

Bello v Salanar Trucking Corp.
2018 NY Slip Op 30185(U)
February 1, 2018
Supreme Court, New York County
Docket Number: 152014/12
Judge: Adam Silvera
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**SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY
PRESENT: Hon. Adam Silvera Part 22**

ALLIYU BELLO,

Plaintiff,

-against-

**SALANAR TRUCKING CORP. and
JONATHAN SANCHEZ,**

Defendants.

DECISION/ORDER

**INDEX NO. 152014/12
MOTION SEQ. NO. 002**

The following papers, numbered 1-3 were considered on this order to show cause for summary judgment:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Order to Show Cause, _ Affidavits_ Exhibits _____	<u>1, 2</u>
Answering Affidavits – Exhibits _____	<u>3</u>
Replying Affidavits _____	_____
Cross-Motion: [] Yes [X] No	_____

Upon the foregoing papers, it is ordered that defendant’s motion for summary judgment is denied for the reasons set forth below.

Defendants Salanar Trucking Corp. and Jonathan Sanchez move for summary judgment dismissing the complaint, and plaintiff opposes. No reply was submitted.

BACKGROUND

Plaintiff Alliyu Bello alleges in his complaint that due to the negligence of defendants, he suffered personal injuries as a result of an automobile accident which occurred on September 29, 2011, at the intersection of Columbus Avenue and West 81st Street, New York, New York. At about 5:00 a.m., plaintiff, a taxi driver, was about to commence his shift and stopped his vehicle

at the intersection during a red light. After about 20 seconds, defendants' truck rear-ended plaintiff's vehicle, shoving it into the intersection. The impact damaged the rear of plaintiff's vehicle and the front of defendants' truck. After the police made out their accident report, plaintiff drove his vehicle to the garage in Long Island City and a coworker drove him home. Later in the day, plaintiff was driven to the Harlem Hospital emergency room. There, plaintiff complained of pain in the right knee, ribs, shoulder and lower back. Plaintiff was examined, X-rayed, given a neck collar and back brace, and released with a prescription for medication. Subsequently, plaintiff brought this action against defendants, alleging serious injuries directly related to the accident and seeking damages due to defendants' liability.

DISCUSSION

Defendants move for summary judgment dismissing the complaint against them on the ground that plaintiff's alleged injuries, caused by the accident, did not reach the threshold of "serious injury," as required by section 5102 of the Insurance Law.

In support of their motion, defendants proffer, *inter alia*, plaintiff's verified bill of particulars, plaintiff's deposition testimony, and a recent medical examination report from a physician chosen by defendants to examine plaintiff. The bill of particulars indicates that plaintiff sustained injuries to his back, right rib and neck as a result of the accident. During the deposition on February 19, 2015, plaintiff testified that, after the accident, he complained of pain to his knee, shoulder and lower back. He had X rays taken of those body parts at the emergency room of Harlem Hospital, but the X rays revealed no fractures. Plaintiff sought treatment with Dr. Laudon, claiming that his right knee was swollen and that he had pain in his ribs. Thereafter, Dr. Laudon arranged for plaintiff to have physical therapy with a Dr. Slater. Such therapy included massage, electrical stimulation and acupuncture. Plaintiff testified that he discontinued

physical therapy as he felt it was not helping him. Subsequently, plaintiff went to Dr. Hobeika, complaining of right knee pain. Plaintiff rejected Dr. Hobeika's suggestion of surgery, and sought treatment with another physical therapist, Dr. Panayotidis. Plaintiff further testified that he is currently working. However, he testified that his capacity to run, squat, climb and lift objects has been limited, but he is not confined to his home.

Defendants submit the examination report of Dr. Arnold Berman, along with Dr. Berman's affirmation. Dr. Berman, an orthopedic surgeon, stated that he examined plaintiff on March 10, 2016, and read plaintiff's medical records relating to his injuries caused by the accident. During the examination, he observed that plaintiff did not exhibit tenderness, muscle spasm or pain. Dr. Berman's ranges of motion for plaintiff's neck, back, and upper and lower extremities were designated as normal. Dr. Berman concluded that, while plaintiff had sustained cervical, thoracic and lumbar sprains, they were not noticeable at the present time, and that plaintiff suffered no residual orthopedic disabilities.

