

Flete v MV Pub. Transp., Inc

2017 NY Slip Op 31399(U)

June 28, 2017

Supreme Court, New York County

Docket Number: 159949/2014

Judge: Paul A. Goetz

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

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PEDRO FLETE and CELESTINA FLETE,

Index No.: 159949/2014
Motion Sequence No.: 4

Plaintiff(s),

DECISION and ORDER

-against-

MV PUBLIC TRANSPORTATION, INC,
ANGEL M. MILLAN, JR. and
NEW YORK CITY TRANSIT AUTHORITY,

Defendant(s).

-----X

Recitation, as required by CPLR § 2219(a), the following papers were considered on the motion(s):

<u>Papers</u>	<u>Numbered</u>
Defendants' Notice of Motion for summary judgment and affirmation with exhibits	1
Plaintiffs' opposition affirmation with exhibits	2
Defendants' reply affirmation	3

PAUL A. GOETZ, J.

Plaintiffs, initiated this action against Defendants, alleging serious injuries as defined by Insurance Law Section 5102(d) resulting from Defendants' negligent ownership and/or operation of a motor vehicle on July 24, 2013¹. Defendants now move for summary judgment pursuant to CPLR Section 3212 on the grounds that the injuries allegedly sustained by Plaintiffs fail to establish the serious injury threshold as defined by Insurance Law Section 5102 (d) and therefore, Plaintiffs' claims for non-economic losses are barred by Insurance Law Section 5104 (a).

¹Plaintiffs' complaint alleges that on or about July 24, 2013, on the FDR Drive and East 79th Street, New York, New York, a Ford motor vehicle owned by Defendants, MV Public Transportation and the New York City Transit Authority and operated by Defendant, Angel M. Millan, Jr. collided with a Ford motor vehicle in which Plaintiffs were passengers causing them to sustain serious injuries.

PARTIES' CONTENTIONS

PLAINTIFFS' BILL OF PARTICULARS

Plaintiff, Pedro Flete alleges the following and other related injuries as a result of the accident: a fracture at L1, bulging discs at L3-4, L4-5, and L5-S1, a disc herniation at L4-5 with impingement on the nerve roots, a grade I sprain to the anterior cruciate ligament of the left knee, cervical and lumbar radiculopathy, aggravation of a pre-existing degenerative condition and cervical, thoracic and lumbar spasms.

Plaintiff, Celeste Flete alleges the following and other related injuries as a result of the accident: a disc bulge with an annular tear and herniation impinging on the underlying thecal sac and compressing the emerging nerve roots at the L3-4, disc bulge with a superimposed left paracentral annular tear and disc herniation impinging on the emerging left nerve root at L4-5, disc herniations at C3-4 and C4-5, disc bulges at C5-6 and C6-7, grade I sprain to the anterior cruciate ligament of the right knee, tear of the anterior and posterior fibers of the right suprapinatus, tear of the right subscapularis, right shoulder distal cuff and infraspinatus tendinopathy.

Plaintiffs aver that these injuries meet the following Insurance Law Section 5102 (d) criteria: 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; significant limitation of use of a body function or system; and 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 and eighty days immediately following the occurrence of the injury or impairment.

DEFENDANTS' SUBMISSIONS REGARDING MR. FLETE

Neurologist, Dr. Gutstein

In support of their motion, Defendants annex the sworn affirmation of a neurologist, Dr. Hal S. Gutstein, who performed an independent neurological examination of Mr. Flete on May 13, 2016. Mr. Flete reported to Dr. Gutstein among other things that he had a stroke "long time ago."

