

Coleman v Biscardi

2013 NY Slip Op 31169(U)

May 29, 2013

Supreme Court, Suffolk County

Docket Number: 09-44384

Judge: W. Gerard Asher

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

P R E S E N T :

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 12-14-12
ADJ. DATE 2-26-13
Mot. Seq. # 001 - MD

-----X
KEVIN COLEMAN and JAMES THOMAS,

Plaintiffs,

- against -

PAULA K. BISCARDI,

Defendant.
-----X

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Upon the following papers numbered 1 to 20 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 13 - 18; Replying Affidavits and supporting papers 19 - 20; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant for an order pursuant to CPLR 3212 granting summary judgment in her favor on the ground that plaintiff James Thomas did not sustain a serious injury as defined in Insurance Law § 5102 (d) is denied.

This is an action to recover damages for injuries allegedly sustained by plaintiffs on August 2, 2009 as a result of a motor vehicle accident. Plaintiffs allege that the vehicle operated by plaintiff Kevin Coleman in which plaintiff James Thomas (Thomas) was a front seat passenger was struck by the vehicle operated by defendant, Paula K. Biscardi. The accident occurred on Yaphank Road in front of 145A Patchogue/Yaphank Road in Suffolk County, New York. By their bill of particulars, plaintiffs allege that plaintiff Thomas sustained serious injuries as a result of the subject accident including, post-traumatic headache syndrome, cervical spine derangement/myofascial neck pain syndrome, left C5-C6-C7 and right C6-C7 radiculopathy, lumbosacral spine derangement/myofascial low back pain syndrome, right and left L5-S1 radiculopathy, lumbosacral sprain/strain, ulnar sensory nerve root neuropathy of the left upper extremities, C6 and C7 radiculopathy on the right, blunt injury of the trunk, bulging disc at L3-4 and L4-5, cervical sprain/strain and sacroiliac joint derangement/sacroilitis. In addition, plaintiffs allege that following

the accident, plaintiff Thomas was treated at the emergency room of Brookhaven Memorial Medical Center in Patchogue, New York and then released and that he was confined to bed for five days and to home for two weeks. At the time of the accident, plaintiff was not employed.

Defendant now moves for summary judgment in her favor on the ground that plaintiff James Thomas did not sustain a serious injury as defined in Insurance Law § 5102 (d). In support of her motion, defendant submits the summons and complaint, her answer, plaintiffs' bill of particulars, plaintiffs' supplemental bill of particulars, plaintiffs' second supplemental bill of particulars, the deposition transcript of plaintiff Thomas, the affirmed report dated October 3, 2011 of defendant's examining orthopedic surgeon, Jay Nathan, M.D., and the affirmed report dated August 15, 2011 of defendant's examining neurologist, Uriel Davis, D.O.

Insurance Law § 5102 (d) defines "serious injury" as "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."

In order to recover under the "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (*Oberly v Bangs Ambulance Inc.*, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, either objective evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration based on a recent examination of plaintiff must be provided or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (*see Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865 [2000]; *Mejia v DeRose*, 35 AD3d 407, 825 NYS2d 722 [2d Dept 2006]). In order to qualify under the 90/180-days category, an injury must be "medically determined" meaning that the condition must be substantiated by a physician, and the condition must be causally related to the accident (*see Damas v Valdes*, 84 AD3d 87, 921 NYS2d 114 [2d Dept 2011]).

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Boone v New York City Tr. Auth.*, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]).

In his affirmed report, Dr. Nathan states that he performed an independent orthopedist examination on plaintiff Thomas on October 3, 2011, that plaintiff's current complaints consisted of pain in his neck,

back, right knee, left knee, right shoulder, right wrist and chest, and that plaintiff informed that he was working full time as a warehouse/assembly worker. Dr. Nathan reports that he used a goniometer for range of motion testing and provides range of motion testing results and other test results from his physical examination of plaintiff's right and left shoulders, right and left elbows, right and left wrists, right and left hands, right and left hip, right and left knee, cervical spine and thoracolumbar spine. The range of motion testing results all show full range, no limitations, as compared to the normal range measurements and all negative test results. Dr. Nathan diagnoses cervical sprain and lumbar sprain and opines that the injuries sustained by plaintiff are causally related to the subject accident, and that plaintiff has no disability and may continue to work.

