Romero v Konneh
2016 NY Slip Op 31672(U)
September 6, 2016
Supreme Court, New York County
Docket Number: 150108/15
Judge: Leticia M. Ramirez

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 22

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OSVALDO ROMERO,

Plaintiff(s),

-against-

MOHAMMED KONNEH and FREEDOM CAR LEASING,

Defendant(s).

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Index #: 150108/15
Mot. Seq: 01

DECISION/ORDER
HON. LETICIA M. RAMIREZ

Defendants' motion, pursuant to CPLR §3212, for summary judgment on the basis that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law §5102(d) is denied.

It is well settled that summary judgment is a drastic remedy and cannot be granted where there is any doubt as to the existence of triable issues of fact or if there is even arguably such an issue. *Hourigan v. McGarry, 106 A.D.2d 845*, appeal dismissed *65 N.Y.2d 637 (1985); Andre v. Pomeroy, 35 N.Y.2d 361 (1974)*. In deciding summary judgment motions, the Court must accept, as true, the non-moving party's recounting of the facts and must draw all reasonable inferences in favor of the non-moving party. *Warney v Haddad, 237 A.D.2d 123 (1st Dept. 1997); Assaf v Ropog Cab Corp., 153 A.D.2d 520 (1st Dept. 1989)*. While plaintiff has the burden of proof, at trial, of establishing a *prima facie* case of sustaining a "serious injury" in accordance with Insurance Law §5102(d), defendants have the burden, on a summary judgment motion, of making a *prima facie* showing that plaintiff has not sustained a "serious injury" as a matter of law. In doing so, defendants must submit admissible evidence to demonstrate that there are no material issues of fact to require a trial. *Zuckerman v City of New York, 49 N.Y.2d 557 (1980); Winegrad v New York Univ. Med. Ctr., 64 N.Y.2d 851 (1985); Alvarez v Prospect Hosp., 68 N.Y.2d 320 (1986)*. Defendants' failure to make such a showing mandates the denial of a summary judgment motion, regardless of the sufficiency of opposing papers. *Winegrad v New York Univ. Med. Ctr., supra; Alvarez v Prospect Hosp., supra.*

An acute sprain or strain that causes a significant physical limitation may constitute a "serious injury" within the meaning of §5102(d) of the New York State Insurance Law. *Licari v Elliot, 57 N.Y.2d 230 (1982); Smith-Carter v Valdez, 2008 NY Slip OP 31231U (Sup. Ct. N.Y.*

2008); Rodriguez v Russell, 2013 NY Slip Op 33954U, (Sup. Ct. Bronx 2013); Maenza v Letkajornsook, 172 A.D.2d 500 (2nd Dept. 1991); Konco v E.T.C. Leasing Corp., 160 A.D.2d 680 (2nd Dept. 1990). Furthermore, a tendon or ligament tear or a bulging or herniated disc may also constitute evidence of a "serious injury" in accordance with the Insurance Law. *Cruz v Lugo, 29 Misc.3d 1225(A) (Sup. Ct. Bronx 2008); Shvartsman v Vildman, 47 A.D.3d 700 (2nd Dept. 2008); Tobias v Chupenko, 41 A.D.3d 583 (2nd Dept. 2007); Lewis v White, 274 A.D.2d 455 (2nd Dept. 2000).* However, such claims must be supported by objective competent medical evidence demonstrating a significant physical limitation resulting therefrom. *Licari v Elliot, 57 N.Y.2d 230 (1982); Pommells v Perez, 4 N.Y.3d 566 (2005).*

According to the plaintiff's Bill of Particulars, plaintiff alleges sustaining, *inter alia*, a tear of the distal supraspinatus tendon of the right shoulder and a tear of the anterior glenoid labrum of the right shoulder, necessitating surgery on October 20, 2014 and bulging discs at C4-5, C5-6 and C6-7 as a result of the subject accident of May 12, 2014.

Defendants failed to meet their burden of making a *prima facie* showing that plaintiff did not sustain a "serious injury," as a matter of law. *Zuckerman v City of New York , supra.; Winegrad v New York Univ. Med. Ctr., supra; Alvarez v Prospect Hosp., supra.*

In support of their motion, defendants submitted, *inter alia,* the affirmed report of Dr. Edward Toriello, who examined plaintiff on December 2, 2015. Although Dr. Toriello noted that plaintiff had full range of motion of his right shoulder, Dr. Toriello noted, *inter alia*, that plaintiff's cervical spine range of motion was limited, to wit: flexion was to 26 degrees (normal is 50 degrees) and extension was to 50 degrees (normal is 60 degrees). Given this, and as Dr. Toriello noted that "the range of motion examination is a subjective test under the voluntary control of the individual being tested," Dr. Toriello's report raises a triable issue of fact warranting denial of defendants' motion. The finder of fact must determine whether plaintiff's cervical spine limitation is due to actual injury(ies) or subjective complaints of pain and/or limitation. *Hourigan v. McGarry, supra.*

Furthermore, alhtough Dr. Toriello noted his review of plaintiff's cervical spine MRI report dated June 20, 2014 and it's findings of bulging discs at C4-5, C5-6 and C6-7, Dr. Toriello's diagnosis relative to plaintiff's cervical spine was a resolved cervical spine strain. Dr. Toriello does not explain the inconsistency in the MRI findings and his diagnosis. This, coupled

with the fact that defendants' radiologist, Dr. Audrey Eisenstadt, noted in her affirmed report that her review of the films of plaintiff's aforesaid cervical spine MRI did not reveal any disc bulging or herniations contrary to plaintiff's allegations, further create triable issues of fact for jury determination. *Ugarriza v. Schmider, 46 N.Y.2d 471 (1979); Andre v. Pomeroy, 35 N.Y.2d 361 (1974); Moreno v. Chemtob, 706 N.Y.S.2d 150 (2nd Dept. 2000).*

This Court need not evaluate the remainder of plaintiff's claimed injuries to determine whether they meet the "serious injury" threshold, since if plaintiff is able to establish a "serious injury" at trial, plaintiff may recover for all injuries sustained in the subject accident. *McClelland v Estevez, 77 A.D.3d 403 (1st Dept. 2010).*

It is also unnecessary for the Court to consider plaintiff's opposing papers, since defendants have not meet their burden of demonstrating the absence of a "serious injury," as a matter of law. *Licari v Elliot, supra.*; *Winegrad v New York Univ. Med. Ctr., supra.; Alvarez v Prospect Hosp., supra.*; *Manceri v Bowe, 19 A.D.3d 462 (2nd Dept. 2005).*

Nowithstanding, plaintiff sufficiently raised a triable issue of fact as to whether he sustained, *inter alia*, a tear of the distal supraspinatus tendon of the right shoulder and/or a tear of the anterior glenoid labrum of the right shoulder, necessitating surgery on October 20, 2014 and whether he sustained a "significant" or "permanent consequential" limitation of his right shoulder as a result of the subject accident, with the affirmed report of Dr. Randall Ehrlich. It is well settled that the finder of fact must resolve conflicts in expert medical opinions. *Ugarriza v. Schmider, supra.; Andre v. Pomeroy, , supra.; Moreno v. Chemtob, , supra.*

Next, contrary to defendants' contention, plaintiff's explanation for his gap in treatment, to wit: that his no-fault benefits were ended; that Medicaid would not pay for treatment stemming from the subject accident; and that he could not afford medical treatment on his own, was sufficient to raise a triable issue of fact as to this issue. *Ramkumar v Grand Style Tansp. Enters. Inc., 22 N.Y.3d 905 (2013); Francovig v Senekis Cab Corp., 41 A.D.3d 643 (2nd Dept. 2007).*

Based upon the foregoing, those portions of defendants' motion seeking dismissal of plaintiff's claim of sustaining a "serious injury" based upon the "significant" and "permanent consequential" limitation categories are denied.

However, that portion of defendants' motion seeking dismissal of plaintiff's claim of sustaining a "serious injury" based upon the "90/180" category is granted. Plaintiff failed to raise

a triable issue of fact as to whether he was prevented from performing substantially all of his usual and customary daily activities for not less than 90 days during the 180 days immediately following the subject accident. During his deposition, plaintiff, who was not employed at the time of the subject accident, only alleged that he was confined to bed for one to two weeks and thereafter confined to home for one additional week immediately following the subject accident. Plaitniff further testified that he was not directed by a doctor regarding his bed an/or home confinement. In addition, no competent objective medical evidence was submitted to support a claim under the "90/180" category of the Insurance Law. *Eliah v Mahlah, 58 A.D.3d 434 (1st Dept. 2009); Springer v Arthurs, 22 A.D.3d 829 (2nd Dept. 2005); Bennett v Reed, 263 A.D.2d 800 (3rd Dept. 1999)*. As such, plaintiff's claim of sustaining a "serious injury" based upon the "90/180" category is dismissed.

Accordingly, defendants' summary judgment motion is denied in part and granted in part, as explained herein. All parties are directed to appear for the next DCM Compliance Conference on October 21, 2016. Plaintiff is directed to serve a copy of this Decision, with Notice of Entry, upon defendants within 20 days of this Decision.

This constitutes the Decision/Order of the Court.

Dated: September 6, 2016
New York, New York

HON. LETICIA M. RAMIREZ, J.S.C.