SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 62

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CARLOS S. RAMOS,

Plaintiff,

-against-

JOHN J. KEENAN and CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Defendants.

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DECISION AND ORDER
Index No. 159641/2013
Mot. Seq. No. 001

Hon. James E. d'Auguste

Defendants John J. Keenan and Consolidated Edison Company of New York, Inc. ("Con Edison") (collectively, "defendants") move, pursuant to CPLR 3212, for an order granting summary judgment in their favor on the grounds that plaintiff Charles S. Ramos has not sustained a "serious injury" under New York Insurance Law ("Insurance Law") Section 5102(d).[1] For the reasons stated herein, defendants' motion for summary judgment is granted in part and denied in part.

Factual and Procedural History

Plaintiff, a delivery person and owner of his own cheese company, commenced this action to recover damages for personal injuries allegedly sustained as a result of a motor vehicle accident that occurred when the vehicle he was driving was struck from behind by a vehicle owned and/or operated by defendants at or near the intersection of East 69th Street and Second Avenue in the County, City and State of New York on October 3, 2012. Plaintiff alleges that, as a result of the accident, he suffers from, *inter*

[1] Section 5102(d) defines "serious injury" as the following:

> a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's 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.

alia, bulged and/or herniated discs in his cervical spine and lumbar spine that required him to receive an epidural steroid injection.

Discussion

Defendants meet their initial burden of establishing that plaintiff did not sustain a permanent loss of use or significant limitation of a body organ, member, function, or system based upon his testimony at an examination before trial ("EBT") (Borstein Aff. Ex. D)[2] and the signed report of Dr. Leo Sultan, an orthopedist who performed an independent medical exam ("IME") of plaintiff on behalf of Con Edison on June 22, 2016 (*id.* Ex. F). In his report, Dr. Sultan states that he reviewed magnetic resonance image ("MRI") radiology reports of plaintiff's cervical and lumbar spine, right knee, and elbow taken in October and November of 2012. *Id.* Ex. F, at 1. Dr. Sultan also performed range of motion testing of plaintiff's cervical spine, thoracolumbar spine, right knee, and right elbow using goniometric measurements and found all ranges of motion to be normal based upon "the AMA Guidelines 5th Edition, N.Y.S. guidelines and McBride's Guide to Permanent Disability along with more than 40 years of clinical experience." *Id.* Ex. F, at 3. Ultimately, Dr. Sultan opined that his examination of plaintiff did "not confirm any ongoing causally related orthopedic or neurological impairment in regard to the [alleged accident]" and that the injuries presented in the radiology reports did not present themselves during the course of the June 22, 2016 IME. *Id.* Ex. F, at 4.

In opposition, plaintiff raises triable issues of material fact by submitting, *inter alia*, the signed report of Dr. David H. Delman that shows qualitative losses of range of motion in plaintiff's cervical spine (40-44%), lumbar spine (44-50%), and right knee (23%) and an affirmation stating the same. LaRock

[2] Plaintiff argues that his EBT is inadmissible as it was allegedly never provided to him for review, pursuant to CPLR 3116. In response, defendants argue that the EBT was mailed to plaintiff for review and annexed a copy of a cover letter addressed to plaintiff's counsel to their reply papers as proof of mailing. Although the letter is submitted by way of reply, this Court may consider such evidence since it directly responds to plaintiff's argument in opposition that his EBT is inadmissible. *Whale Telecom Ltd. v. Qualcomm Inc.*, 41 A.D.3d 348, 348 (1st Dep't 2007) (holding that the court providently exercised its discretion in considering defendants' evidence submitted in reply, which was directly responsive to plaintiff's argument in opposition).

