

Siyunov v Jazz Leasing Corp.
2013 NY Slip Op 30059(U)
January 9, 2013
Sup Ct, Queens County
Docket Number: 29920/2010
Judge: Robert J. McDonald
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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

BORIS SIYUNOV, an infant, by his
 Mother and Natural Guardian, ZHANNA
 KANDKHOROVA,

Index No.: 29920/2010

Motion Date: 11/29/12

Plaintiff,

Motion Nos.: 11

- against -

Motion Seq.: 1

JAZZ LEASING CORP., BADAR R. SHAKIL,
 ALFONSINA PEREZ and COLIN KANG XIE,

Defendants.

- - - - - x

The following papers numbered 1 to 15 were read on this motion by
 defendants JAZZ LEASING CORP. and BADAR R. SHAKIL, for an order
 pursuant to CPLR 3212 granting the defendant summary judgment and
 dismissing the plaintiff's complaint on the ground that plaintiff
 has not sustained a serious injury within the meaning of
 Insurance Law §§ 5102 and 5104:

Papers Numbered

Notice of Motion-Affidavits- Exhibits.....	1 - 7
Affirmation in Opposition-Affidavits.....	8 - 12
Reply Affirmation.....	13 - 15

This is a personal injury action in which plaintiff, Boris Siyunov, age 17, seeks to recover damages for injuries he allegedly sustained on January 15, 2010, as a result of a motor vehicle accident that occurred when the taxi cab in which he was a passenger struck the co-defendants' vehicle in the rear. At the time of the accident the plaintiff was being driven to John Bowne High School. The accident took place on the northbound side of Yellowstone Boulevard at the intersection with 62nd Drive in Queens County, New York.

Defendants Jazz Leasing Corp., the owner of the taxi cab and Badar R. Shakil, the driver of the taxi, now move for an order pursuant to CPLR 3212 dismissing the plaintiff's complaint on the

ground that the injuries claimed by the plaintiff fail to satisfy the serious injury threshold requirement of Section 5102(d) of the Insurance Law. In support of the motion, the defendants submit an affirmation from counsel, Cynthia Hung, Esq; a copy of the pleadings; plaintiff's verified bill of particulars; a copy of the transcript of plaintiff's examination before trial; the affirmed medical report of board certified neurologist, Dr. Jean-Robert Desrouleaux; and the affirmed reports of radiologist, Dr. A. Robert Tantleff.

In his verified bill of particulars, the plaintiff states that as a result of the accident he sustained bulging discs at L3-L4, L4-L5, C4-C5, C5-C6 and C6-C7. The plaintiff contends that he sustained a serious injury as defined in Insurance law §5102(d).

The plaintiff was examined on January 12, 2012 by neurologist, Dr. Jean-Robert Desrouleaux, a physician retained by the defendants. At that time the plaintiff reported to Dr. Desrouleaux that he was a passenger in a motor vehicle that struck another vehicle as a result of which he injured his neck, left shoulder, and lower back. Dr. Desrouleaux performed quantified and comparative range of motion tests. On examination he found no limitations of range of motion of the plaintiff's cervical spine, thoracic spine, and lumbar spine. Dr. Desrouleaux states that based upon his examination of the plaintiff, his impression was that plaintiff sustained an injury to the cervical and lumbar spine that was resolved. He states that "no further neurological treatment is indicated. No disability, permanency or residual effect is anticipated in the plaintiff's condition, the plaintiff can continue with daily living activities without neurological restriction. Prognosis is good."

Dr. Tantleff, a radiologist retained by the defendants, examined the MRI studies of the plaintiff's cervical spine and lumbar spine. He stated that MRIs were both normal and unremarkable without evidence of any definable or significant disc bulge, protrusion or herniation. He stated that there was no evidence of acute or recent injury or post-traumatic abnormality.

In his examination before trial, taken on August 30, 2011, the plaintiff testified that he was not wearing a seatbelt at the time of the collision because both seat belts in the rear of the vehicle were not working. He was seated in the rear seat behind the driver. The impact caused him to hit his head and left shoulder on the inside of the vehicle. He left the scene in an ambulance and was transported to the emergency room at North Shore/Forest Hills Hospital where he was treated and released the

same day. He subsequently received physical therapy and chiropractic treatments at the office of Dr. Pang. He was treated several times a week for approximately four months. Dr. Pang also referred him for MRIs of his back and neck. Plaintiff testified that he was also treated by Dr. Macias, a neurologist. He stated that after the accident he was out of school for two days and over the course of the remainder of the school years he missed 12 - 13 days. He was not confined to his bed or home after the accident. At the time of the deposition he stated that he still had migraine pain to his head and he still has pain in his back. He states that he can no longer run, play basketball, walk for long periods of time or carry heavy objects. The last time he received any treatments for his injuries was in May 2010.

