Woodley v Modesto
2016 NY Slip Op 31999(U)
September 8, 2016
Supreme Court, Bronx County
Docket Number: 306922/2011
Judge: Ruben Franco

 FILED Sep 09 2016 Bronx County Clerk

NEW YORK SUPREME COURT
COUNTY OF BRONX: IAS PART-26

ELROY WOODLEY,

Plaintiff,

-against-

KERVAN MODESTO and FORDHAM AUTO SALES, INC.,

Defendants.

Index No. 306922/2011

MEMORANDUM DECISION/ORDER

HON. RUBEN FRANCO

This action arises out of an motor vehicle accident which occurred on June 1, 2011, in which plaintiff was the operator of an automobile that came into contact with an automobile owned by defendant Fordham Auto Sales, Inc., and operated by defendant Kervan Modesto.

Defendants move for summary judgment pursuant to CPLR § 3212, alleging that the injuries claimed by plaintiff do not satisfy the "serious injury" requirements of Insurance Law § 5102(d).

Plaintiff claims in his Bill of Particulars, dated November 23, 2011 (movants Exhibit E), that as a result of this accident, he sustained the following: internal derangement of the left knee with tears of left lateral and medial meniscus, synovitis, chondromalacia patella and chondromalacia medical femoral condyle, requiring arthroscopic lateral and medial menisectomy, synovectomy, chondroplasty of the patella, and chondroplasty of the medical femoral condyle.

The defendant has the burden to establish, by evidentiary proof in admissible form, that

plaintiff did not suffer a serious injury (Lowe v. Bennet, 122 AD2d 728 [1st Dept. 1986], *aff'd* 69 NY2d 700 [1986]). When defendant's evidence is sufficient to make out a *prima facie* case that a serious injury has not been sustained, the burden shifts to plaintiff to produce sufficient evidence in admissible form to raise a triable issue of fact as to whether he sustained a serious injury (see Licari v. Elliot, 57 NY2d 230 [1982]).

In support of the motion, defendants submit the affirmed report of Dr. Martin Barschi, an orthopedist, who examined plaintiff on August 14, 2013 (movants' Exhibit I). Plaintiff's Bill of Particulars claims a serious injury only with respect to his left knee, thus, the court will limit its review of Dr. Barschi's report to the portions that address plaintiff's left knee. Dr. Barschi reviewed the actual MRI films of plaintiff's left knee, taken on June 6, 2011, which, according to him, revealed a mild-to-moderate effusion. He states that there was an abnormal signal in the posterior horn of the medial meniscus "consisting with being smaller and a probable tear of the root of the posterior horn of the medial meniscus." His report also states that: "there was also a horizontal tear noted in the posterior horn of the lateral meniscus. The ligaments were intact. There was evidence of old Osgood-Schlatter disease. He did have a subcortical cyst in the area of the medical femoral condyle and also small osteophytes medially and laterally on the condyles. In addition, there was an osteophyte in the area of the pateliofemoral joint."

Dr. Barschi conducted range of motion tests with the use of a goniometer. He found that plaintiff had genu varum of his left knee, but not the right knee. Plaintiff could flex from 0 degree to 125 degrees (normal 115 degrees to 140 degrees). The right knee could flex from 0 degree to 135 degrees (normal 115 degrees to 140 degrees). There was some prominence in the medial joint line of the left knee. He had mild tenderness along the medial joint line as well. He

had negative McMurray sign. There was no effusion or instability I the right or left knee. Based upon his history, Dr. Barschi concluded that plaintiff did sustain an internal derangement to his left knee, although degenerative changes in the knee involving the pateliofemoral joint, as well as the osteoarthritic changes in the joint, are findings that would have been present prior to his accident of June 1, 2011. Although there were some findings in the left knee consistent with osteoarthritis, Dr. Barschi emphasized that, based upon the MRI findings of the left knee taken soon after the accident of June 1, 2011, the degenerative arthritis in plaintiff's left knee was present prior to the motor vehicle accident of June 1, 2011. Dr. Barschi concluded that further orthopedic treatment or physical therapy relating to the accident of June 1, 2011, would not be indicated or necessary.