Defendants contend that based on the evidence submitted, there is no proof that plaintiff has established a prima facie case for serious injuries. According to defendants, plaintiff alleges that he suffered a "permanent loss of use of a body function," and/or "a permanent consequential limitation of use of a body organ," and/or "a significant limitation of use of a body part," and/or a disability that prevented him from substantially doing his customary daily activities during 90 of the first 180 days following the accident. Defendants argue that plaintiff has failed to provide any objective proof that he has sustained such a physical disability. Thus, defendants argue that plaintiff has not made out a serious injury claim and, in the absence of any issues of fact, they are entitled to summary judgment.

In opposition, plaintiff contends that there are issues of fact precluding summary judgment. Plaintiff emphasizes that he has suffered seriously from the injuries, having lost over five months of work as a result. He claims that he can no longer run more than a few blocks, whereas previously, he ran distances for exercise; that he cannot lift anything over ten pounds without difficulty; and that his right knee causes him such pain that after an hour of driving, he is forced to stop. Plaintiff submits the medical report of his orthopedist, Dr. Paul Hobeika. This report, dated March 6, 2012, provides a diagnosis of displacement of lumbar intervertebral disc, lumbar spinal stenosis, internal derangement of the knee, patella-femoral disease and chondromalacia. Dr. Hobeika concluded that plaintiff had "100%" temporary impairment as of the date of the report, which was made over five months after the accident. Dr. Hobeika held that plaintiff was cleared to return to work, with limitations as to his climbing stairs, kneeling and lifting objects.

Plaintiff submits Doctor's Progress reports dated March 26, 2012, June 25, 2012, and February 5, 2013, which assert a repeated rating of 60% temporary disability and stress a need for physical therapy. Plaintiff also submits a Report of MML/Permanent Impairment from Dr. Hobeika arising from an examination on April 30, 2013 which states that plaintiff has a permanent impairment of 40% to his lumbar spine and 30% to his right knee. This report stresses the limited physical activities to which plaintiff is confined at work and at home. Plaintiff submits an affirmed report, dated September 10, 2012, from an orthopedist, Dr. William Walsh, who examined him after he made a Worker's Compensation claim. Dr. Walsh declared that physical therapy was insufficient and suggested surgery for the right knee.

Plaintiff asserts that the report from Dr. Berman is biased in favor of defendants. Plaintiff contends that Dr. Berman failed to review or comment on his right knee MRI report of January

27, 2012, with its positive findings. Plaintiff argues that Dr. Berman chose to ignore medical evidence that revealed more crucial aspects of his physical condition.

Plaintiff claims that there is enough evidence to preclude the granting of summary judgment, particularly, evidence of a permanent or significant limitation of use, or a 90/180 day disability pursuant to §5102(d) of the Insurance Law.

“The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law”. *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Upon the proffer of evidence establishing a prima facie case by the movant, “the party opposing a motion for summary judgment bears the burden of ‘produc [ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact’”. *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. *See Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 (1st Dept 2002).

It is well settled that the question of whether a plaintiff has established a prima facie case for a “serious injury,” as described in section 5102 (d) of the Insurance Law, remains an issue of law to be decided by the court. *See Licari v Elliott*, 57 NY2d 230, 235 (1982). Claims of serious injury must be supported by objective medical evidence demonstrating a significant physical limitation resulting from the accident. *See Pommells v Perez*, 4 NY3d 566, 574 (2005).

Defendants submitted a medical examination report from Dr. Berman, which consisted of a quantitative evaluation of plaintiff’s physical range of motion. This report was a relatively recent evaluation and provides a current assessment of plaintiff’s limitation of functions. In his

opposition, plaintiff provided medical reports from an earlier period. It is evident from these reports that plaintiff suffered a significant, if not permanent, limitation of body functions as a consequence of the accident and the resulting injuries. The reports also indicate that plaintiff probably endured an impairment of a non-permanent nature, which prevented him from performing substantially all of his usual material functions for at least 90 days following the accident. However no follow up report showing more recent findings were proffered by plaintiff with respect to his present condition. Plaintiff, however, did proffer sufficient medical proof showing that he was impaired to the degree that he was unable to perform his usual daily activities substantially during the 90-day period following the accident such that the Court finds that plaintiff has demonstrated an issue of fact precluding summary judgment. Thus, defendants' motion for summary judgment is denied.

Accordingly, it is

ORDERED that defendants Salanar Trucking Corp. and Jonathan Sanchez's motion for summary judgment is denied; and it is further

ORDERED that, within thirty days of entry, plaintiff shall serve a copy of this order upon all parties, together with notice of entry.

Dated: February 1, 2018

ENTER:



Hon. Adam Silvera, J.S.C.