Lavalle v Vasquez
2013 NY Slip Op 32494(U)
October 11, 2013
Supreme Court, New York County
Docket Number: 102153/11
Judge: Arlene P. Bluth
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH
Justice

PART 22

Index Number : 102153/2011
LAVALLE, LAWRENCE
vs.
VASQUEZ, MYSCHELE
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 3, were read on this motion to/for MSJ - summ jdg.

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1

Answering Affidavits — Exhibits _____ | No(s). 2

Replying Affidavits _____ | No(s). 3

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER

FILED

OCT 17 2013

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 10/11/13

HON. ARLENE P. BLUTH, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

[* 2]

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

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Lawrence Lavalle and Peter Lavalle,

Plaintiffs,

- against-

MYSCHELE VASQUEZ,

Defendant.

---------- X

DECISION AND ORDER

Index No. 102153/11
Motion Seq 02

HON. ARLENE P. BLUTH, JSC

Defendant's motion for summary judgment dismissing this action on the ground that neither plaintiff sustained a "serious injury" within the meaning of Insurance Law § 5012 (d) is denied.

In this action, plaintiffs, who are brothers, allege that on July 4, 2010 they sustained serious personal injuries when they were in a motor vehicle accident with defendant in Brooklyn.

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" (*see Rodriguez v Goldstein*, 182 AD2d 396 [1st Dept 1992]). Such evidence includes "affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (*Shinn v Catanzaro*, 1 AD3d 195, 197 [1st Dept 2003], quoting *Grossman v Wright*, 268 AD2d 79, 84 [2d Dept 2000]). In order to establish prima facie entitlement to summary judgment under the 90/180 category of the statute, a "defendant must provide medical evidence of the absence of injury precluding 90 days of normal activity during the first 180 days following the accident" (*Elias v Mahlah*, 58 AD3d 434 [1st Dept 2009]). However, a defendant can establish prima facie entitlement to summary judgment on

this category without medical evidence by citing other evidence, such as the plaintiff's own deposition testimony or records demonstrating that plaintiff was not prevented from performing all of the substantial activities constituting customary daily activities for the prescribed period (*id.*).

Once the defendant meets his initial burden, the plaintiff must then demonstrate a triable issue of fact as to whether he sustained a serious injury (*see Shinn*, 1 AD3d at 197). 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 qualitative assessment that assigns a numeric percentage to plaintiff's loss of range of motion (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350-351 [2002]).

In the verified bill of particulars (exh C to moving papers, ¶ 9), both plaintiffs claim injuries to the cervical and lumbar spine (herniated and bulging discs and radiculopathy). Lawrence also claims a right elbow contusion and Peter also claims myofacial pain syndrome, headaches and an inner ear injury. While each also makes a 90/180 claim, in paragraphs 13 and 14 of the bill they detail that Lawrence was home for a week and Peter for two weeks (and testified to less at their depositions).

Defendant has satisfied her prima facie showing that the plaintiffs did not sustain a permanent consequential or significant limitation to their cervical or lumbar spines by offering the affirmed reports of defendant's orthopedist, Dr. Robert Israel (exh F for Lawrence and exh G for Peter, both dated April 4, 2012). Dr. Israel affirmed that after examining each plaintiff, he

found full range of motion and no disability.[1] Additionally, defendant met her initial burden with respect to each plaintiff's 90/180-day claim by submitting the verified bill of particulars and each plaintiff's testimony.

In opposition, plaintiff Lawrence Lavalle raises an issue of fact with respect to his claimed injuries by submitting the affidavit of his treating chiropractor, Steven Shoshany, DC (exh. B). Dr. Shoshany evaluated/began treatment of Lawrence on July 29, 2010 and August 3, 2010. He found restricted range of motion in the cervical and lumbar spine, reduced lower extremity leg strength, stiffness, pain and spasms, and numbness in Lawrence's hands and feet. Lawrence treated with Dr. Shoshany for about six months with chiropractic manipulation, traction, therapeutic exercises, and ultrasound and electric stimulation. Dr. Shoshany discharged Lawrence from care on February 2, 2011 "as he had reached maximum recovery in that continued treatment would be palliative." In a follow-up visit on November 20, 2012, among other things, Dr. Shoshany found significant restrictions in range of motion in Lawrence's cervical spine (flexion 30/60, left and right lateral flexion 25/40) and lumbar spine (flexion 45/90, extension 20/30, left lateral bending 25/40 and right lateral bending 20/40). Dr. Shoshany concludes, to a reasonable degree of chiropractic certainty and based on his treatment and examinations of Lawrence, that his injuries are permanent and causally related to the subject accident.