Dr. Gutstein's examination of Mr. Flete's left knee revealed "4/5 [power & normal] with pain at the left knee with resistance of the left leg [and] [s]traight leg raising test negative to 65 degrees bilaterally except for pain in the left knee on elevation. Tenderness on palpation of the left knee"

Using a goniometer, Dr. Gutstein performed range of motion tests on Mr. Flete's cervical and lumbar spine. Dr. Gutstein's range of motion examination of Flete's

cervical spine revealed "Forward Flexion was restricted to 40 degrees (normal is 50) for limitation of motion of 20%; Extension was restricted at 50 degrees (normal is 60) for limitation of motion of 17%; Bilateral rotation was restricted to 70 degrees (normal is 80 degrees) for limitation of motion of 13%." Regarding Mr. Flete's lumbar spine Dr. Gutstein reports that Mr. Flete stated "'too much pain' and does not attempt any movements while I am using a goniometer. Casual observation demonstrates substantial range of movements of the cervical and lumbar spine."

Dr. Gutstein concludes in part that Mr. Flete "has a cervical & lumbar sacral sprain and strain with aggravation of pre-existing degenerative disc and joint disease including likely old L1 compression fracture. Otherwise, the claimant is neurologically intact." Dr. Gutstein does "not detect any functional neurological impairment as a result of the July 24, 2013 accident" and the accident "has not caused a consequential neurological imitation of use of a body organ, member, or system in [his] area of specialty."

Orthopedist, Dr. Hershon

Defendants also submit an affirmed independent orthopedic examination of Mr. Flete performed by Dr. Stuart J. Hershon, on May 26, 2016. Mr. Flete also reported to Dr. Hershon that he had a stroke prior to the July 24, 2013, accident. Dr. Hershon performed range of motion testing on Mr. Flete's cervical and thoracic spine and found all movements within the normal range.

Dr. Hershon's impression/diagnosis is that Mr. Flete's old compression fracture at L1 is resolved, and his lumbar, cervical and thoracic sprains are resolved. Dr. Hershon opines that Mr. Flete "has a disability referable to a previous stroke" and his disability does not relate to the July 24, 2013, accident.

Radiologist, Dr. Fisher

Defendants submit affirmed independent radiology reports prepared by Dr. David A. Fisher dated July 19, 2016. Dr. Fisher reviewed an MRI taken of Mr. Flete thoracic spine on September 4, 2013, and one of his lumbar spine taken on August 30, 2013, and he concludes that "[b]oth studies show an old healed L1 vertebral body compression fracture and mild diffuse degenerative changes in this 60 year-old. There is no herniation or acute fracture. There is no radiographic evidence of recent traumatic or causally related injury to the thoracic spine." Regarding the old healed compression fracture at L1, Dr. Fisher observes that it is "with resultant mild kyphosis and central canal narrowing."

Dr. Fisher reviewed an MRI taken of Mr. Flete's left knee on August 30, 2013, and concludes that "[a]side from mild cartilage wear, this is an unremarkable study in this 60 year-old. There is no meniscal or ligament tear. There is no radiographic evidence of recent traumatic or causally related injury to the left knee."

90/180

In support of the assertion that Mr. Flete did not suffer a serious injury under the 90/180 category, Defendants rely on and attach as an exhibit Mr. Flete's unsigned deposition transcript wherein he states that for approximately one year following the accident he was unable to bath and dress without his wife's assistance. There is no indication in Defendants' moving papers that Mr. Flete's deposition transcript was submitted to him for review and that he failed to sign and return it within 60 days pursuant to CPLR § 3116(a).

DEFENDANTS' SUBMISSIONS REGARDING MS. FLETE**Neurologist, Dr. Gutstein**

Dr. Gutstein performed an independent neurological examination of Ms. Flete on May 13, 2016, and recorded his examination in an affirmed report. Using a goniometer, Dr. Gutstein conducted range of motion tests on Ms. Flete's cervical and lumbar spine and found all movements within the normal range. Dr. Gutstein concludes that Ms. Flete is "neurologically intact" and he does "not detect any functional neurological impairment as a result of the [July 24, 2013] accident."

Orthopedist, Dr. Hershon

Dr. Hershon performed an independent orthopedic examination of Ms. Flete on May 26, 2016, and recored the examination in an affirmed report. Dr. Hershon conducted range of motion tests on Ms. Flete's cervical, thoracic, and lumbar spine; her left shoulder, elbow, wrist and hand; right shoulder, elbow, wrist and hand; both hips; both knees and ankles; and found all movements within the normal range.

