Baki v Valcourt
2013 NY Slip Op 30025(U)
January 7, 2013
Sup Ct, NY County
Docket Number: 106229/10
Judge: Michael D. Stallman
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SCANNED ON 1/10/2013

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN — *Justice* — **PART 21**

Index Number : 106229/2010
BAKI, ABDUL
vs.
VALCOURT, ERNSEAU
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. 106229/10
MOTION DATE 10/16/12
MOTION SEQ. NO. 003

The following papers, numbered 1 to 11 were read on this motion for summary judgment

Notice of Motion—Affidavit of Service; Affirmation — Exhibits A-I	No(s). 1-2; 3
Affirmation in Partial Opposition—Affidavit of Service;	No(s). 4-5
Affirmation in Opposition —Affidavit of Service	6-7
Reply Affirmation — Affidavit of Service; Reply Affirmation — Affidavit of Service — Exhibit A	No(s). 8-9; 10-11

Upon the foregoing papers, it is ordered that this motion for summary judgment is decided in accordance with the annexed memorandum decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED
JAN 10 2013
NEW YORK
COUNTY CLERK'S OFFICE

HON. MICHAEL D. STALLMAN

Dated: JAN 7 2013
New York, New York

J.S.C.

1. Check one: ☐ CASE DISPOSED ■ NON-FINAL DISPOSITION
2. Check if appropriate: MOTION IS: ■ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check if appropriate: ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

---X
ABDUL BAKI,

Plaintiff,

- against -

ERNSEAU VALCOURT, CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY, ADVANCE TRANSIT CO., INC., PREMIER PARATRANSIT, LLC, NEW YORK CITY TRANSIT AUTHORITY-DIVISION OF PARATRANSIT, METROPOLITAN TRANSPORTATION AUTHORITY, MTA BUS COMPANY, ACCESS-A-RIDE and ABRAM SHIMUNOV,

Defendants.
---X

Index No. 106229/2010

Decision and Order

FILED

JAN 10 2013

NEW YORK
COUNTY CLERK'S OFFICE

HON. MICHAEL D. STALLMAN, J.:

This action arises out of a motor vehicle accident involving three vehicles that occurred on November 10, 2009 on a northbound lane of the Robert F Kennedy Bridge (formerly the Triborough Bridge), near East 125th Street and Second Avenue. A 2007 Ford paratransit bus driven by defendant Ernseau Valcourt allegedly rear-ended a 2006 Sienna minivan driven by plaintiff Abdul Baki. Shimunov claims that the Honda Odyssey he was driving then rear-ended Valcourt's paratransit bus, but that the paratransit bus did not subsequently make contact with Baki's vehicle. At his deposition, Valcourt testified, "I only hit the car in front one time." (O'Shaughnessy Affirm., Ex F, at 169.)

Valcourt commenced his own action against Baki, *Valcourt v Karman Auto*

Sales, Baki, and Shimunov, Index no. 402515/2011, which has been joined for trial with this action.

Defendant Shimunov now moves for summary judgment dismissing Baki's complaint as against him. (Motion Seq. No. 003.) The other defendants separately move for summary judgment dismissing Baki's action on the ground that he did not suffer a serious injury within the meaning of Insurance Law § 5102 (d). (Motion Seq. No. 004.) This decision addresses both motions.

DISCUSSION

The standards for summary judgment are well-settled.

> "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party. Summary judgment is a drastic remedy, to be granted only where the moving party has tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact, and then only if, upon the moving party's meeting of this burden, the non-moving party fails to establish the existence of material issues of fact which require a trial of the action. The moving party's [f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, regardless of the sufficiency of the opposing papers ."

(*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal citations and quotation marks omitted].)

Shimunov's Motion for Summary Judgment (Motion Seq. No. 003)

Shimumov's motion for summary judgment is granted. Neither Valcourt nor

[* 4]

plaintiff dispute Shimunov's contention that there was only one impact between Valcourt's vehicle and Baki's vehicle. (Paliseno Opp. Affirm. ¶ 8.) Indeed, plaintiff executed a stipulation of discontinuance to discontinue the action as against defendant Shimunov only, but the stipulation was not executed by the attorneys of record for the other parties in this action. (Galperin Opp. Affirm., Ex A.)