Defendants' counsel contends that the affirmed medical reports of Drs. Tantleff and Desrouleaux, as well as the EBT testimony of the plaintiff, stating that he only missed two days of school immediately following the accident, are sufficient to establish, *prima facie*, that the plaintiff has not sustained a permanent loss of a body organ, member, function or system; that he has not sustained a permanent consequential limitation of a body organ or member or a significant limitation of use of a body function or system. Counsel also contends that the plaintiff, who was not confined to bed or home for more than one day after the accident, did not sustain a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff, for not less than 90 days during the immediate one hundred days following the occurrence, from performing substantially all of his usual daily activities.

In opposition, plaintiff's attorney, Andrew B. Siegel, Esq., submits affirmed medical reports from the plaintiff's treating physician Dr. Pang. In his medical report dated September 10, 2012, Dr. Pang states that the plaintiff first presented to his office on January 18, 2010 three days following the accident. At that time the plaintiff was 15 years of age. He complained of pain in his neck radiating to his shoulders, lower back, buttocks and legs. Dr. Pang states that at presentation the plaintiff was unable to perform basic movements with his back which he found to be indicative of recent trauma. He treated the plaintiff on an intensive basis, three or four times per week for five months through June 2010. He states that after June 2010, the plaintiff received treatment at his office from time to time and presents for therapy when necessary. He states that as his accompanying medical records demonstrate, the plaintiff suffered from both qualitative and quantitative abnormalities in his neck and back.

On September 10, 2012, Dr. Pang re-examined the plaintiff and found that he had the same complaints of radiating back pain as he did at the initial examination and he continued to demonstrate deficits in range of motion. On September 10, 2012, Dr. Pang found after objective testing that the plaintiff still had limited range of motion of the lumbar spine and cervical spine. Dr. Pang also states that the MRI films demonstrate a series of traumatic bulges and consequent compression caused by the subject accident. He states that the plaintiff's objectively determined range of motion deficits are significant and permanent. He concludes that the plaintiff's injuries were caused by his accident of January, 2010, that the accident caused a significant limitation and loss of use of a bodily system, and that the injuries are permanent such that the plaintiff will experience restricted range of motion and pain for the balance of his life.

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 defendants' 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 proof submitted by the defendants, including the affirmed medical reports of Drs. Tantleff and Desrouleaux, as well as the plaintiff's examination before trial in which he testified that he only missed two days of school after the accident, were sufficient to meet its prima facie burden by demonstrating that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the

subject accident (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]).

However, this Court finds that the plaintiff raised triable issues of fact by submitting the affirmed medical report of Dr. Pang, attesting to the fact that the plaintiff sustained bulging discs in the cervical and lumbar spine as a result of the accident and finding that the plaintiff had significant limitations in range of motion of his cervical spine and lumbar spine, both contemporaneous to the accident and in a recent examination, and concluding that the plaintiff's limitations were significant and permanent and resulted from trauma causally related to the accident (see Perl v. Meher, 18 NY3d 208 [2011]; David v Caceres, 2012 NY Slip Op 5132 [2d Dept. 2012]; Martin v Portexit Corp., 2012 NY Slip Op 5088 [1st Dept. 2012]; Ortiz v Zorbas, 62 AD3d 770 [2d Dept. 2009]; Azor v Torado, 59 ADd 367 [2d Dept. 2009]). As such, the plaintiff raised a triable issue of fact as to whether he sustained a serious injury under the permanent consequential and/or the significant limitation of use categories of Insurance Law § 5102(d) as a result of the subject accident (see Khavosov v Castillo, 81 AD3d 903[2d Dept. 2011]; Mahmood v Vicks, 81 AD3d 606 [2d Dept. 2011]; Compass v GAE Transp., Inc., 79 AD3d 1091[2d Dept. 2010]; Evans v Pitt, 77 AD3d 611 [2d Dept. 2010]; Tai Ho Kang v Young Sun Cho, 74 AD3d 1328 743 [2d Dept. 2010]).

In addition, Dr. Pang adequately explained the gap in plaintiff's treatment stating that no-fault had stopped the plaintiff's benefits in June 2010 and there was no alternative source of payment. In addition, Dr. Pang opined that the plaintiff had reached the point of maximum medical improvement (see Abdelaziz v Fazel, 78 AD3d 1086 [2d Dept. 2010]; Tai Ho Kang v Young Sun Cho, 74 AD3d 1328 [2d Dept. 2010]; Domanas v Delgado Travel Agency, Inc., 56 AD3d 717 [2d Dept. 2008]; Black v Robinson, 305 AD2d 438 [2d Dept. 2003]).

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

ORDERED, that the defendants' motion for an order granting summary judgment dismissing plaintiff's complaint is denied.

Dated: January 9, 2013
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.