Dr. Davis indicates in his affirmed report that he performed a neurological evaluation of plaintiff Thomas on August 15, 2011, that plaintiff informed that he had a prior motor vehicle accident as a pedestrian in 2007 and sustained head trauma with no residual, and that plaintiff's present complaint was lower back pain. Dr. Davis reports that plaintiff ambulated with a normal gait, that there was no clubbing, cyanosis or edema present in plaintiff's extremities, that plaintiff's higher cortical functions were normal, that his cranial nerves were normal and that his fundi and visual fields were normal. In addition, Dr. Davis found that plaintiff's motor examination was normal, his deep tendon reflexes were 1-2+, equal and symmetric in the upper and lower extremities, and his sensation to light touch, pinprick and vibration were normal. Dr. Davis also provides the results of his range of motion testing of plaintiff's lumbar spine, right shoulder, right wrist, right knee and left knee using a goniometer, all of which show full range when compared to normal measurements. In conclusion, Dr. Davis diagnoses status post-motor vehicle accident, unremarkable neurological examination, chest contusion resolved, lumbar sprain and strain resolved, and sprains of the right shoulder, right knee, left knee and right wrist, all resolved. He opines that there appears to be a cause and effect relationship between plaintiff's injuries and the subject accident. Dr. Davis further opines that from a neurological perspective there is no disability or permanency and that plaintiff can continue to perform his regular activities of daily living without restrictions.

At his deposition on February 22, 2011, plaintiff testified that the air bags of the vehicle deployed during the collision, that his head hit the passenger window, the air bag and his seat, that the seat belt pressed on his right shoulder, that his hips were bruised by the lap belt, and that his right wrist and right knee hit the glove compartment. Plaintiff was taken to the emergency room of Brookhaven Memorial Medical Center with complaints of pain in his chest and right shoulder, he underwent x-rays, and was released and then followed up with a chiropractor, Dr. Robert Leahy, from whom he received physical therapy. In addition, plaintiff testified that he received treatment to his spine, neck and right shoulder from August to approximately November 2009. He added that his treatment included nerve testing and that he was sent for CAT scans and MRI's. According to plaintiff, following the accident he was confined to his home for approximately one week and confined to his bed for two days. He explained that he was not employed at the time of the accident and that he had been employed four months prior as a store cashier. Plaintiff also testified that his current complaints consisted of migraines "twice every two weeks," a stiff neck twice a week, constant pain in his back, and that his right knee and wrist and chest occasionally bother him. He stated that he wears Ace bandages and a back brace given by his chiropractor. Plaintiff informed that he attempted to see his chiropractor after November 2009 but that his insurance benefits had run out.

Defendant met her prima facie burden of showing that plaintiff Thomas did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (*see Palumbo v Forster*, 103 AD3d 865, 962 NYS2d 271 [2d Dept 2013]; *Frisch v Harris*, 101 AD3d 941, 957 NYS2d 235 [2d Dept 2012]). Defendant's evidentiary submissions, including the affirmed reports of her examining orthopedic surgeon and neurologist, established, prima facie, that none of the injuries plaintiff allegedly sustained to the cervical and lumbar regions of his spine, and to his head, shoulders, knees and wrists, constituted a serious injury under the permanent consequential limitation of use or the significant limitation of use categories of Insurance Law § 5102 (d) (*see Quintana v Arena Transp., Inc.*, 89 AD3d 1002, 933 NYS2d 379 [2d Dept 2011]; *Frederique v Krappf*, 86 AD3d 533, 926 NYS2d 170 [2d Dept 2011]). Defendant's examining orthopedic surgeon and neurologist provided range of motion test results showing full range-of-motion in the cervical and lumbosacral regions of plaintiff's spine, shoulders, elbows, wrists, hands, hips and knees and the results of other objective tests which were all negative (*see Hayes v Vasilios*, 96 AD3d 1010, 947 NYS2d 550 [2d Dept 2012]; *Staff v Yshua*, 59 AD3d 614, 874 NYS2d 180 [2d Dept 2009]). Defendant also established prima facie that plaintiff did not sustain a serious injury under the 90/180 category of Insurance Law § 5102 (d) (*see Estaba v Quow*, 74 AD3d 734, 902 NYS2d 155 [2d Dept 2010]; *see also Kreimerman v Stunis*, 74 AD3d 753, 902 NYS2d 180 [2d Dept 2010]; *Kaminski v Kawamoto*, 49 AD3d 501, 853 NYS2d 588 [2d Dept 2008]). Moreover, there is no evidence that plaintiff incurred economic loss in excess of basic economic loss as defined in Insurance Law § 5102 (a) (*see Moran v Palmer*, 234 AD2d 526, 651 NYS2d 195 [2d Dept 1996]).

The burden then shifted to plaintiff Thomas to show, by admissible evidentiary proof, the existence of a triable issue of fact (*see Marietta v Scelzo*, 29 AD3d 539, 815 NYS2d 137 [2d Dept 2006]).

In opposition to the motion, plaintiff Thomas contends that he did sustain a serious injury as defined in Insurance Law § 5102 (d). In support of his opposition he submits his own affidavit, the unsworn physiatry consultation initial report of Lyudmila Poretskaya, M.D., the affidavit of plaintiff's treating chiropractor, Robert Leahy, D.C., and the affirmation of radiologist, Eilyahu Engelsohn, M.D.