Dr. Hershon's impression/ diagnosis is that Ms. Flete's cervical sprain, and thoracic and lumbar sprain are resolved; and the contusions on her right shoulder, left and right hand and wrist are also resolved.

Radiologist, Dr. Fisher

Defendants submit affirmed independent radiology reports prepared by Dr. David A. Fisher dated March 3, 2016. Dr. Fisher reviewed MRI's taken of Ms. Flete on August 30, 2013, including one of her cervical spine wherein he concludes in part that "[t]here are small disc herniation[s] at C3/4 and C4/5. These are non-specific and could be degenerative or traumatic in nature. Without the benefit of a prior study for comparison, a causal relationship can neither be confirmed nor excluded."

Dr. Fisher's report on the MRI of Ms. Flete's lumbar spine concludes in part that "[t]here is a small/moderate disc herniation at L3/4. This is non-specific and could be

degenerative or traumatic in nature. Without the benefit of a prior study for comparison, a causal relationship can neither be confirmed nor excluded.”

Regarding the MRI's of Ms. Flete's right knee and right shoulder, Dr. Fisher's reports conclude in part that “[t]here is no radiographic evidence of recent traumatic or causally related injury.”

90/180-Day

In support of the assertion that Ms. Flete did not suffer a serious injury under the 90/180-day category, Defendants rely on and attach as an exhibit Ms. Flete's unsigned deposition transcript wherein she states that she has difficulty lifting heavy objects and she assists her husband with bathing and dressing both before and after the accident. There is no indication in Defendants' moving papers that Ms. Flete's deposition transcript was submitted to him for review and that he failed to sign and return it within 60 days pursuant to CPLR § 3116(a).

PLAINTIFFS' SUBMISSIONS IN OPPOSITION

The only admissible medical evidence submitted in opposition for both Plaintiffs are affirmations from a chiropractor, Dr. Peter Morgan. On August 14, 2013, Mr. Flete saw Dr. Morgan whose exam at the time revealed positive findings for several tests and limited range of motion in his lumbar and cervical spine. Dr. Morgan concludes that his positive findings and Mr. Flete's limited range of motion were consistent with cervical and lumbar disc injuries causally related to the accident and as a result he had chiropractic treatment and physical therapy from August, 2013 to January, 2014. More recently, on September 2, 2016, Dr. Morgan examined Mr. Flete and found limited range of motion in his cervical and lumbar spine as well as muscle spasms, palpatory tenderness and trigger point sensitivity.

Ms. Flete also saw Dr. Morgan on August 14, 2013, whose exam revealed positive findings for several tests and limited range of motion in her lumbar and cervical spine and right shoulder. Dr. Morgan concludes that his positive findings and Ms. Flete's limited range of motion in her lumbar and cervical spine and right shoulder are causally related to the accident. Dr. Morgan indicates that Ms. Flete stopped treating with him in January, 2014, when she reached maximum medical improvement. More recently on September 2, 2016, Dr. Morgan examined Ms. Flete and found limited range of motion in her cervical and lumbar spine.

ANALYSIS

Summary Judgment

"To prevail on a motion for summary judgment, the defendant has the initial burden to present competent evidence showing that the plaintiff has not suffered a serious injury" (*Spencer v Golden Eagle, Inc.*, 82 AD3d 589, 590 [1st Dept 2011] [internal quotation marks and citations omitted]). Once defendant meets its initial burden, plaintiff must then demonstrate a triable issue of fact as to whether s/he sustained a serious injury within the meaning of Insurance Law § 5102 [d] (*Shinn v Catanzaro*, 1 AD3d 195, 197 [1st Dept 2003]).

A plaintiff's expert may provide a qualitative assessment that has an objective basis and compares plaintiff's limitations with normal function in the context of the limb or body system's use and purpose, or a quantitative assessment that assigns a numeric percentage to plaintiff's loss of range of motion (*See Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350-351 [2002]).

