

Hossain v R & B Car Limo Corp.

2010 NY Slip Op 32499(U)

August 13, 2010

Supreme Court, Queens County

Docket Number: 4480/2008

Judge: James J. Golia

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JAMES J. GOLIA IA Part 33
Justice

<p>_____ x</p> <p>MOHAMMAD HOSSAIN AND MUSHFIQ PATHAN,</p> <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;">- against -</p> <p>R & B CAR LIMO CORP., ALEXANDR LAEVSKY, IGOR YUDILEVICH, MAHMUD UZZAMAN, AND RAMELL BELL,</p> <p style="text-align: center;">Defendants.</p> <p>_____ x</p>	x	<p>Index Number <u>4480</u> 2008</p> <p>Motion Date <u>May 13,</u> 2010</p> <p>Motion Cal. Number <u>13</u></p> <p>Motion Seq. No. <u>2</u></p>
---	---	---

The following papers numbered 1 to 24 read on this motion by defendants R & B Car Limo Corp. (R & B Car Limo) and Alexandr Laevsky (Laevsky) for summary judgment on the ground that plaintiffs Mohammad Hossain (Hossain) and Mushfiq Pathan (Pathan) did not sustain serious injuries as defined in Insurance Law § 5102 (d); on the cross motions by defendant Igor Yudilevich (Yudilevich) for summary judgment on the ground that Hossain and Pathan (collectively referred to as plaintiffs) did not sustain serious injuries as a result of the subject accident and on the issue of liability; and on the cross motion by R & B Car Limo and Laevsky for leave to renew their prior cross motion for summary judgment on the issue of liability.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	1-4
Notices of Cross Motion - Affidavits - Exhibits.....	5-17
Answering Affidavits - Exhibits.....	18-22
Reply Affidavits.....	23-24

Upon the foregoing papers it is ordered that the motion and cross motions are determined as follows:

This is an action to recover for personal injuries plaintiffs allegedly sustained in a motor vehicle accident which occurred on September 10, 2006. A collision allegedly occurred between a vehicle owned and operated by defendant Ramell Bell (Bell), a vehicle owned by R & B Car Limo and operated by Laevsky, a vehicle owned and operated by Yudilevich, and a vehicle operated by defendant Mahmud Uzzaman (Uzzaman),¹ in which plaintiffs were passengers. In their bill of particulars, both plaintiffs alleged injuries to their cervical spines, lumbar spines, right knees and left knees, and Pathan alleged injuries to his left ankle. In addition, both plaintiffs alleged that they sustained injuries which prevented them from performing substantially all of their usual and customary activities for 90 of the 180 days immediately following the subject accident.

On their motion, R & B Car Limo and Laevsky have the initial burden of demonstrating that plaintiffs did not sustain serious injuries within the meaning of Insurance Law § 5102 (d) (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 352 [2002]; *Gaddy v Eyer*, 79 NY2d 955, 956-957 [1992]). R & B Car Limo and Laevsky have relied upon, among other things, the deposition testimony of both plaintiffs and the affirmed medical reports of Wendy Cohen, M.D., Julio Westerband, M.D., R.C. Krishna, M.D., and Joseph Elfenbein, M.D.

Dr.'s Cohen and Westerband both examined Hossain. After objective testing, Dr.'s Cohen and Westerband concluded that Hossain had normal range of motion in his cervical spine and lumbar spine. Dr. Westerband further concluded that Hossain had normal range of motion in his both of his knees. Hossain testified at his deposition that he was a full-time student at the time of the subject accident. Based upon his testimony that he did not miss any time from school, R & B Car Limo and Laevsky have established that Hossain did not sustain an injury that prevented him from performing substantially all of his usual and customary activities for 90 of the 180 days following the accident (*see Antonio v Gear Trans Corp.*, 65 AD3d 869 [2009]; *Hasner v Budnik*, 35 AD3d 366, 367-368 [2006]; *see e.g. Feeney v Klotz*, 309 AD2d 782, 782-783 [2003]). Therefore, R & B Car Limo and Laevsky have satisfied their initial burden with respect to Hossain (*see Toure v Avis Rent A Car Sys.*, 98 NY2d at 352).

¹ The claim against Uzzaman was apparently settled as indicated in an order entered on June 2, 2009.

Dr.'s Krishna and Elfenbein both examined Pathan. After objective testing, both of these doctors concluded that Pathan had normal range of motion in his cervical spine, while Dr. Elfenbein concluded that Pathan had normal range of motion in his lumbar spine, both of his knees and in his left ankle. Pathan testified at his deposition that he was employed in two positions at the time of the subject accident. He further testified that he did not miss any time from either job immediately following the accident, except for calling in sick less than five times. Based upon Pathan's testimony, R & B Car Limo and Laevsky have established that he did not sustain an injury within the 90/180-day category (*see Hasner v Budnik*, 35 AD3d at 367-368). Therefore, R & B Car Limo and Laevsky have also satisfied their initial burden with respect to Pathan (*see Toure v Avis Rent A Car Sys.*, 98 NY2d at 352).

In opposition, plaintiffs have submitted two affidavits from Dennis Long, D.C., a chiropractor, one relating to his examination of Hossain and one relating to Pathan. Dr. Long initially examined both Hossain and Pathan the day after the subject accident and, after objective testing, he concluded that both of them had limited range of motion in their cervical spines and lumbar spines. Dr. Long also conducted a recent examination of both Hossain and Pathan in March 2010. After objective testing, Dr. Long concluded that, even approximately three and a half years after the subject accident, both Hossain and Pathan continued to suffer from limited range of motion in their cervical spines and lumbar spines. Dr. Long stated in both of his affidavits that plaintiffs' injuries were causally related to the subject accident.

