

Where defendant's motion for summary judgment properly raises an issue as to whether a serious injury has been sustained, it is incumbent upon the plaintiff to produce evidentiary proof in admissible form in support of his or her allegations. The burden, in other words, shifts to the plaintiff to come forward with sufficient evidence to demonstrate the existence of an issue of fact as to whether he or she suffered a serious injury (see Gaddy v Eyler, 79 NY2d 955 [1992]; Zuckerman v City of New York, 49 NY2d 557[1980]; Grossman v Wright, 268 AD2d 79 [2d Dept 2000]).

Here, the conclusion that plaintiff did not suffer a disability or impairment as a result of the subject accident was directly contradicted by Dr. Elfenbein who examined plaintiff more than three years after the subject accident and recorded objectively-measured limitations in range of motion (see Sook Houng v Beers, 151 AD3d 995 [2d Dept. 2017]; Mercado v Mendoza, 133 AD3d 833 [2d Dept. 2015]; Ambroselli v Team Massapequa, Inc., 88 AD3d 927 [2d Dept. 2011]; Grant v Parsons Coach, Ltd., 12 AD3d 484 [2d Dept. 2004]; Lopez v Sentaroe, 65 NYS2d 1017 [1985][finding that providing evidence of a ten degree limitation in range of motion is sufficient for the denial of summary judgment to defendants]). Moreover, Dr. Elfenbein failed to explain the restricted ranges of motion.

Thus, defendants failed to make a prima facie showing of entitlement to judgment as a matter of law that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d), tendering sufficient evidence to demonstrate the absence of any material issues of fact (see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]; Reynolds v Wai Sang Leung, 78 AD3d 919 [2d Dept. 2010]).

Where a defendant fails to meet the defendant's prima facie burden, the court will deny the motion for summary judgment regardless of the sufficiency of the opposition papers (see Ayotte v Gervasio, 81 NY2d 1062 [1993]; Barrera v MTA Long Island Bus, 52 AD3d 446 [2d Dept. 2008]).

In any event, in opposition, plaintiff raised triable issues of fact as to whether he sustained a serious injury by submitting, inter alia, the medical reports of Eric J. Katz, M.D., P.C., James W. Depuy, M.D., and Gabriel L. Dassa, D.O., attesting to the fact that plaintiff sustained injuries as a result of the subject accident, finding that plaintiff had significant limitations in ranges of motion both contemporaneous to the accident and in a recent examination, and concluding that the limitations are permanent and causally related to the

accident (see Perl v Meher, 18 NY3d 208 [2011]; David v Caceres, 96 AD3d 990 [2d Dept. 2012]; Martin v Portexit Corp., 98 AD3d 63 [1st Dept. 2012]).

Accordingly, for the reasons set forth above, it is hereby

ORDERED, that both the motion and cross-motion are denied.

Dated: November 22, 2021
Long Island City, N.Y.

FILED
1/12/2022
COUNTY CLERK
QUEENS COUNTY

Robert J. McDonald

ROBERT J. MCDONALD
J.S.C.