The co-defendants partially oppose Shimunov's motion, insofar as they dispute Shimunov's account that the contact between Valcourt's and Baki's vehicles was a "pure rear-end collision" (Paliseno Opp. Affirm. ¶ 3), which is not relevant to Shimunov's motion. Plaintiff opposes the motion as academic, in light of the stipulation. Shimunov's motion is not academic because the stipulation was not executed by the attorneys of record for all parties, as required under CPLR 3217 (a) (2).

Therefore, Shimunov's motion for summary judgment is granted, and complaint in this action (*Baki v Valcourt*, Index No. 106229/2010) is severed and dismissed as against Shimunov. Shimunov's cross claim against his co-defendants for contribution is dismissed, and the cross claim of his co-defendants against Shimunov for indemnification and/or contribution is also dismissed.

Co-Defendants' Motion for Summary Judgment (Motion Seq. No. 004)

The No-Fault Law "bars recovery in automobile accident cases for 'non-economic loss' (e.g., pain and suffering) unless the plaintiff has a 'serious injury' as defined in the statute. . . ." (*Perl v Meher*, 18 NY3d 208 [2011].)

> "Of the several categories of 'serious injury' listed in the statutory definition, three are relevant here: 'permanent consequential limitation of use of a body organ or member'; 'significant limitation of use of a body function or system'; and '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' (Insurance Law § 5102[d])."

(*Id.*)

To meet the prima facie burden of summary judgment, a defendant must "submit[ ] expert medical reports finding normal ranges of motion in the claimed affected body parts and no objective evidence that any limitations resulted from the accident." (*Vega v MTA Bus Co.*, 96 AD3d 506, 507 [1st Dept 2012].) Here, plaintiff alleged that he suffered, among things, hypoesthesia in his cervical spine, cervical radiculopathy, radiating neck pain, decreased range of motion in his cervical spine, bulging discs in his lumbar spine, hypoesthesia in his lumbar spine, lumbar radiculopathy, sciatica, lumbar back pain, scoliosis, decreased range of motion in his

lumbar spine, swelling of his right knee, and numbness, weakness, and pins and needles in his legs. (Paliseno Affirm., Ex B [Verified Bill of Particulars ¶ 10.)

In support of their motion, co-defendants submit affirmed reports from Dr. Robert S. April, a neurologist, and Dr. Edward M. Adler, an orthopedic surgeon, who both examined plaintiff. (Paliseno Affirm., Ex E.) Co-defendants also submit certified hospital records from the date of the accident, unaffirmed and unsworn MRI reports, and an unaffirmed and unsworn report of an EMG & NCV study. (Paliseno Affirm., Exs F, G.) A report from an MRI taken of plaintiff's lumbar spine found "Ventral osteophytes are present at L2-L5. Narrowing of the L5-S1 intervertebral disc spaces present. Facet hypertrophy is present at L4, L5 and S1." (*Id.*, Ex F.) The radiologist concluded, "Degenerative changes." (*Id.*) A report from an MRI taken of plaintiff's right knee states, "There is a degenerative tear of the posterior horn of the medial meniscus without extension to the articular surface." (*Id.*)

Dr. Adler found normal ranges of motion in plaintiff's cervical spine except as to extension, which was 30 degrees (normal 45 degrees). (*Id.*) Dr. Adler found normal ranges of motion in plaintiff's lumbar spine, except as to flexion, which was 70 degrees (normal 80 degrees), and back extension, which was 10 degrees (normal 25 degrees). (*Id.*) Dr. Adler found normal range of motion in plaintiff's right knee, no effusion, no joint line tenderness on either side, and no retropatellar tenderness. (*Id.*)

According to Dr. Adler,

> "the claimant's examination reveals some subjective complaints of pain, but there is no objective evidence of radiculopathy or injury to any of his musculoskeletal structures. He may have developed a cervical and lumbar sprain/strain related to the motor vehicle accident, but his subjective complaints at this time are related to the chronic degenerative changes in his lumbar spine, and predate the motor vehicle accident."

