Duda v Ibarra
2011 NY Slip Op 32630(U)
September 29, 2011
Sup Ct, Nassau County
Docket Number: 5237/10
Judge: Karen V. Murphy
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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 15 NASSAU COUNTY

PRESENT:
Honorable Karen V. Murphy
Justice of the Supreme Court

______________________________________ x

STEPAN DUDA,

Plaintiff(s),

-against-

DAVID T. IBARRA and ANITA I. IBARRA,

Defendant(s).

______________________________________ x

Index No. 5237/10

Motion Submitted: 7/26/11
Motion Sequence: 001

The following papers read on this motion:

Notice of Motion/Order to Show Cause........................X
Answering Papers...X
Reply...X
Briefs: Plaintiff's/Petitioner's.......................................
Defendant's/Respondent's.................................

Defendants move this Court for an Order granting summary judgment in their favor and dismissing the complaint on the ground that plaintiff has not sustained a serious injury within the meaning of Insurance Law § 5102(d). Plaintiff opposes the requested relief.

This action arises from a motor vehicle accident that occurred in Nassau County on October 10, 2009. Plaintiff alleges that defendants' vehicle struck plaintiff's vehicle in the rear, while plaintiff was stopped at a red light. Plaintiff claims to have struck his head on the interior of his vehicle, resulting in alleged injuries to his cervical spine. Plaintiff declined medical attention at the scene, and was able to drive his vehicle home after the accident. Plaintiff received physical therapy, massage and acupuncture for approximately four months following the accident, but has not used any devices, including a brace, relative to his claimed neck injury.

In his Bill of Particulars, plaintiff claims that he has sustained permanent loss of use of a body organ or member; 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 of a non-permanent nature which prevented plaintiff from performing substantially all of the material acts which constitute plaintiff's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence.

It is well recognized that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact. (***Andre v. Pomeroy,*** 35 N.Y.2d 361, 320 N.E.2d 853, 362 N.Y.S.2d 131 [1974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact. (***Cauthers v. Brite Ideas, LLC,*** 41 A.D.3d 755, 837 N.Y.S.2d 594 [2d Dept., 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the plaintiff. (***Makaj v. Metropolitan Transportation Authority***, 18 A.D.3d 625, 796 N.Y.S.2d 621 [2d Dept., 2005]).

A party moving for summary judgment must make a *prima facie* showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. (***Winegrad v. New York Univ. Med. Center,*** 64 N.Y.2d 851, 476 N.E.2d 642, 487 N.Y.S.2d 316 (1985); ***Zuckerman v. City of New York,*** 49 N.Y.2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]). Here, defendants must demonstrate that the plaintiff did not sustain a serious injury within the meaning of Insurance Law Section 5102(d) as a result of this accident (***Felix v. New York City Transit Auth.,*** 32 A.D.3d 527, 819 N.Y.S.2d 835 [2d Dept., 2006]). Defendant has met her burden.

A tear in tendons, as well as a tear in a ligament or bulging disc is not evidence of a serious injury under the no-fault law in the absence of objective evidence of the extent of the alleged physical limitations resulting from injury and its duration (***Little v. Locoh***, 71 A.D.3d 837, 897 N.Y.S.2d 183 [2d Dept., 2010]).

In support of their motion for summary judgment, defendants have submitted, *inter alia*, the plaintiff's deposition testimony, plaintiff's verified Bill of Particulars, and the affirmed medical report of Dr. Iqbal Merchant, defendants' examining neurologist.

Plaintiff was examined by Dr. Merchant on December 20, 2010, over one year after the date of the accident. Dr. Merchant reviewed a number of plaintiff's medical records, including an October 20, 2009 MRI report, and an x-ray report from the same date, physical therapy reports, and the reports of plaintiff's doctors and his chiropractor. Dr. Merchant also measured range of motion in plaintiff's cervical and lumbar spine areas, with a goniometer,

and he conducted compression, Hoover and straight leg raise tests. Dr. Merchant set forth his specific findings, comparing those findings to normal range of motion, and he concluded that plaintiff does not exhibit any objective evidence of a neurological disability.

Plaintiff's deposition testimony establishes that plaintiff was working full-time as a manager for a building maintenance company at the time of the accident, and part-time for another company assisting with building maintenance. Plaintiff testified that he was working a total of approximately sixty (60) hours per week, and that his jobs sometimes require physical labor, including carrying sheetrock. Plaintiff further testified that he declined medical attention at the scene of the accident, and told the police that he was not injured.