Mr. Flete

Defendants established prima facie that Mr. Flete did not sustain a compression fracture at L1 as a result of the accident through the affirmed report of Dr. Fisher. Dr. Fisher indicates that there is evidence that the fracture is old because there is "mild kyphosis and central canal narrowing" at L1 (*Cf. Frias v Gonzalez-Vargas*, 147 AD3d 500 [1st Dept Feb. 14, 2017] [observing that defendants satisfied their prima facie burden that plaintiff did not sustain a serious injury by submitting a report of an x-ray finding no fracture]). Plaintiffs fail to raise an issue of fact as to Mr. Flete's alleged fracture at L1 because the only affirmed report submitted by Plaintiffs on behalf of Mr. Flete is Dr. Morgan's affirmation and he does not address the L1 fracture. Therefore, Defendants motion for summary judgment as it relates to Mr. Flete's alleged fracture is granted.

Defendants failed to make a prima facie showing that Mr. Flete did not sustain a serious injury under the permanent loss of use of a body organ, member, function or system; the permanent consequential limitation of use of a body organ or member; and significant limitation of use of a body function or system categories of Insurance Law § 5105(d) to his spine and left knee.

While Dr. Hershon found Mr. Flete's range of motion of his cervical and thoracic spine within the normal range and concluded that his sprains are resolved, Dr. Gutstein found limited ranges of motion in Mr. Flete's cervical spine and did not perform range of motion testing for his lumbar spine. Moreover, Dr. Gutsein concludes that Mr. Flete has *unresolved* cervical and lumbarsacral sprain and strain with aggravation of pre-existing degenerative disc and joint disease including old L1 compression fracture. Therefore, a

triable issue of fact remains on the issue of whether Mr. Flete's spinal injuries are permanent or significant (*Accord Pineda v Moore*, 111 AD3d 557 [1st Dept 2013] [finding defendants failed to establish their burden on summary judgment in part because one of defendants' examining doctors found limited ranges of motion thereby raising a triable issue of fact]; *Martinez v Pioneer Trans. Corp.*, 48 AD3d 306 [1st Dept 2008] [observing "[w]here conflicting medical evidence is offered on the issue of whether a plaintiff's injuries are permanent or significant, and varying inferences may be drawn, the question is one for the jury."])).

Dr. Gutstein's examination of Flete's left knee showed a reduction in "power" and although he notes that bilaterally the straight leg raising test was negative, he further notes pain in the left knee and "tenderness on palpation" leaving varying inferences that may be drawn as to whether the injury to Mr. Flete's left knee is permanent or significant (*Martinez*, 48 AD3d at 306).

Defendants also failed to make a prima facie showing that Mr. Flete did not sustain a serious injury under the 90/180-day category. The Court notes that Mr. Flete's unsigned deposition transcript may be considered because Plaintiffs accepted its accuracy by submitting it in opposition to Defendants' summary judgment motion (*Accord Castano v Wygand*, 122 AD3d 476 [1st Dept 2014] [observing there is no requirement that a deposition transcript be signed where the party whose signature is missing submits it in support of a motion for summary judgment]). Since there is some objective medical evidence that Mr. Flete's injuries were caused by the accident, his inability to perform certain personal maintenance tasks is sufficient to submit his 90/180 claim to the jury for resolution (*Cf. Valentin v Pomilla*, 59 AD 3d 184 [1st Dept 2009] [holding "absent any objective medical evidence that injuries were caused by the accident, the inability to perform among other things personal maintenance tasks is insufficient to establish a 90/180-day claim]).

Accordingly, Mr. Flete's claim that he suffered a serious injury under the fracture category of Insurance Law § 5102 (d) is dismissed with prejudice and his remaining claims of serious injury to his spine and left knee under the permanent loss of use of a body organ, member, function or system; the permanent consequential limitation of use of a body organ or member; the significant limitation of use of a body function or system; and the 90/180-day categories of Insurance Law § 5105(d) must be decided by a jury.