Plaintiff's treating chiropractor, Dr. Leahy, informs in his affidavit that he first examined plaintiff Thomas on August 10, 2009 and provides the results of his range of motion testing of plaintiff's cervical spine and lumbar spine on said date using an Acumar digital inclinometer. He reports that plaintiff's cervical flexion was 7 degrees (50 degrees normal), extension 12 degrees (60 degrees normal), right lateral flexion 5 degrees (45 degrees normal), left lateral flexion 14 degrees (45 degrees normal), left rotation 6 degrees (80 degrees normal), and right rotation 24 degrees (80 degrees normal). With respect to plaintiff's lumbar spine, Dr. Leahy found flexion was 5 degrees (60 degrees normal), extension 16 degrees (25 degrees normal), right lateral flexion 4 degrees (25 degrees normal), and left lateral flexion 11 degrees (25 degrees normal). His initial diagnosis was post-traumatic headaches syndrome, cervical spine derangement/myofascial neck pain syndrome, lumbar spine derangement and cervical radiculitis. In addition, Dr. Leahy diagnosed that plaintiff's injuries were causally related to the subject motor vehicle accident and were permanent and would inhibit his mobility and consequently affect his quality of life. He explains that plaintiff received chiropractic therapy consisting of chiropractic manipulation from August 2009 until November 30, 2009 when plaintiff stopped treating as he had reached maximum improvement and his condition was chronic. Dr. Leahy also provides subsequent range of motion testing results for plaintiff's cervical spine and lumbar spine and other test results. He reports his findings for plaintiff's

reevaluation on December 6, 2012, including the results of orthopedic testing that the shoulder depression test was positive bilaterally, kemp's test was positive, and straight leg raising was positive on the right 45 degrees. Dr. Leahy also provides the results of his range of motion testing on that date indicating that plaintiff's cervical flexion was 32 degrees (50 degrees normal), extension was 35 degrees (60 degrees normal), left lateral flexion was 31 degrees (45 degrees normal), right lateral flexion was 33 degrees (45 degrees normal), right rotation was 60 degrees (80 degrees normal) and left rotation was 56 degrees (80 degrees normal). He further indicates that plaintiff's lumbar spine range of motion testing results showed flexion 46 degrees (60 degrees normal), extension was 19 degrees (25 degrees normal), left lateral flexion was 21 degrees (25 degrees normal) and right lateral flexion was 23 degrees (25 degrees normal). Dr. Leahy's final diagnosis based on the results of his testing and the November 10, 2009 MRI's was segmental dysfunction cervical thoracic, cervical radiculopathy bilaterally, sensory ulnar neuropathy on the left, segmental dysfunction lumbar, lumbar radiculopathy L5/S1 bilaterally, myofascial syndrome, and vertebrogenic headaches. He concludes by opining that plaintiff's injuries were causally related to the subject accident and are permanent in nature resulting in persistent function disabilities.

Dr. Engelsohn's affirmation indicates that on November 10, 2009 he interpreted a multiplanar, multisequence MRI of plaintiff's lumbar spine showing a congenitally narrowed lumbar spine canal and small disc bulges at L4-5 and L3-4 with no high-grade spinal canal stenosis or nerve root impingement.

Here, plaintiff Thomas in opposition to defendant's prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d), raised a triable issue of fact as to whether he sustained such an injury (*see Perl v Meher*, 18 NY3d 208, 936 NYS2d 655 [2011]; *Johnston v Peluso*, 105 AD3d 1008, 963 NYS2d 388 [2d Dept 2013]; *Breville v Jerez*, 103 AD3d 605, 958 NYS2d 626 [2d Dept 2013]). Specifically, plaintiff raised a triable issue of fact as to whether any of the alleged injuries to the cervical and lumbar regions of his spine constituted a serious injury under the permanent consequential limitation of use and/or significant limitation of use categories of Insurance Law § 5102 (d) (*see Granela v Ruppert*, 101 AD3d 944, 955 NYS2d 520 [2d Dept 2012]; *Johnson v Cristino*, 91 AD3d 604, 936 NYS2d 275 [2d Dept 2012]). Contrary to defendant's contentions in reply, Dr. Leahy explained the lengthy gap in plaintiff's treatment on the ground that plaintiff reached maximum medical improvement (*see Johnson v Cristino*, 91 AD3d 604, 936 NYS2d 275; *Vaco v Arellano*, 74 AD3d 791, 901 NYS2d 549 [2d Dept 2010]; *Eusebio v Yannetti*, 68 AD3d 919, 892 NYS2d 127 [2d Dept 2009]), and offered objective quantitative proof as to the extent of plaintiff's physical limitations (*see Caliendo v Ellington*, 104 AD3d 635, 960 NYS2d 471 [2d Dept 2013]).

Accordingly, the instant motion is denied.

Dated: _____

May 29, 2013



 J.S.C.

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION