

Pino v CHP Corp.

2012 NY Slip Op 30534(U)

February 27, 2012

Supreme Court, Queens County

Docket Number: 6271/2010

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

NELSON PINO, Index No.: 6271/2010
Plaintiff, Motion Date: 02/09/12
- against - Motion No.: 23
Motion Seq.: 1
CHP CORP., and PAOLO IDROVO,

Defendants.

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The following papers numbered 1 to 12 were read on this motion by defendants, CHP CORP., and PAOLO IDROVO for an order pursuant to CPLR 3212 granting defendants summary judgment and dismissing the complaint of NELSON PINO on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law §§ 5102 and 5104:

Papers
Numbered

Notice of Motion-Affidavits-Exhibits-Memorandum of Law...1 - 5
Affirmation in Opposition-Affidavits-Exhibits.....6 - 10
Reply Affirmation.....11 - 12

This is a personal injury action in which plaintiff, Nelson Pino, seeks to recover damages for injuries he sustained as a result of a motor vehicle accident that occurred on April 7, 2009 at the intersection of 34th Avenue and 88th Street in Queens County, New York.

The plaintiff alleges that he was injured when the left side of his vehicle was sideswiped by the right side of defendant's vehicle while they were both making a right turn onto 88th Street from 34th Avenue. Plaintiff alleges that he sustained further injuries after he stepped out of his vehicle and was struck by defendant's vehicle. Defendants' vehicle is owned by defendant

CHP Corp. and was operated by Paolo Idrovo.

The plaintiff commenced this action by filing a summons and complaint on March 12, 2010. Issue was joined by service of defendants' verified answer dated May 20, 2010. Defendants now move for an order pursuant to CPLR 3212(b), granting summary judgment dismissing the plaintiff's complaint on the ground that plaintiff did not suffer a serious injury as defined by Insurance Law § 5102.

In support of the motion, defendants submit an affirmation from counsel, William B. Stock, Esq.; a copy of the pleadings; plaintiff's verified bill of particulars; the affirmed medical reports of orthopedic surgeon, Dr. Robert J. Orlandi, and neurologist, Dr. Ravi Tikoo; a copy of the transcript of the examination before trial of plaintiff Nelson Pino; claims search report regarding the plaintiff's prior accidents; and plaintiff's employment records.

In his verified bill of particulars, plaintiff states that as a result of the accident he sustained, inter alia, traumatic chondromalacia of the right patella requiring arthroscopic surgery, disc bulge at C5-C6 level and impingement syndrome of the right shoulder. Plaintiff works as a mechanic for CEC Elevator Cab Corp and states that he was confined to bed and home except for occasional outings for approximately 4 months since the date of the accident.

Plaintiff contends that he sustained a serious injury as defined in Insurance Law § 5102(d) in that he sustained a permanent loss of use of a body organ, member function or system; a permanent consequential limitation or use of a body organ or member; a significant limitation of use of a body function or system; and a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute his 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.

Dr. Robert J. Orlandi, a board certified orthopedic surgeon, retained by the defendants, examined Mr. Pino on April 5, 2011. The plaintiff told Dr. Orlandi that he missed one month from work immediately after the accident. He also stated that he injured his neck, left shoulder, lower back and right knee as a result of the accident. He stated that he did not injure any of those areas previously. He also stated that the knee surgery did not result in any improvement. Dr. Orlandi performed quantified and

comparative range of motion tests. He found that the plaintiff had no limitations of range of motion in the cervical spine, right shoulder and right knee. However, Dr. Orlandi found that the plaintiff exhibited a significant limited range of motion of the lumbar spine stating, "today the claimant chooses to forward flex to just 45 degrees normal being 80 degrees." Dr. Orlandi also concludes that the right knee MRI provides no medical indication for the arthroscopy. Dr. Orlandi states that the plaintiff suffered cervical strain, resolved; no clinical residuals on the right knee and lumbar strain also resolved but associated with a false loss of lumbar forward flexion. He found that the plaintiff did not have a musculoskeletal disability and he can continue to work without restriction.

Mr. Pino, was also examined by Dr. Tikoo, defendant's neurologist on April 8, 2011. In his affirmed report, he states that the plaintiff presented with complaints of left-sided headaches, neck, back, and right knee pain. Dr. Tikoo performed a neurological exam and diagnosed the plaintiff with, (1) subjective complaints of headache; (2) history of cervical strain (3) history of lumbosacral sprain; (4) history of soft tissue injuries to the right knee. It should be noted that Dr. Tikoo stated that, "straight leg raising was possible up to 90 degrees bilaterally in the sitting position (normal=90) but only to 45 degrees in the standing position. This was a voluntary limitation, without neurological basis." He concludes that there were no objective findings to substantiate his subjective complaints. He states that the plaintiff does not need any further treatment or diagnostic treatment. He states that plaintiff is not disabled from a neurological basis and that a permanent injury has not been sustained.