(*Id.*)

Dr. April found no neurological signs on examinations and concluded with reasonable medical certainty that the accident "did not produce a neurological diagnosis, disability, limitation or need for further intervention." (*Id.*) Using a goniometer, Dr. April measured normal ranges of motion in plaintiff's neck with respect to lateral rotation, extension, and full flexion. Dr. April also found a normal range of motion of plaintiff's low back.

Co-defendants have not met their prima facie burden that plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102 (d). "The defendant cannot satisfy that burden if it presents the affirmation of a doctor which recites that the plaintiff has normal ranges of motion in the affected body parts but does not specify the objective tests performed to arrive at that conclusion." (*Linton v Nawaz*, 62 AD3d 434, 438-439 [1st Dept 2009]; *see also Beazer v Webster*, 70 AD3d 587 [1st Dept 2010]["Defendants' failure to indicate the objective tests used

to determine the range of motion in plaintiff's cervical spine was fatal to their efforts to establish a prima facie case for summary dismissal"]; *see Jean-Louis v Gueye*, 94 AD3d 504, 505 [1st Dept 2012] [plaintiff's orthopedic surgeon was not required to reconcile his findings with unaffirmed emergency room records that failed to indicate any objective instruments or criteria used to make notations of plaintiff's full range of motion].) Here, Dr. Adler's affirmed report does not specify the objective instruments used where Dr. Adler found normal ranges of motion in plaintiff's cervical and lumbar spine.

Unlike Dr. Adler, Dr. April measured plaintiff's ranges of motion using a goniometer. However, Dr. April's affirmed report failed to compare the measured ranges of motion in plaintiff's low back to corresponding normal values. (*Jean-Louis v Gueye*, 94 AD3d 504, 505 [1st Dept 2012].) "Failure to provide a comparison to the normal range of motion requires speculation concerning the significance of the numerical results." (*Charley v Goss*, 54 AD3d 569 , 573 [1st Dept 2008].)

Finally, co-defendants's own submissions were, in some respects, contradictory. Dr. April's findings that plaintiff had normal ranges of motion in his neck and lower back conflict with Dr. Adler's findings that plaintiff had limited ranges of motion with regard to extension of plaintiff's cervical spine, and limited ranges of motion with regard to flexion and back extension in plaintiff's lumbar

spine. "The contradictory findings raise a triable issue of fact. Where conflicting medical evidence is offered on the issue of whether a plaintiff's injuries are permanent or significant, and varying inferences may be drawn, the question is one for the jury." (*Martinez v Pioneer Transp. Corp.*, 48 AD3d 306, 307 [1st Dept 2008].)

Thus, co-defendants did not meet their prima facie burden of establishing that plaintiff did not suffer a serious injury under the categories of "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system" of Insurance Law § 5102 (d).

Insurance Law § 5102 (d) also defines a "serious injury" as

> "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 [90] days during the [180] days immediately following the occurrence of the injury or impairment."

Under this 90/180 day category, "an injury must be 'medically determined' . . . meaning that the condition must be substantiated by a physician. Additionally, the condition must be causally related to the accident." (*Damas v Valdes*, 84 AD3d 87, 93 [2d Dept 2011][internal citations omitted].)

Co-defendants have not met their prima facie burden of establishing that plaintiff suffered no "medically determined," non-permanent injury lasting at least 90 days during the 180 days following the accident. Co-defendants contend that the only

doctor who ever told plaintiff not to return to work for any period of time following the accident was Dr. McMahon, who first examined him on May 25, 2011. (Galperin Opp. Affirm., Ex C [McMahon Affirm.] ¶ 3.) However, the deposition testimony that co-defendants cite does not support their contention. At plaintiff's deposition, he was asked,

> "Did a doctor ever tell you to not return to work for any period of time at all?
> A. Yes. Dr. McMahon."