Plaintiff further testified that he did not lose any time from work, and that his job duties did not change as a result of the subject accident. Although plaintiff stated that he occasionally has headaches approximately once a week, he is able to alleviate the pain by taking Tylenol. Plaintiff claims that his neck pains him when he drives, or when the weather changes, and sometimes when he is sleeping. Nonetheless, plaintiff has driven to upstate New York approximately five times since the accident. The duration of the upstate car trips is between two and one-half to three hours, one way. In addition, plaintiff admits that none of the medical professionals who treated him imposed driving restrictions upon him, and none of them prescribed him a collar or a brace.

According to plaintiff, he stopped treatment for his injuries after a period of four months following the subject accident. According to plaintiff, he ceased treatment because he felt better. Plaintiff further stated that he "can do pretty much the same things" as he did before the accident, although he states that he is somewhat limited in lifting heavy things over his shoulder since the accident. Nonetheless, plaintiff plays volleyball every Tuesday evening at 8 p.m., and has not had to hire any household help since the accident. Plaintiff has not received any injections for pain, and none of the treating medical professionals has suggested surgery as a result of the accident.

The affirmed medical reports of defendants' physician, as well as the plaintiff's deposition testimony can be sufficient to establish *prima facie* that the plaintiffs did not sustain a serious injury in a motor vehicle collision within the meaning of Insurance Law § 5102(d) (see ***Park v. Orellana***, 49 A.D.3d 721, 854 N.Y.S.2d 447 (2d Dept., 2008); ***Tarhan v. Kabashi***, 44 A.D.3d 847, 844 N.Y.S.2d 89 [2d Dept., 2007]).

Examining the reports of defendants' physician, there are sufficient tests conducted set forth therein to provide an objective basis so that their respective qualitative assessments of plaintiff could readily be challenged by any of plaintiff's expert(s) during cross examination at trial, and be weighed by the trier of fact *(**Toure v. Avis Rent A Car Systems,**

Inc., 98 N.Y.2d 345, 350, 774 N.E.2d 1197, 746 N.Y.S.2d 865 (2002); ***Gaddy v. Eyler,*** 79 N.Y.2d 955, 591 N.E.2d 1176, 582 N.Y.S.2d 990 [1992]).

Furthermore, a defendant may establish through presentation of a plaintiff's own deposition testimony that a plaintiff did not sustain an injury of a non-permanent nature, which prevented plaintiff from performing substantially all of the material acts, which constitute plaintiff's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence (***Kuperberg v. Montalbano***, 72 A.D.3d 903, 899 N.Y.S.2d 344 (2d Dept., 2010); ***Sanchez v. Williamsburg Volunteer of Hatzolah, Inc.***, 48 A.D.3d 664, 852 N.Y.S.2d 287 [2d Dept., 2008]).

Thus, as noted, defendants' submission of plaintiff's deposition testimony (***Jackson v. Colvert***, 24 A.D.3d 420, 805 N.Y.S.2d 424 (2d Dept., 2005); ***Batista v. Olivo***, 17 A.D.3d 494, 795 N.Y.S.2d 54 [2d Dept., 2005]), and affirmation of defendants' physician are sufficient herein to make a *prima facie* showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) (***Paul v. Trerotola***, 11 A.D.3d 441, 782 N.Y.S.2d 773 [2d Dept., 2004]), under permanent consequential limitation and significant limitation categories of the applicable law, nor under the 90/180 category of the law.

Plaintiff is now required to come forward with viable, valid objective evidence to verify his complaints of pain, permanent injury and incapacity (***Farozes v. Kamran***, 22 A.D.3d 458, 802 N.Y.S.2d 706 [2d Dept., 2005]). Plaintiff has failed to meet his burden.

As to plaintiff's 90/180 claim (Verified Bill of Particulars, paragraph 18), the Court notes that a plaintiff must set forth competent medical evidence to establish that he sustained a medically determined injury or impairment of a nonpermanent nature, which prevented him from performing substantially all of the material acts, which constituted his usual and customary daily activities for 90 of the 180 days following the subject collision (***Ly v. Holloway***, 60 A.D.3d 1006, 876 N.Y.S.2d 482 [2d Dept., 2009]).

In opposition to defendants' summary judgment motion, plaintiff has submitted an affidavit dated June 29, 2011wherein he claims, in conclusory fashion, that, "[t]he accident has left me unable to perform my normal daily activities." Plaintiff requests his day in court so that he can "testify as to the specific ways [his] life has been impacted as a result of his injuries." Plaintiff further states that, "to date" he has difficulty performing household chores, and difficulty standing, bending and driving. He also claims that the pain worsens "on prolonged sitting and turning." Finally, plaintiff avers that he is "employed as a building superintendent." He states that he is working but has "difficulty" with some of his duties because of his symptoms.

Plaintiff does not state what specific activities or chores he is unable to perform, or even that he was prevented from performing substantially all of his usual and customary activities for 90 of the 180 days following the accident, nor could he make such a statement in light of his completely contradictory deposition testimony taken in November 2010. The Court finds that plaintiff's self-serving affidavit is an attempt to raise a feigned factual issue, and to avoid the consequences of his earlier testimony regarding the 90/180 claim. Plaintiff's affidavit is insufficient to defeat defendants' motion, and plaintiff has failed to raise triable issues of fact as to whether he sustained a serious injury for the 90/180 category of loss (*see* ***Wu v. City of New York***, 42 A.D.3d 451, 839 N.Y.S.2d 548 (2d Dept., 2007); ***Semple v. Sterling Estates, LLC***, 300 A.D.2d 297, 751 N.Y.S.2d 306 (2d Dept., 2002); ***Regina v. Friedman***, 272 A.D.2d 461, 707 N.Y.S.2d 674 [2d Dept., 2000]).

In support of his claims under the permanent consequential limitation and significant limitation categories of the Insurance Law with respect to his cervical spine, plaintiff has submitted the affirmations of some of his treating physicians, an affidavit from his chiropractor, and his treatment reports from Baldwin Medical Services, P.C.

Defendant asks this Court not to consider the unaffirmed reports of Drs. Ploski and Hausknecht, as well as plaintiff's unaffirmed physical therapy notes. Defendant also asks this Court not to consider "any other reports" from Baldwin Medical Services because its medical director, Dr. Aminov, has not submitted a notarized affidavit certifying the reports as business records. The Court will consider all reports on plaintiff's motion which were listed as being relied upon by defendant's expert (Dr. Merchant) (*see* ***Williams v. Clark***, 54 A.D.3d 942, 864 N.Y.S.2d 493 (2d Dept., 2008); ***Barry v. Valerio***, 72 A.D.3d 996, 902 N.Y.S.2d 97 [2d Dept., 2010]). Thus, Dr. Aminov's failure to have his business records affidavit notarized does not prevent this Court from considering the documents relied upon by Dr. Merchant.

Dr. Aminov's affirmation, however, is another matter. The affirmation is not subscribed and affirmed by him to be true under the penalties of perjury, as required by CPLR § 2106. Furthermore, and to the extent that Dr. Aminov attempts to subscribe and affirm the observations of other physicians and plaintiff's chiropractor without having personally performed any of the examinations referred to therein, the Court will not consider those portions of the affirmation.

Apparently, none of Dr. Aminov's affirmation is based upon personal contact with plaintiff until May 19, 2011 when he affirms that he conducted a "re-evaluation" of plaintiff. Dr. Aminov claims to have measured plaintiff's range of motion (paragraph 15); yet, he does not specifically state therein that the reported ranges of motion relate to plaintiff's neck. Dr. Aminov's conclusion stated in paragraph 15 avers that plaintiff "has sustained significant

injuries to his cervical and lumbar spine." Thus, it is fatal to his affirmation that he has failed to report which specific part of plaintiff's body he measured for range of motion. Moreover, Dr. Aminov fails to state by what means he measured plaintiff's range of motion.[1] The Court also finds it necessary to note that the latter half of paragraph 15 was clearly authored for another patient whose name is crossed out. Plaintiff's surname is handwritten above the cross-out, and the accident date is also crossed out, with the subject accident date hand-written above the cross-out. None of these alterations are initialed by Dr. Aminov. Thus, this Court finds that Dr. Aminov's entire affirmation is circumspect, insufficient, and not worthy of consideration in the determination of this motion.

Thus, as discussed in detail below, it appears that plaintiff has not submitted to this Court for its consideration any recent findings to verify his subjective complaints of pain and limitation of movement (see ***Tudisco v. James***, 28 A.D.3d 536, 813 N.Y.S.2d 482 (2d Dept., 2006); ***Hernandez v. DIVA Cab Corp.***, 22 A.D.3d 722, 804 N.Y.S.2d 396 [2d Dept., 2005]).

The report of plaintiff's chiropractor, Marc Jacobs, D.C., which is dated October 13, 2009, fails to state by what means, or with what instrument, he measured plaintiff's range of motion in the cervical spine. The affidavit dated May 24, 2011 belatedly states that the October 13 measurements were performed with a hand-held goniometer. Both the affidavit, as well as the evaluation report, fail to set forth the normal ranges of motion for comparison to Dr. Jacobs' actual findings. Thus, the report and affidavit are insufficient to establish that plaintiff has sustained a significant limitation in his cervical spine as a result of the subject accident as stated therein. Also, nowhere in that report, or in his affidavit, does Dr. Jacobs state that plaintiff was confined to bed, or was disabled for any time period, in any way, at any time, or that plaintiff currently suffers from a disability related to the subject accident.