In his examination before trial, taken on February 4, 2011, plaintiff testified that after the accident he was confined to his home for about one month and he was out of work for one month and then returned to work periodically. He stated that after the accident he left the scene in an ambulance and was taken to the emergency room at North Shore LIJ at Forest Hills Hospital. He had x-rays taken and was released from the emergency room the same day. Two days later he sought treatment at Queens Arthroscopy and Sports Medicine clinic. He received treatments for his knee, neck and back. He went three times a week for approximately five months. On July 10, 2009 he had arthroscopic surgery on his right knee. He stated that he stopped his treatments when his no-fault benefits ran out.

Defendants' counsel contends that the medical reports of Drs. Orlandi and Tikoo as well as the plaintiff's deposition

testimony are sufficient to establish, prima facie, that the plaintiff has not sustained a permanent consequential limitation or use of a body organ or member; a significant limitation of use of a body function or system; or a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute her 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.

In opposition, plaintiff's attorney Morton Povman, Esq., submits his own affirmation as well as the affirmed medical reports of Dr. Glenn J. Jakobsen and orthopedic surgeon, Dr. Laxmidhar Diwan.

Dr. Jakobsen states in his affirmed report dated December 28, 2011 that he first treated plaintiff in 2007 for injuries to his neck, low back, right knee and shoulder for an incident that occurred on April 17, 2007. Dr. Jakobsen also states that he was informed that the plaintiff was in a motor vehicle accident in 2002 for which he sustained injuries to his neck, back, right shoulder, and right knee. However, he states that his past history played an "insignificant part in evaluating his injuries arising from the motor vehicle accident of April 7, 2009" as he had recovered from his prior injuries and was asymptomatic for over one year prior to the most recent accident.

Dr. Jakobsen first examined plaintiff with regard to this accident two days post accident. At that time, using objective quantified tests, he found significantly reduced range of motion of the cervical spine, lumbar spine, right shoulder and right knee caused by the accident of April 7, 2009. He also reviewed the MRI films and agreed that the plaintiff sustained certain specified injuries to his cervical and lumbar spines, right shoulder and right knee including disc bulges at C5-6 and L4-5. When plaintiff's no-fault benefits ran out on April 7, 2010, it was determined that further treatment would be palliative only. Dr. Jakobsen reexamined the plaintiff on October 18, 2011, at which time he found that the plaintiff still exhibited significant limitations of range of motion of the lumbar spine, cervical spine, right shoulder and right knee. He also states that the plaintiff was unable to perform substantially all of his normal daily activities for approximately six months immediately following the accident. He states that the plaintiff's injuries are partially permanent in nature and are all causally related to the subject accident. He states

that in his opinion, Mr. Pino will have a permanent limitation of the right knee of 35% and limitation of the cervical and lumbosacral spine of 30 % and a right upper extremity limitation of 15%.

Plaintiff also submits the affirmed report of orthopedic surgeon, Dr. Diwan, stating that he saw the plaintiff in July 2009 and after objective testing found limitations in range of motion of the lumbar spine, right shoulder right elbow right knee and cervical spine for which he recommended and performed arthroscopic surgery.

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]).

Initially, it is defendant's obligation to demonstrate that the plaintiff has not sustained a "serious injury" by submitting affidavits or affirmations of its medical experts who have examined the litigant and have found no objective medical findings which support the plaintiff's claim (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]). 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 defendants failed to meet their prima facie burden of showing 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]). Defendants failed to

establish, prima facie, that plaintiff did not sustain a serious injury under the permanent loss of use, permanent consequential limitation of use or significant limitation of use categories as a result of the accident (see Insurance Law § 5102 [d]).

As stated above, in his affirmed medical report, Dr. Orlandi stated that when he examined the plaintiff's lumbar spine on April 5, 2011, he exhibited a significant range of motion limitation. Despite these objective findings he concluded that the physical examination did not reveal objective evidence of a disability. He indicated that the plaintiff voluntarily chose to limit his range of motion. Dr. Tikoo also found a limitation in the plaintiff's range of motion which he also characterized as voluntary and without neurological basis. Dr. Orlandi's and Dr. Tikoo's findings alone raise an issue of fact as to whether the injured plaintiff suffered a significant limitation of use of a body function or system (see Williams v Fava Cab Corp., 90 AD3d 912 [2d Dept. 2011]; Granovskiy v Zarbaliyev, 78 AD3d 656 [2d Dept. 2010]; Britt v Bustamante, 77 AD3d 781 [2d Dept. 2010]; Croyle v Monroe Woodbury Cent. School Dist., 71 AD3d 944 [2d Dept. 2010]; Leopold v New York City Tr. Auth., 72 AD3d 906 [2d Dept. 2010]; Catalan v G & A Processing, 71 AD3d 1071 [2d Dept. 2010]; Kjono v Fenning, 69 AD3d 581 [2d Dept. 2010]; McDowall v Abreu, 11 AD3d 590 [2d Dept. 2004]).

In any event, this Court finds that the plaintiff raised triable issues of fact by submitting the affirmed medical reports of Drs. Diwan and Jakobsen attesting to the fact that the plaintiff had significant limitations in range of motion 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 Dixon v Fuller, 79 AD3d 94 [2d Dept. 2010]; 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 ADd 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. Jakobsen found that the plaintiff had a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute his usual

and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury.

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: February 27, 2012
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.