Alabdullah v Singh
2017 NY Slip Op 30435(U)
March 3, 2017
Supreme Court, Queens County
Docket Number: 6381/2015
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

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FIRAS ALABDULLAH, Index No.: 6381/2015

Plaintiff, Motion Date: 2/27/17

- against - Motion No.: 262

AVTAR SINGH and HARPREET SINGH, Motion Seq.: 1

Defendants.

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The following papers numbered 1 to 9 read on this motion by defendants for an order pursuant to CPLR 3212, granting defendants summary judgment and dismissing plaintiff's complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law §§ 5104(a) and 5102(d):

	Papers Numbered
Notice of Motion-Affirmation-Exhibits	1 - 4
Affirmation in Opposition-Exhibits	5 - 7
Reply Affirmation	8 - 9

In this negligence action, plaintiff seeks to recover damages for personal injuries allegedly sustained as a result of a motor vehicle accident that occurred on September 13, 2014 on Prince Street at or near its intersection with Mott Street in New York County, New York. In the verified bill of particulars, plaintiff alleges that he sustained serious injuries to, inter alia, his cervical spine, right shoulder, thoracic spine, lumbar spine, right hip, pelvis, bilateral knees, and left leg.

Plaintiff commenced this action by filing a summons and complaint on May 26, 2015. Issue was joined by service of defendants' verified answer dated August 4, 2015. Defendants now move for an order pursuant to CPLR 3212(b), granting summary judgment and dismissing 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, Dominick Dale, Esq.; a copy of the pleadings; a copy of the verified bill of particulars; a copy of the note of issue; a copy of the transcript of the examination before trial of plaintiff; copies of the affirmed medical reports of Salvatore J. Corso, M.D., Vladimir Zlatnik, M.D., and Raj D. Tolat, M.D.; and a copy of the Police Accident Report (MV-104AN).

At his deposition, taken on January 14, 2016, plaintiff testified that he was involved in the subject accident. The force of the impact was not severe. There was a slight crack on his vehicle's left light and scratches. His friend drove his vehicle from the scene of the accident. They grabbed a sandwich and then went back home. He first sought medical attention within two days after the accident. He was involved in a prior accident in 2013 in which he injured his neck, both shoulders, and the entire left side of his body. The subject accident aggravated his prior injuries. He had an MRI prior to the subject accident in which he had five disc herniations and bulges. He stopped treatment in January 2015. He was not working at the time of the subject accident.

Dr. Zlatnik examined plaintiff on May 3, 2016. Plaintiff presented with current complaints of pain in his back, bilateral shoulders, and left leg. Dr. Zlatnik states that he only reviewed plaintiff's verified bill of particulars in rendering his opinion. He performed objective range of motion testing using a goniometer, and found decreased ranges of motion in plaintiff's cervical spine, thoracic spine, and lumbar spine. However, all other objective tests were normal. Dr. Zlatnik concludes that there is no disability from a neurological standpoint, and plaintiff is able to function and perform all activities of daily living from a neurological perspective.

Dr. Corso performed an independent orthopedic evaluation of plaintiff on May 4, 2016. Plaintiff presented with current complaints of pain in his neck, left shoulder, and lower back. Plaintiff informed Dr. Corso that he had no prior accidents. Dr. Corso states that he only reviewed plaintiff's verified bill of particulars in rendering his opinion. He performed objective range of motion testing using a goniometer, and found normal ranges of motion in plaintiff's cervical spine, thoracic spine, lumbar spine, bilateral shoulders/arms, bilateral hips and pelvis, and bilateral knees. All other objective tests were normal. Dr. Corso concludes that plaintiff is capable of engaging in normal activities of daily living. There is no evidence of disability or permanent injury. He further notes that all orthopedic testing was negative, there were no muscle spasms or

trigger points, and reflexes, muscle strength, sensation and muscle tone were all normal.

Defendants also submit a copy of Dr. Tolat's report. Plaintiff first sought medical treatment at Premier East Physical Medicine and Rehabilitation, P.C. ten days after the accident. He had an initial consultation with Dr. Tolat. While range of motion testing was limited, there was no swelling, erythema or acute spasm regarding plaintiff's lumbar spine, thoracic spine, and bilateral shoulders.

Defendants' counsel contends that the medical report and plaintiff's own testimony are sufficient to demonstrate that plaintiff did not sustain a significant disfigurement; a fracture; a permanent loss of use of a body, organ, member, function or system; a permanent consequential limitation of 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 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.

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 the 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, including the affirmed reports of Drs. Zlatnik and Corso and plaintiff's testimony, 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]).

