Hernandez v Sakellis
2015 NY Slip Op 32414(U)
November 13, 2015
Supreme Court, Queens County
Docket Number: 704728/2013
Judge: Robert J. McDonald

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

RENE P. HERNANDEZ, Index No.: 704728/2013

Plaintiff, Motion Date: 10/28/15

- against - Motion No.: 62

PANAGIOTIS SAKELLIS and YORK INDUSTRIAL PAINTING CORP., Motion Seq No.: 1

Defendants.

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The following papers numbered 1 to 6 read on this motion by defendants for an order pursuant to CPLR 3212 granting defendants summary judgment and dismissing the complaint of plaintiff on the ground that plaintiff fails to meet the serious injury threshold requirement of Insurance Law § 5102(d):

	Papers Numbered
Notice of Motion-Affirmation-Exhibits	1 - 4
Affirmation in Opposition-Exhibits	5

This is a personal injury action in which plaintiff seeks to recover damages for injuries he allegedly sustained in a motor vehicle accident that occurred on May 1, 2013 on Route 25 at or near its intersection with Calvert Avenue, in Suffolk County, New York. Plaintiff alleges that as a result of the accident he sustained serious injuries to his right shoulder, cervical spine, and lumbar spine, including disc herniations and radiculopathy.

Plaintiff commenced this action by filing a summons and verified complaint on October 25, 2013. Defendants joined issue by service of a verified answer dated November 1, 2013. Defendants now move for an order pursuant to CPLR 3212, dismissing the complaint on the ground that the injuries claimed by plaintiff fail to satisfy the serious injury threshold requirement of Section 5102(d) of the Insurance Law.

In support of the motion, defendants submits an affirmation from counsel, Donald M. Munson, Esq.; a copy of the pleadings; a copy of plaintiff's verified bill of particulars; a copy of the transcript of the examination before trial of plaintiff taken on January 16, 2015; and the affirmed medical report of Eduardo V. Alvarez, M.D.

On April 4, 2015, Dr. Alvarez performed an independent orthopedic examination on plaintiff. Plaintiff presented with current complaints of intermittent headaches, dizziness, pain and stiffness of the neck and back, accessional pain in his right shoulder, and difficulty with sleep. Dr. Alvarez identifies the medical records he reviewed and performed range of motion testing. He found normal ranges of motion in plaintiff's cervicothoracic spine, lumbosacral spine, shoulders, elbows, wrists, hips, knees, and ankles. Dr. Alvarez stats that plaintiff's injuries were causally-related to the subject accident as there were no preexisting conditions and/or prior injuries. He concludes that there is no objective evidence of any ongoing causally related orthopedic disability, and plaintiff is able and is performing his usual customary activities of daily living with no restrictions.

At his examination before trial, plaintiff testified that he was in a motor vehicle accident on May 1, 2013. He was taken from the scene of the accident by ambulance. He states that he only missed four days from work as a result of the accident. When he returned to work he was only able to do paperwork and he worked less hours. Currently, he is unable to do anything that is physical at work, play basketball, go to the gym, help teach his daughter to play basketball, and maintain his house such as cutting the grass. He still has neck and back pain.

Defendants' counsel contends that the evidence submitted is sufficient to establish, prima facie, that plaintiff has not sustained a permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; or significant limitation of use of a body function or system. Counsel also contends that plaintiff, who alleges that he only missed four days from work, did not sustain a medically determined injury or impairment of a nonpermanent nature which prevented him, for not less than 90 days during the immediate 180 days following the occurrence, from performing substantially all of his usual daily activities.

In opposition, plaintiff submits an affirmation from counsel, Patrick W. Cannon, Esq.; photographs of plaintiff's vehicle after the accident; a copy of the MRI reports of plaintiff's lumbar spine and cervical spine; and an affidavit from Nicholas Martin, D.C.

Plaintiff first sought treatment with Dr. Martin on May 3, 2013. Dr. Martin performed range of motion testing and found restricted range of motion in plaintiff's cervical spine and lumbar spine. Plaintiff treated with Dr. Martin until April 16, 2014 when he was discharged from Dr. Martin's care as he had reached the maximum medical benefits provided and any further treatment would have been palliative in nature. Dr. Martine re-examined plaintiff on September 17, 2015. Plaintiff's present complaints were back and neck pain. Dr. Martin found continued limitations in plaintiff's range of motion in his cervical spine lumbar spine. He concludes that the injuries are expected to be permanent and are the direct result of the subject accident.

Dr. Michele Rubin performed an MRI of plaintiff's cervical spine on July 19, 2013 and found a posterocentral disc herniation at C4-C5, loss of the normal cervical lordosis, and mildly decreased T1 marrow signal. Dr. Rubin also performed an MRI of plaintiff's lumbar spine on July 26, 2013 and found a left foraminal herniation at L4-L5 and edema/fluid within the interspinous spaces at L4-L5 and L5-S1.

Defendants have not submitted a reply.

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 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 defendant's 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 competent proof submitted by defendants is sufficient to meet defendants' prima facie burden by demonstrating that 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]; Carballo v Pacheco, 85 AD3d 703 [2d Dept. 2011]; Ranford v Tim's Tree & Lawn Serv., Inc., 71 AD3d 973 [2d Dept. 2010]).

However, this Court finds that plaintiff raised a triable issue of fact by submitting the MRI reports showing disc herniations along with the affirmed medical report attesting to the fact that plaintiff sustained injuries as a result of the accident and finding that plaintiff had significant limitations in ranges of motion both contemporaneous to the accident and in a recent examination (see Perl v Meher, 18 NY3d 208 [2011]; David v Caceres, 96 AD3d 990 [2d Dept. 2012]; Martin v Portexit Corp., 98 AD3d 63 [1st Dept. 2012]; Azor v Torado, 59 AD2d 367 [2d Dept. 2009]; Ortiz v Zorbas, 62 AD3d 770 [2d Dept. 2009]).

As such, plaintiff demonstrated issues 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 light of this finding, the court need not address the 90/180 category.

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

ORDERED, that the motion by defendants for an order granting summary judgment, dismissing plaintiff's complaint is denied; and it is further

ORDERED, that this matter remains on the calendar of the Trial Scheduling Part for November 30, 2015.

Dated: November 13, 2015
Long Island City, N.Y.

FILED

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COUNTY CLERK
QUEENS COUNTY

ROBERT J. MCDONALD
J.S.C.