Ms. Flete

Defendants made a prima facie showing that Ms. Flete did not sustain a serious injury under the permanent loss of use of a body organ, member, function or system; the permanent consequential limitation of use of a body organ or member; and the significant limitation of use of a body function or system categories of Insurance Law §

5105(d).² Dr. Gutstein and Dr. Hershon found normal ranges of motion for Ms. Flete' cervical, thoracic and lumbar spine; left shoulder, elbow, wrist and hand; right shoulder, elbow, wrist and hand; both hips; and both knees and ankles. Moreover, Dr. Gutstein's testing showed Ms. Flete "neurologically intact" without any neurological impairment and Dr. Hershon concluded that her sprains and contusions are resolved (*Fernandez v Hernandez*, 2017 NY Slip Op [1st Dept June 20, 2017] [holding defendants met their prima facie showing by submitting affirmed orthopedic report finding normal ranges of motion, negative objective test results, and resolved sprains, strains, and contusions]; *Cabrera v Apple Provisions, Inc.*, 2017 NY Slip Op 05044 [1st Dept June 20, 2017] [same])

Defendants also made a prima facie showing on Ms. Flete's 90/180-day claim by relying on her deposition testimony that she continued to assist her husband with bathing and dressing after the accident and that she has difficulty lifting heavy objects since difficulty lifting heavy objects does not constitute "substantially all" of Ms. Flete's usual activities (*Accord Dembele v Cambisaca*, 59 AD3d 352 [1st Dept 2009] [holding defendant met his prima facie burden in part by showing that "plaintiff's complaints that, among other things, his knee hurts when he drives or walks up more than four steps, do not constitute the loss of 'substantially all' of his usual activities required to make a showing of serious injury."]).

Ms. Flete raises a triable issue of fact through the affirmation of Dr. Morgan whose exam revealed positive test findings and limited range of motion for her lumbar and cervical spine and her right shoulder (*Kwon v Baquedano*, 2012 NY Slip Op 31314[U]; 2012 NY Misc LEXIS 2348 [SC Queens Co 2012] [holding plaintiff raised triable issues of fact by submitting doctors affirmations showing that plaintiff had significant limitations in range of motion]). However, Ms. Flete's opposition does not raise a triable issue of fact on her 90/180-day claim.

Accordingly, Ms. Flete's claim that she suffered a serious injury under the 90/180-day category of Insurance Law § 5102 (d) is dismissed with prejudice and her remaining claims of serious injury to her lumbar and cervical spine and her right shoulder under the permanent loss of use of a body organ, member, function or system; the permanent consequential limitation of use of a body organ or member; and the significant limitation of use of a body function or system categories of Insurance Law § 5105(d) must be decided by a jury.

Based upon the foregoing, it is hereby

ORDERED that Defendants' motion for summary judgment is GRANTED to the extent that Mr. Flete's claim of a serious injury under the fracture category of Insurance Law § 5102 (d) and Ms. Flete's claim under the 90/180-day category are DISMISSED

²The Court notes that none of the injuries allegedly sustained by Ms. Flete in the bill of particulars would support a claim under the fracture category of Insurance Law § 5105 (d).

with prejudice; and it is further

ORDERED that Defendant's motion for summary judgment is DENIED as to Mr. Flete's claims of serious injury to his spine and left knee under the permanent loss of use of a body organ, member, function or system; the permanent consequential limitation of use of a body organ or member; the significant limitation of use of a body function or system; and the 90/180-day categories of Insurance Law § 5105(d); and it is further

ORDERED that Defendant's motion for summary judgment is DENIED as to Ms. Flete's claims of serious injury to her lumbar and cervical spine and her right shoulder under the permanent loss of use of a body organ, member, function or system; the permanent consequential limitation of use of a body organ or member; and the significant limitation of use of a body function or system categories of Insurance Law § 5105(d).

This constitutes the Decision and Order of the Court.

Dated: June 28, 2017

ENTER:


HON. PAUL A. GOETZ, J.S.C.