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[1]Plaintiffs' argument that the prima facie case was not made because Dr. Israel did not discuss various records is without merit; it is enough that Dr. Israel's examination was normal. See *Fuentes v Sanchez*, 91 AD3d 418, 419 [1st Dept 2012]; *Zhijian Yang v Alston*, 73 AD3d 562 [1st Dept 2010]).

In opposition, plaintiff Peter Lavalle raises an issue of fact with respect to his claimed injuries by submitting the affirmation of his treating physician, Chee G. Kim, MD (exh. E). Dr. Kim evaluated Peter on July 29, 2010 and found restricted range of motion in the cervical and lumbar spine, ringing in the left ear with dizziness and headaches. Peter treated with Dr. Kim for about seven months with physical therapy, heat and electric stimulation. Dr. Kim discharged Peter from care on March 14, 2011 "as he had reached maximum recovery in that continued treatment would be palliative." In a follow-up visit on November 20, 2012, among other things, Dr. Kim found significant restrictions in range of motion in Peter's cervical spine (extension 44/60, left and right lateral flexion 33 and 34/45 respectively) and lumbar spine (flexion 50/60 and extension 16/25). Dr. Kim concludes, to a reasonable degree of medical certainty and based on the treatment and examinations of Peter, that his injuries are permanent and causally related to the subject accident. Dr. Kim concludes that, because of this accident, Peter has suffered a permanent 20-25% loss of range of motion in his neck and 15-20% loss of range of motion in lower back because if this accident. Notably, neither Peter Lavalle (in his affidavit) nor Dr. Kim makes any mention of any continued inner ear ringing or dizziness.

Conclusion

The affidavit of Dr. Shoshany (for Lawrence) and the affirmation Dr. Kim (for Peter) have sufficiently raised an issue of fact as to each plaintiff. Plaintiff's "contrary evidence ... [is] sufficient to raise an issue of fact" (*Perl v Meher*, 18 NY3d 208, 218-219 [2011])." The "recent quantified range of motion limitations, positive tests, and permanency provided the requisite proof of limitations and duration of the disc injuries" (*Pietropinto v Benjamin*, 104 AD3d 617,

617-618 [1st Dept 2013]). Quite simply, Drs. Shoshany and Kim disagree with Dr. Israel and it is up to the jury, not this Court, to evaluate the medical testimony and decide who and what to believe.

However, plaintiffs fail to raise an issue of fact as to whether their claimed injuries prevented them from "performing substantially all of the material acts which constitute[d his] usual and customary daily activities" (Insurance Law § 5102 [d]; *Merrick v Lopez-Garcia*, 100 AD3d 456, 457 [1st Dept 2012]). Plaintiffs' bill of particulars claims only that they missed a week or two of work, their depositions claimed less and their affidavits in opposition to the motion do not set forth a 90/180 claim. Therefore, defendant is granted summary judgment dismissing each plaintiff's 90/180-day claim (*Colon v Torres*, 106 AD3d 458, 965 NYS2d 90 [1st Dept 2013], *Martin v Portexit Corp.*, 98 AD3d 63 [1st Dept 2012]).

Accordingly, it is

ORDERED that defendant's motion for summary judgment dismissing this action on the ground that plaintiffs did not sustain a "serious injury" within the meaning of Insurance Law § 5012 (d) is granted only to the extent that each plaintiff's 90/180-day claim is dismissed, and is otherwise denied.

This is the Decision and Order of the Court.

Dated: New York, NY
October 11, 2013

Hon. Arlene P. Bluth, JSC