Plaintiff contends that defendants did not satisfy their initial burden to make the *prima facie* showing necessary to warrant a judgment as a matter of law that plaintiff did not suffer a serious injury under Insurance Law § 5102(d), with respect to a permanent loss of the use of a body organ, member, function or system, as well as with respect to a permanent consequential limitation of the use of a body organ or member, and regarding a significant limitation of the use of a body function or system. Dr. Barschi's examination of plaintiff set forth range of motion findings of 125 degrees for the left knee and 135 degrees for the right knee, comparing his findings to a spectrum of ranges of motion from 115-140 degrees. Plaintiff asserts that this method is improper because it leaves the court to speculate as to the actual ranges of motion without variations, and under which conditions such variations would be applicable, citing trial orders from courts in the Second Department (Childress v. Murphy, 2014 N.Y. Slip Op. 32459(U) [Sup. Ct., Suffolk County, 2014]; Camarda v. Coupe, 2014 N.Y. Slip Op. 33347(U)

[Sup. Ct., Suffolk County, 2014]; Lyons v. Subhan, 33 Misc.3d 1223(A), 2012 N.Y. Slip Op. 52089(U) [Sup. Ct., Suffolk County, 2014]; Lee v. M & M Auto Coach, Ltd., 2011 N.Y. Slip Op. 30667(U) [Sup. Ct., Nassau County, 2011]; Ramirez v. Castaneda-Valle, 2012 N.Y. Slip Op. 32647(U) [Sup. Ct., Suffolk County, 2012]; Gutierrez-DeLaCruz v. Dedomenico, 2012 N.Y. Slip Op. 32054(U) [Sup. Ct., Suffolk County, 2012]). This court respectfully declines to follow these decisions to the extent they stand for the proposition that a corresponding normal value for a range of motion expressed in a medical report must be expressed as a single normal value for defendants to meet their *prima facie* burden. Absent supporting medical evidence that corresponding normal values of range of motion cannot be expressed as a range of values, plaintiff's contention goes to the weight of the report, not its admissibility (see Thompson v. New York City Transit Authority, 45 Misc.3d 1220(A), 2014 N.Y. Slip Op. 51642(U) [Sup. Ct., N.Y. County, 2014]; Mompremier v. New York City Transit Authority, 43 Misc.3d 1206(A), 2014 N.Y. Slip Op. 50511(U)) [Sup. Ct., N.Y. County, 2014]).

Accordingly, the court finds that defendants satisfied their initial burden to make the *prima facie* showing necessary to warrant a judgment as a matter of law, that plaintiff did not suffer a serious injury under Insurance Law § 5102(d), with respect a permanent loss of the use of a body organ, member, function or system, as well as with respect to a permanent consequential limitation of the use of a body organ or member, and regarding a significant limitation of the use of a body function or system.

Defendants have also made out a *prima facie* showing that plaintiff did not sustain a serious injury under the 90/180 category outlined in Insurance Law §5102(d). Paragraph "8" of plaintiff's Supplemental Bill of Particulars (defendants' Exhibit F), states that plaintiff was

confined to his bed and home for a period of approximately one week. Paragraph "10" of his Supplemental Bill of Particulars states that plaintiff was incapacitated from his usual employment for a period of approximately one week. This evidence fails to raise a triable issue of fact with respect to this injury category (see Boateng v. Calle, 105 A.d.3d 541 [1st Dept. 2013]; Borja v. Delarosa, 90 A.D.3d 407 [1st Dept. 2011]; Perez v. Coor, 84 A.D.3d 646 [1st Dept. 2011]).

In opposition to the motion, plaintiff submits the affirmations of Dr. Louis C. Rose, an orthopedist (plaintiff's Exhibit C), and Dr. Steven Winter, a radiologist (plaintiff's Exhibit D), as well as plaintiff's affidavit (Exhibit E).

Dr. Rose states that he reviewed the records from North Central Bronx Hospital, dated June 1, 2011, which shows that plaintiff went to the emergency room with complaints of left knee pain following a motor vehicle accident earlier in the day. Plaintiff was examined at the hospital, observed, treated, prescribed pain relievers and released. Plaintiff then consulted with Dr. Ivan Baraque at Bronx Boulevard Medical, P.C., where he began a formal regimen of physical therapy for his left knee, from June 2, 2011 through November 7, 2011. Dr. Rose stated that he reviewed plaintiff's physical therapy records, however, the court notes that neither the hospital records nor the physical therapy records reviewed by Dr. Rose, were attached to plaintiff's opposition papers.

Dr. Rose first examined plaintiff on June 28, 2011, at which time he reviewed an MRI of plaintiff's left knee, performed on June 6, 2011, which showed an oblique tear of the medial meniscus. His examination of the knee revealed tenderness at the medial and lateral joints, and swelling. The McMurray's test was positive with medial joint pain. There was positive

ballottment of the patella consistent with effusion. Range of motion testing using a goniometer revealed left knee flexion at 120 degrees (normal 150 degrees). Dr. Rose concluded that plaintiff had a tear of the medial meniscus of his left knee and recommended arthroscopic surgery. He advised plaintiff to modify his activities, cautioning him against ambulating upon slippery or uneven surfaces and advised against kneeling and squatting activities, continued use of the heating pad to the area, and to continue taking his prescribed medications.

On July 21, 2011, Dr. Rose performed arthroscopic surgery of plaintiff's left knee consisting of medial and lateral menisectomy, synovectomy, chondroplasty of the patella and of the medial femoral condyle. His post-operative diagnosis was that plaintiff suffered a tear of the medial meniscus of the left knee, a tear of the lateral meniscus of the left knee, synovitis of the left knee, chondromalacia of the patella of the left knee, and chondroplasty of the medial femoral condyle of the left knee.

Plaintiff returned to Dr. Rose's office on July 27, 2011, for a follow-up examination. Range of motion testing of his left knee revealed left knee flexion at 110 degrees (normal 150 degrees). His diagnosis of plaintiff remained the same, giving plaintiff the same instructions issued on June 28, 2011. Further follow-up examinations of plaintiff by Dr. Rose took place on August 3, 2011, September 14, 2011, October 26, 2011, January 13, 2012, April 9, 2012, March 1, 2013, May 24, 2013, August 16, 2013, November 8, 2013, April 25, 2014, August 8, 2014, and October 31, 2014. Range of motion testing of plaintiff's left knee on these dates fluctuated, going up and down from 110 degrees to 125 degrees (normal 150 degrees). On plaintiff's August 3, 2011 visit, Dr. Rose prescribed a left knee brace and advised plaintiff to continue to attend physical therapy two to three times per week. On plaintiff's January 13, 2012 visit, Dr.

Rose did not recommend that plaintiff continue physical therapy, feeling that after five months of physical therapy, to continue it would be only palliative in nature. Dr. Rose's post-operative diagnosis of plaintiff's condition, continued unchanged through all of these visits.

Dr. Rose stated that based upon plaintiff's history, the physical examinations, the arthroscopic surgery he performed on the knee, and the testing and treatment of plaintiff, that plaintiff suffered a permanent partial disability of his left knee, resulting in a permanent consequential limitation of use and a significant limitation of use of his left knee, which is causally related to plaintiff's motor vehicle accident of June 1, 2011. Dr. Rose further opined that the injuries sustained by plaintiff prevented him from performing the material acts which constituted his usual and customary daily activities for 90 of the first 180 days immediately following his accident.

Dr. Rose's affirmation quantifying restrictions of range of motion limitations of plaintiff's left knee raise triable issues of fact as to the extent of plaintiff's injury and causation, regarding plaintiff's claim of significant limitation of use, and permanent consequential limitation of use of his left knee (see Mejia v. Ramos, 124 A.D.3d 449 [1st Dept. 2015]; McSweeney v. Cho, 115 A.D.3d 572 [1st Dept. 2014]; Vargas v. Marte, 123 A.D.3d 471 [1st Dept. 2014]; Abreu v. Castro, 107 A.D.3d 512 [1st Dept. 2013]). Dr. Rose states in his affirmation that plaintiff's left knee injury was causally related to the accident. Moreover, plaintiff, in his affidavit, read as a whole, expresses that he was asymptomatic before the motor vehicle accident (see Feaster v. Boulabat, 77 A.D.3d 677 [1st Dept. 2010]).

Defendants assert that plaintiff failed to raise an issue of fact inasmuch as, he failed to submit admissible evidence of contemporaneous range of motion limitations following the

accident. While the Court in Perl v. Meher, 18 N.Y. 3d 208 (2011), rejected a rule that would make contemporaneous quantitative measurements a prerequisite to recovery, it confirmed the necessity of some type of contemporaneous treatment to establish that a plaintiff's injuries were causally related to the accident in question. The court finds that plaintiff has submitted sufficient proof of contemporaneous treatment.

Accordingly, defendants' motion for summary judgment is granted to the extent that plaintiff's claim of a serious injury under the category of a permanent loss of the use of a body organ, member, function or system, and under the 90/180 category, are dismissed. It is denied in all other respects.

This constitutes the Decision and Order of the Court.

Dated: September 8, 2016

Ruben Franco, J.S.C.

HON. RUBÉN FRANCO