FILED Oct 12 2011 Bronx County Clerk

NEW YORK SUPREME COURT----------COUNTY OF BRONX

PART IA - 5

CLAUDIO PENA,

Plaintiff,

-against-

AMERICAN TRANSIT INC., MONICA A. LAING-SCOTT, THE NEW YORK CITY TRANSIT AUTHORITY and THE METROPOLITAN TRANSPORTATION AUTHORITY,

Defendants.

INDEX NUMBER: 15322/2007

Present:
HON. **ALISON Y.TUITT**
Justice

The following papers numbered 1 to 4

Read on this Defendants' Motion for Summary Judgment

On Calendar of 7/11/11

Notice of Motion-Exhibits and Affirmation 1

Affirmation in Opposition and Exhibits 2

Reply/Sur-Reply Affirmations 3, 4

Upon the foregoing papers, defendants' motion for summary judgment on the issue of threshold is denied for the reasons set forth herein.

The within action arises from a motor vehicle accident on August 26, 2006 in which plaintiff alleges that he sustained serious injuries. Defendants move for summary judgment on the grounds that plaintiff failed to prove a serious injury as required by §5102(d) of the Insurance Law.

The court's function on this motion for summary judgment is issue finding rather than issue determination. Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. Rotuba

Extruders v. Ceppos, 46 N.Y.2d 223 (1978). The movant must come forward with evidentiary proof in admissible form sufficient to direct judgment in its favor as a matter of law. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. Stone v. Goodson, 8 N.Y.2d 8, (1960); Sillman v. Twentieth Century Fox Film Corp., *supra*.

In the present action, the burden rests on defendant to establish, by the submission of evidentiary proof in admissible form, that plaintiff has not suffered a serious injury. Lowe v. Bennett, 511 N.Y.S.2d 603 (1st Dept. 1986), *aff'd*, 69 N.Y.2d 701 (1986). When a defendant's motion is sufficient to raise the issue of whether a "serious injury" has been sustained, the burden shifts and it is then incumbent upon the plaintiff to produce prima facie evidence in admissible form to support the claim of serious injury. Licari v Elliot, 57 N.Y.2d 230 (1982); Lopez v. Senatore, 65 N.Y.2d 1017 (1985). When a claim is raised under the "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," in order to prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion is acceptable. Toure v. Avis Rent A Car Systems, Inc., 98 N.Y.2d 345 (2002). In addition, an expert's qualitative assessment of a plaintiff's condition is also probative, provided that: (1) the evaluation has an objective basis and, (2) the evaluation compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system. Toure, supra. [1]

In the instant action, defendants move for summary judgment arguing that plaintiff has not suffered a serious injury. Plaintiff alleges that as a result of the accident he sustained, in relevant part, injuries to his left knee as follows: tear of posterior horn of the medial meniscus resulting in arthroscopic surgery, internal

[1]The Toure decision appears to indicate that claims of neck or back injury resulting from bulging or herniated discs may be considered either under the category of a "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system," as well as the 90/180 day category (Toure v. Avis Rent A Car Systems, Inc., 98 N.Y.2d 345, 352, 774 N.E.2d 1197, 746 N.Y.S.2d 865 [2002].)

derangement, joint effusion and popliteal cyst; injuries to his right knee as follows: meniscal tears, anterior cruciate ligament tear, tendonitis, joint effusion, retropatellar spurs, popliteal cyst, patellafemoral syndrome; disc bulges at C3-4, C4-5 and C5-6; herniated nucleau pulposus at L5-S1 with impingement and disc bulges at L3-4 and L4-5 with impingement.