Dr. Long also adequately explained the gap in both Hossain's and Pathan's treatment by stating in his affidavits with respect to each of them, that their treatment was discontinued because he determined that they had reached "maximum medical benefit from the course of chiropractic and physical therapy" and that "further treatment would only be palliative in nature" (*see Pommells v Perez*, 4 NY3d 566, 577 [2005]; *Mercado-Arif v Garcia*, 74 AD3d 446, 447 [2010]). Therefore, Hossain and Pathan have raised a triable issue of fact.

Yudilevich has cross-moved for summary judgment on the ground that plaintiffs did not sustain serious injuries as a result of the subject accident and he has adopted R & B Car Limo's and Laevsky's arguments and evidence on this issue. In light of the above decision, Yudilevich is not entitled to the relief sought on this branch of his motion.

Yudilevich has also cross-moved for summary judgment on the issue of liability. He has made a prior cross motion for summary judgment on this ground. However, the branch of Yudilevich's instant cross motion relating to the issue of liability does not violate the rule against successive motions since it has been supported by deposition testimony elicited after the order denying his prior cross motion (*see North Fork Preserve, Inc. v Kaplan*, 68 AD3d 732, 733 [2009]; *Auffermann v Distl*, 56 AD3d 502 [2008]).

On the branch of his motion relating to the issue of liability, Yudilevich has argued that his vehicle was struck by a vehicle operated by Bell. “A rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence with respect to the operator of the moving vehicle, and imposes a duty on the operator of the moving vehicle to come forward with an adequate, non-negligent explanation for the accident” (*Foti v Fleetwood Ride, Inc.*, 57 AD3d 724 [2008]).

In support of this branch of his motion, Yudilevich has relied upon his own deposition testimony and his affidavit. Yudilevich testified that his vehicle was stopped in the right lane of the roadway and that it was struck by the vehicle operated by Uzzaman, which was to his left, and also possibly struck by Bell’s vehicle, to his rear. The deposition testimony of Hossain, contained in the record, has contradicted Yudilevich’s testimony and affidavit. Hossain testified that Yudilevich’s vehicle collided with Uzzaman’s vehicle, in which Hossain was a passenger. Therefore, Yudilevich has failed to satisfy his prima facie burden of demonstrating that there are no triable issues of fact (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Thus, it is not necessary to consider the opposition.

R & B Car Limo and Laevsky have cross-moved for leave to renew their prior cross motion for summary judgment on the issue of liability. The court denied their prior cross motion in an order entered on June 2, 2009, on the basis of R & B Car Limo’s and Laevsky’s failure to satisfy their burden through admissible evidence. CPLR 2221 (e) provides in relevant part that “[a] motion for leave to renew . . . shall be identified specifically as such . . . shall be based upon new facts not offered on the prior motion that would change the prior determination . . . [and] shall contain reasonable justification for the failure to present such facts on the prior motion.”

R & B Car Limo and Laevsky have properly identified the instant cross motion as a motion for leave to renew their prior cross motion. They have argued that the instant cross motion has been supported by the deposition testimony of parties to the action and that such depositions had not been conducted at the time of their prior cross motion on the issue of liability. Therefore, R & B Limo and Laevsky have demonstrated that they are entitled to leave to renew their prior cross motion on the issue of liability (CPLR 2221 [e]). In any event, the instant cross motion does not violate the proscription against successive motions since R & B Limo and Laevsky have relied upon evidence elicited after the order denying their prior motion (*see North Fork Preserve, Inc. v Kaplan*, 68 AD3d at 733; *Auffermann v Distl*, 56 AD3d at 502).

In support of their cross motion, R & B Car Limo and Laevsky have relied upon, among other things, the deposition testimony of Hossain and Laevsky. Both Hossain and

Laevsky testified that both of their vehicles were stopped at the time of the accident and that the vehicle operated by Uzzaman, in which Hossain was a passenger, was struck in the rear and then pushed into the rear of the vehicle operated by Laevsky. Therefore, R & B Limo and Laevsky have satisfied their prima facie burden.

Plaintiff has submitted no opposition to the cross motion by R & B Car Limo and Laevsky on the issue of liability. Bell has opposed the cross motion and has argued that issues of fact exist which preclude summary judgment and that facts essential to justify opposition to this cross motion may exist but cannot be stated because the parties have not been deposed. However, Bell has not demonstrated that there is any conflicting evidence as to the fact that the vehicle owned by R & B Car Limo and operated by Laevsky was rear-ended in the subject accident. Furthermore, Bell has failed to offer an evidentiary basis to demonstrate that additional discovery is necessary. His mere hope or speculation that further discovery would lead to relevant evidence is insufficient (*see Corwin v Heart Share Human Servs. of N.Y.*, 66 AD3d 814, 815-816 [2009]; *Spatola v Gelco Corp.*, 5 AD3d 469, 470 [2004]). Therefore, Bell has failed to raise a triable issue of fact in opposition.

Accordingly, R & B Car Limo's and Laevsky's motion for summary judgment on the ground that Hossain and Pathan did not sustain serious injuries is denied. The branches of Yudilevich's cross motion for summary judgment on the ground that Hossain and Pathan did not sustain serious injuries and on the issue of liability are denied. R & B Car Limo's and Laevsky's cross motion for summary judgment on the issue of liability is granted.

Dated: August 13, 2010

J.S.C.