The reports of Dr. Ploski (plaintiff's orthopedic surgeon) dated October 13, November 17 and December 22, 2009 also suffer from the same deficiency in reporting by what means, or with what instrument, plaintiff's range of motion in his cervical spine was measured. In fact, Dr. Ploski's December 22, 2009 report does not specify any particular measurements at all, but simply states that plaintiff "has decreased rotational movements, especially toward the right." The November 17, 2009 report notes certain rotations in degree measurements, but does not specify what is normal range of motion, or the degree to which plaintiff's range of motion was allegedly impaired at that time. Finally, Dr. Ploski has not submitted an affirmation stating that plaintiff currently suffers from a permanent consequential limitation of use of a body organ or member or a significant limitation of use of a body function or

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[1]Dr. Aminov's report from the May 19, 2011 "re-evaluation," which is appended to his affirmation, also fails to include a statement regarding the means by which he measured plaintiff's range of motion in the cervical spine.

system, nor has he affirmed that plaintiff was disabled in accordance with the 90/180 category of injury .

Dr. Hausknecht's initial neurologic consultation dated October 27, 2009 is likewise unavailing. Apparently, the doctor conducted a "mechanical exam" of plaintiff on that date, which revealed a restriction of extension, flexion and lateral rotation in the cervical spine area. Although the degrees of restriction are stated, the means by which such restrictions were measured is not set forth, nor are the normal ranges of motion set forth. Thus, his "impression" that plaintiff was "disabled" at that time as a result of the accident is speculative at best. Furthermore, Dr. Hausknecht has not provided an affirmation stating that plaintiff currently suffers from a permanent consequential limitation of use of a body organ or member or a significant limitation of use of a body function or system.

Dr. Lifschutz, another neurologist, apparently examined plaintiff on one occasion: November 18, 2009. Dr. Lifschutz does not affirm that plaintiff currently suffers from a permanent partial disability or significant limitation of use of a body function or system, nor does Dr. Lifschutz affirm that plaintiff was disabled in accordance with the 90/180 category of injury. Further, although Dr. Lifschutz claims that plaintiff suffered from a "limited range of motion" upon examination of the cervical spine, he does not set forth anything more than that statement. The Court also notes that Dr. Lifschutz's "impressions" set forth in his November 18, 2009 report are that plaintiff suffers from a nerve neuropathy at the wrists, injuries never noticed in the verified Bill of Particulars, and mentioned by plaintiff at his deposition as being resolved.[2]

Finally, the MRI report of October 20, 2009 reveals minimal bulging at the C 3-4 and C 5-6 levels, without spinal stenosis or foraminal narrowing, and a bulge at the C 7-T1 level with mild foraminal narrowing, but no stenosis. The radiologist (Conellia Ha, M.D.) makes no reference to any trauma suffered by plaintiff, and Dr. Ha does not relate any of the findings to the subject accident *(see* ***Knox v. Lennihan***, 65 A.D.3d 615, 884 N.Y.S.2d 171 (2d Dept., 2009); ***Munoz v. Koyfman***, 44 A.D.3d 914, 844 N.Y.S.2d 111 (2d Dept., 2007); ***Collins v. Sheridan Stone***, 8 A.D.3d 321, 778 N.Y.S.2d 79 [2d Dept., 2004]). As noted above in discussing Dr. Merchant's examination of plaintiff, it is well settled that the mere existence of a bulging disc is not conclusive evidence of a serious injury in the absence of

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[2]The Court also notes that page two of Dr. Lifschutz's affirmation appears in a different font than the first page, is clearly a photocopy in which the date "16" has been written in original ink between "June" and "2011," and upon which appears the photocopied signature of Dr. Lifschutz, not an original signature. The appearance of this second page gives the Court pause, and merits consideration of the affirmation as perhaps being hastily prepared solely for the purpose of attempting to defeat the instant motion.

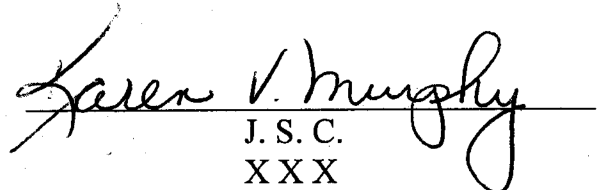
objective evidence of a related disability or restriction (***Knox, supra; Kearse v. New York City Transit Authority***, 16 A.D.3d 45, 789 N.Y.S.2d 281 [2d Dept., 2005]).

For all the foregoing reasons, this Court has determined that plaintiff has failed to raise a triable issue of fact with respect to the issue of serious injury within the meaning of Insurance Law § 5102(d).

Accordingly, defendants' summary judgment motion is granted in its entirety, and the complaint is dismissed.

The foregoing constitutes the Order of this Court.

Dated: September 29, 2011
Mineola, N.Y.



J. S. C.
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