Here, the plaintiff has raised an issue of fact as to whether he sustained a serious injury. Plaintiff produced objective, contemporaneous and qualitative medical evidence regarding her injuries. See, Blackman v. Dinstuhi, 810 N.Y.S.2d 79 (1st Dept. 2006); Jimenez v. Rojas, 810 N.Y.S.2d (1st Dept. 2006). The affirmation of plaintiff's treating physician Dr. Eddy Rodriguez shows that plaintiff initially went to see him within days after the accident with complaints of neck pain radiating to both shoulders, lower back pain radiating to both thighs and buttocks, numbness, tingling sensation and paresthesia at both lower extremities, bilateral knee pain and difficulty walking, prolonged sitting and stair climbing. Dr. Rodriguez conducted range of motion testing on this initial visit and found significant restrictions in plaintiff's cervical and lumbosacral spine. Dr. Rodriguez sets forth the nature of plaintiff's limited ranges of motion by assigning percentages to the limitations and identifying the objective tests performed in deriving those measurements. Rivera v. Benaroti, 815 N.Y.S.2d 44 (1st Dept. 2006); Taylor v. Terrigno, 812 N.Y.S.2d 50 (1st Dept. 2006). In addition, objective medical evidence such as the MRIs sufficiently establish the existence of a serious injury. Toure, supra; Brown v. Achy, 776 N.Y.S.2d 56 (1st Dept. 2004). Furthermore, plaintiff underwent a course of physical therapy.

Dr. Rodriguez also adequately addresses defendants' argument that plaintiff's injuries were degenerative in nature. See, Colon v. Taveras, 873 N.Y.S.2d 637 (1st Dept. 2010); Valentin v. Pomilla, 873 N.Y.S.2d 537 (1st Dept. 2009). Dr. Rodriguez states that defendant's expert "opinion the findings are degenerative in nature that the plaintiff did not sustain any trauma is not consistent with other objective evidence including but not limited to the symptoms/exam findings and pain... the degenerative conditions reported by Dr. Fisher is common for the general population, however, the condition of the kind would not cause pain, symptoms and exam findings of the patient. Moreover, according to the patient he was asymptomatic prior to the said motor vehicle accident. Moreover, said diagnosis is not consistent with Dr. Greenfield's review of the same MRI film." Plaintiff underwent arthroscopic surgery to the left knee on December 9, 2006 and to the right knee on January 20, 2007 as a result of his injuries. With respect to these surgeries and defendant's argument that the injuries were preexisting, Dr. Rodriguez states that "[s]urgery is the gold standard for diagnosing these injuries

and the [sic] supercede any MRI findings. As such, the diagnosis from these operative reports, of which I have reviewed certified records, accurately reveal that trauma rather than any arthritic condition was the cause of the malaties [sic].

Dr. Rodriguez's most recent examination, over four years after the subject accident, also revealed significant restrictions in plaintiff's lumbar and cervical spine, and both knees. "In order to raise a triable issue of fact, plaintiff must demonstrate a limitation of range of motion sustained by objective medical findings that are 'based on a recent examination of the plaintiff.'" Thompson v. Abbasi, 788 N.Y.S.2d 48 (1st Dept. 2005) quoting Grossman v. Wright, 707 N.Y.S.2d 233 (2d Dept. 2000). Here, plaintiff has shown that he continues to suffer from the injuries he allegedly sustained in the accident.

Plaintiff also raised an issue of fact with respect to his 90/180 claim. In his bill of particulars, plaintiff alleges that has been totally disabled from work from the date of the accident to the present. Moreover, plaintiff testified at his deposition that he was unable to perform his duties as a superintendent from the date of the accident until his wife took over as superintendent in or around May, 2008. Plaintiff also testified that from the date of the accident until he left his employment, he would pay two other men to perform his superintendent duties. Furthermore, Dr. Rodriguez states in his affirmed report that plaintiff was prevented from returning to work and performing activities of daily leaving from the time of the accident until at least February 2007 and he states his reason for that finding. Thus, plaintiff's subjective statements indicating the length of time he was unable to work and was substantially disabled from performing his customary and daily activities is supported by objective medical evidence. See, Porter v. Bajana, 918 N.Y.S.2d 414 (1st Dept. 2011).

Accordingly, as plaintiff has raised an issue of fact as to whether he sustained a serious injury as a result of the subject accident, the motion for summary judgment is denied.

This constitutes the decision and order of this Court.

Dated: October 6, 2011

Hon. Alison Y. Tuitt