Although Dr. Zlatnik observed restricted ranges of motion, he stated that he observed better ranges of motion when plaintiff was observed candidly during the examination such as when he was getting on and off the examination table and when he was being distracted during conversation and distracting maneuvers. Additionally, Dr. Zlatnik found that plaintiff displayed evidence of symptom magnification including a positive Waddell's test. As Dr. Zlatnik explained the basis for his conclusion that the noted limitations were self-imposed, and based on the other objective medical evidence defendants' presented, this Court finds that defendants' sufficiently established their prima facie burden.

In opposition, plaintiff submits an affirmation from counsel, Thomas P. Cleere, Esq.; records from Premier East Physical Medicine & Rehabilitation, P.C.; MRI reports; records from Total Health Rehab Center; and an affirmed report from Stuart B. Krost, M.D. Initially, this Court notes that the physical therapy progress note and initial evaluation from Premier East Physical Medicine & Rehabilitation, P.C., records from Total Health and Rehab Center, and Dr. Krost's notes from his initial evaluation on February 5, 2015 and follow up office visit on February 18, 2015 are uncertified and unaffirmed, and therefore, are inadmissible (see Lazu v Harlem Group, Inc., 89 AD3d 435 [1st Dept. 2011] quoting Migliaccio v Maraca, 56 AD3d 393 [1st Dept. 2008][statements and reports by the injured party's examining and treating physicians that are unsworn or not affirmed to be true under penalty of perjury do not meet the test of competent, admissible medical evidence sufficient to defeat a motion for summary judgment]).

Upon a review of the motion papers, opposition, and reply thereto, this Court finds that plaintiff failed to raise a triable issue of fact. Here, it appears that plaintiff's last evaluation was by Dr. Krost in February 2015. Thus, plaintiff failed to provide any recent examination demonstrating that his alleged injuries are permanent. Without a recent examination and medical report in admissible form indicating plaintiff's current physical condition, plaintiff's submissions are insufficient to

raise a triable issue of fact as to whether the plaintiff sustained a serious injury (see Sham v. B&P Chimney Cleaning & Repair Co., Inc., 71 AD3d 978 [2d Dept. 2010] [finding that any projections of permanence have no probative value in the absence of a recent examination]; Cornelius v Cintas Corp., 50 AD3d 1085 [2d Dept. 2008]; Sullivan v Johnson, 40 AD3d 624 [2d Dept. 2007]; Barzey v Clarke, 27 AD3d 600 [2d Dept. 2006]; Farozes v Kamran, 22 AD3d 458 [2d Dept. 2005][finding that in order to raise a triable issue of fact the plaintiff was required to come forward with objective medical evidence, based upon a recent examination, to verify his subjective complaints of pain and limitation of motion]; Ali v Vasquez, 19 AD3d 520 [2d Dept. 2005]).

Even if this Court were to consider Dr. Krost's last examination of plaintiff as a recent examination, Dr. Krost casually related plaintiff's injuries to his cervical and lumbar spine to the instant occurrence as aggravations of the pre-existing injuries. However, Dr. Krost failed to review the medical records from the prior accident. Dr. Krost only reviewed the MRIs taken on November 25, 2013 of the lumbar spine and cervical spine. Accordingly, his conclusion about causality is speculative and insufficient (see Frish v Harris, 101 AD3d 941 [2d Dept. 2012]; Cantave v Gelle, 60 AD3d 988 [2d Dept. 2009]). Moreover, Dr. Krost does not address any of the alleged injuries to plaintiff's right shoulder, thoracic spine, right hip, pelvis, bilateral knees, and left leg. It is the plaintiff's burden to demonstrate that the plaintiff's injuries were proximately caused by the subject accident and not a prior or subsequent injury or condition (see Finkelshteyn v Harris, 280 AD2d 579 [2d Dept. 2001]; Alcalay v Town of Hempstead, 262 AD2d 258 [2d Dept. 1999]). Under these circumstances, it would be speculative to determine that the subject accident was the sole cause of plaintiff's claimed injuries (see Mooney v Edwards, 12 AD3d 424 [2d Dept. 2004]; Dimenshteyn v Caruso, 262 AD2d 348 [2d Dept. 1999]). Additionally, the MRI reports are insufficient to demonstrate causality because they fail to causally relate any findings to the subject accident (see Munoz v Koyfman, 44 AD3d 914 [2d Dept. 2007]; Collins v Stone, 8 AD3d 321 [2d Dept. 2004]).

Regarding the 90/180 day category, plaintiff failed to submit competent medical evidence that the injuries allegedly sustained in the subject accident rendered him unable to perform substantially all of his usual and customary daily activities for not less than 90 days of the first 180 days following the subject accident (see Nieves v Michael, 73 AD3d 716 [2d Dept. 2010]; Sainte-Aime v Ho, 274 AD2d 569 [2d Dept. 2000]).

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

ORDERED, that defendants Avtar Singh and Harpreet Singh's summary judgment motion is granted, plaintiff's complaint is dismissed, and the Clerk of the Court shall enter judgment accordingly.

Dated: March 3, 2017
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C