(Paliseno Affirm., Ex D [Baki EBT], at 128:23-25.) The testimony that co-defendants cite does not establish that Dr. McMahon was the only doctor who told him not to return to work. It does not appear that plaintiff was then asked if any other doctor (other than Dr. McMahon) told him not to return to work.

Although MRIs were taken of plaintiffs' lumbar spine and right knee during the 180 days following the accident, and those MRI reports indicate degenerative changes, no MRI reports were submitted as to plaintiff's alleged cervical spinal injuries. Although co-defendants assert that the hospital records from the date of the accident indicate that an examination of plaintiff's musculoskeletal system was normal, and that plaintiff showed normal range of motion in the upper and lower extremities, co-defendants acknowledge that the impression of the physician was that plaintiff suffered cervical/lumbar strain.

Defendants cite plaintiff's testimony that he was not prescribed any medications, that he neither returned to the hospital nor received epidural injections, and that he went to Afghanistan for about two months in 2011 (Baki EBT, at 120). To the extent that the testimony might perhaps be viewed as some circumstantial evidence of a lack of a medically determined injury, those facts must be viewed in the light most favorable to plaintiff, the non-moving party. (*Vega v Restani Constr. Corp.*, 18 NY3d at 503.) Here, defendants have not met their burden that, as a matter of law, plaintiff either suffered no medically determined injury, or that plaintiff was capable of performing substantially all of his usual and customary activities for at least 90 days during the 180 day period. Defendants do not cite any evidence to indicate whether plaintiff traveled to Afghanistan within the 180 days following the accident. Assuming, for the sake of argument, that plaintiff's travel were within that period (i.e., the entire 2 months of travel occurred within 180 days following the accident), the travel would not preclude that possibility that plaintiff also suffered a non-permanent injury that prevented performing substantially all of his usual and customary activities for at least 90 days of the remaining period when he was not on vacation. Co-defendants "cannot obtain summary judgment by pointing to gaps in plaintiff['s] proof." (*Coastal Sheet Metal Corp. v Martin Assocs., Inc.*, 63 AD3d 617, 618 [1st Dept 2009], citing *Torres v Indus. Container*, 305 AD2d 136 [1st Dept

2003].) Thus, the testimony would not be sufficient to meet co-defendants' prima facie burden on summary judgment that plaintiff did not suffer a non-permanent injury substantially affecting his usual and customary daily activities under the 90/180 day category.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion for summary judgment by defendant Abram Shimunov is granted (Motion Seq. No. 003), the complaint in this action (*Baki v Valcourt*, Index No. 106229/2010) is severed and dismissed as against defendant Shimunov, with costs and disbursements to said defendant as taxed by the Clerk of the Court; and it is further

ORDERED that defendant Shimunov's cross claim against his co-defendants for contribution is dismissed, and the cross claim of defendants Valcourt, City of New York, New York City Transit Authority, Advance Transit Co., Inc., Premier Paratransit LLC, New York City Transit Authority-Division of Paratransit, Metropolitan Transportation Authority, and Access-A-Ride against defendant Shimunov for indemnification and/or contribution is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly in favor of defendant Abram Shimunov; and it is further

ORDERED that the motion for summary judgment by defendants Valcourt, City of New York, New York City Transit Authority, Advance Transit Co., Inc., Premier Paratransit LLC, New York City Transit Authority-Division of Paratransit, Metropolitan Transportation Authority, and Access-A-Ride (Motion Seq. No. 004) is denied; and it is further

ORDERED that the remainder of the action shall continue.

Dated: January 7, 2013
New York, New York

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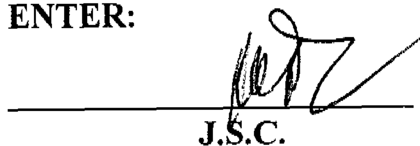

J.S.C.

HON. MICHAEL D. STALLMAN

FILED

JAN 10 2013

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