Aff. Ex. G. Courts have often found quantitative analyses from range-of-motion testing to be sufficient in order to prove, or disprove, a "serious injury" depending on the amount of loss in range of motion—*e.g.*, a 12% loss may be considered "mild, minor or slight" (*see Licari v. Elliott*, 57 N.Y.2d 230 (1982); *McLoud v. Reyes*, 82 A.D.3d 848, 849 (2d Dep't 2011) (finding a 12% loss in range of motion to be insignificant)), whereas losses in range of motion of 20% or more may meet the serious injury threshold (*see, e.g.*, *Mazo v. Wolofsky*, 9 A.D.3d 452 (2d Dep't 2004) (holding that a 20% loss in range of motion constitutes a serious injury); *Brown v. Achy*, 9 A.D.3d 30, 31-33 (1st Dep't 2004) (same as to 25%); *Cassagnol v. Williamsburg Plaza Taxi Inc.*, 234 A.D.2d 208, 209-10 (1st Dep't 1996) (same as to 40%)). Dr. Delman opines that plaintiff's impairments are permanent in nature and causally related to the alleged accident. *Id.* Ex. F, at 4. This evidence of loss of plaintiff's range of motion, in conjunction with the positive MRI reports that show bulging and herniated spinal discs (*id.* Ex. E), which were reviewed by Dr. Sultan and affirmed by Dr. Steven Winter, a board-certified radiologist, raise genuine issues of material fact as to the seriousness of plaintiff's injuries that are best left for a jury to decide. *See Toure v. Avis Rent A Car Sys., Inc.*, 98 N.Y.2d 345, 351 (2002).

Defendants, however, argue that plaintiff has not suffered from a medically-determined injury or impairment that prevented him from performing substantially all of the material acts that constitute his usual and customary daily activities for at least ninety (90) days of the one-hundred eighty (180) days following the accident (the "90/180-day claim"). As such, defendants have established an entitlement to summary judgment on the 90/180-day claim. Although plaintiff, in his EBT and affidavit, states that he still feels pain in his neck, back, and right knee and has difficulty "sitting for long periods of time, standing for long periods of time, lifting heavy things, carrying heavy things, sleeping, bending, walking long distances and doing chores around [his] house" (LaRock Aff. Ex. A, ¶ 7), it is uncontested that plaintiff returned to work just two weeks after the alleged accident and was able to fulfill the bulk of his job-related duties. Plaintiff's subjective complaints of pain, even when taken in conjunction with objective medical

evidence of loss of range of motion, are "insufficient to raise the inference that plaintiff was prevented from performing [his] usual and customary activities for at least 90 of the 180 days following the [alleged] accident." *Vaughan v. Leon*, 94 A.D.3d 646, 650 (1st Dep't 2012); *see also Onishi v. N & B Taxi, Inc.*, 51 A.D.3d 594, 595 (1st Dep't 2008) (dismissing a 90/180-day claim where plaintiff returned to work after eleven (11) days); *Anderson v. Pena*, 122 A.D.3d 484 (1st Dep't 2014) (holding that plaintiff did not sustain a 90/180-day injury where she returned to limited duty work only two weeks after the accident and continued working thereafter). Although the evidence submitted by plaintiff in opposition shows a significant curtailment, he fails to raise any genuine issue of material fact that would suggest he suffered a temporary injury that incapacitated him from performing substantially all of his regular material activities.

Despite having proved an entitlement to summary judgment on the 90/180-day claim, defendants failed to meet their burden with respect to any other threshold categories as defined by Insurance Law Section 5102(d). In opposition to the instant motion, plaintiff argues that any alleged gap in treatment is reasonably explained by his affidavit that states he could not afford to continue seeking treatment for his alleged injuries after his no-fault benefits had been discontinued. LaRock Aff. Ex. A, ¶¶ 8, 9. The Court of Appeals has held that a "plaintiff need not incur the additional expense of consultation, treatment or therapy, merely to establish the seriousness or causal relation of his injury." *Pommells v. Perez*, 4 N.Y.3d 566, 577 (2005). Additionally, the affirmation submitted by Dr. Delman states that "Mr. Ramos stopped receiving physical therapy from my facility because I felt the patient had plateaued and reached the maximal medical benefit from formal physical therapy and as such, I discontinued it." *Id.* Ex. A, ¶ 7. Dr. Delman's report states the same. *Id.* Ex. F, at 1. Accordingly, this Court finds that plaintiff has reasonably and sufficiently explained the gap in treatment alleged by defendants in order to survive the instant motion for summary judgment.

In accordance with the foregoing, it is hereby

ORDERED that the branch of defendants' motion for summary judgment seeking dismissal of plaintiff's 90/180-day claim is granted; and it is further,

ORDERED that the remaining branches of defendants' motion for summary judgment are denied.

This constitutes the decision and order of this Court.

Dated: June 15, 2017

Hon. James E. d'Auguste, J.S.C.