

Velezquez v Ragab

2016 NY Slip Op 32331(U)

November 17, 2016

Supreme Court, Kings County

Docket Number: 507373/14

Judge: Larry D. Martin

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At an I.A.S. Trial Term, Part 41 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Borough of Brooklyn, City and State of New York, on the 17th day of November, 2016.

PRESENT:

Hon. LARRY D. MARTIN, J.S.C.

BRANDON VELEZQUEZ,

Plaintiff,

Motion Sequence #1

-vs-

INDEX No. 507373/14

MOSTAFA RAGAB,

Defendant.

The following papers numbered 1 to 4 read on this motion

Papers Numbered

Notice of Motion

and Affidavits (Affirmations) Annexed _____

1-2

Answering Affidavit (Affirmation) _____

3

Reply Affidavit (Affirmation) _____

4

Upon the foregoing papers, defendant Mostafa Ragab (“defendant”) moves for an order, pursuant to CPLR 3212, granting summary judgment in favor of defendant, and dismissing the complaint herein, on the grounds that plaintiff Brandon Velezquez (“plaintiff”) has not sustained a serious injury as defined under New York Insurance Law § 5102 (d)¹.

Plaintiff commenced this action to recover compensatory damages for personal injuries he allegedly sustained on November 5, 2013, as a result of a motor vehicle accident (the “subject accident”) wherein defendant’s vehicle struck plaintiff, a pedestrian at the time of the accident.

In the verified bill of particulars, plaintiff alleges, inter alia, that he has restrictions in the range of motion of his lumbar spine, a torn medial meniscus of the left joint, left knee instability, left

¹ 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.”

[* 2]

knee synovitis, a torn anterior cruciate ligament, aggravation and/or exacerbation of a preexisting injury and a forty percent (40%) disability. Plaintiff further alleges that his knee injury necessitated surgery, which was ultimately performed on February 19, 2014. Based upon the foregoing allegations, plaintiff asserts that his claims satisfy the permanent loss of use, permanent consequential limitation of use, significant limitation of use and the 90/180-day categories of the No-Fault Insurance Law.

When considering a motion for summary judgment, the court should only grant the motion where there are no material and triable issues of fact (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The movant has the burden of demonstrating “a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 852 [1985]). Once the movant has made this showing, the burden of proof shifts to the opponent to produce admissible evidence that establishes the existence of material issues which require a trial (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 352 [2002]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

In support of his motion, defendant submits, inter alia, the transcript of plaintiff’s deposition on August 3, 2015, the affirmed medical reports of Dr. Barbara Freeman (“Dr. Freeman”) and Dr. Mark Decker (“Dr. Decker”), as well as the unaffirmed medical report of plaintiff’s treating physician, Dr. John Xethalis (“Dr. Xethalis”). According to the initial report of Dr. Xethalis, a board-certified orthopedic surgeon who treated plaintiff ten (10) days after the accident, plaintiff had normal ranges-of-motion (“ROM”) in the left knee joint and right wrist. However, Dr. Xethalis noted that plaintiff had “patellofemoral crepitus and tenderness of the lateral facet of the patella,” as well as “tenderness of the posterior medial corner with a positive McMurray test” (Notice of Motion,

Exhibit G). Dr. Xethalis further found that plaintiff had “swelling and tenderness over the dorsum of the right sacrum and fifth metatarsals,” as well as restriction in the ROM of his lumbar spine. Ultimately, Dr. Xethalis opined that plaintiff had a torn medial meniscus of the left joint and contusion of the dorsum of the right hand (*id.*).

Dr. Xethalis also examined plaintiff on December 12, 2013, noting that plaintiff was still experiencing medial joint line tenderness, though ROM of the left knee was within normal limits. Moreover, based upon a review of plaintiff’s MRI films, which displayed, among other things, an “[o]blique undersurface tear of the posterior horn and posterior body of the medial meniscus,” Dr. Xethalis advised plaintiff to undergo left knee arthroscopic surgery and physical therapy (*id.* at 2-3). Dr. Xethalis also conducted a post-surgery examination of plaintiff on February 21, 2014. At this visit, Dr. Xethalis referred plaintiff for physical therapy and advised him to “ambulate with axillary crutches and partial weight bearing in order to protect the left ACL” (*id.* at 4). On April 21, 2014 plaintiff was examined by Dr. Xethalis again. Dr. Xethalis’s notes from this examination indicate that plaintiff had normal ROM of his left knee joint; however, Dr. Xethalis noted the presence of synovitis, continued tenderness at the lateral portal and patellofemoral crepitus and tenderness (*id.*).

Defendant further proffers a medical report dated June 15, 2015 from Dr. Decker, a board-certified radiologist, based upon his review of the MRI of plaintiff’s left knee. In his report, Dr. Decker determined that plaintiff suffered, among other things: (1) a “[h]orizontal undersurface tear of the posterior horn of the medial meniscus,” (2) a “5-mm meniscal cyst in the posterior joint line toward the notch,” (3) “[c]artilage softening over [the] central trochlea,” (4) “cartilage loss over [the] patella apex extending lateral fissure and deep flap and associated marrow edema,” (5) “[l]ateral subluxation and patella alta” and (6) a “[t]hickened medial plica” (Notice of Motion, Exhibit 5). However, Dr. Decker concluded that plaintiff’s horizontal tears, thickened medial plica, joint

effusion and other changes to his patellofemoral joint were caused by longstanding degeneration and were not causally related to subject accident (*id.*).

Next, defendant submits an IME from Dr. Freeman, a board-certified orthopaedic surgeon who examined plaintiff on November 10, 2015. In her report, Dr. Freeman noted that plaintiff had arthroscopic surgery to his left knee prior to his left-knee surgery in 2014² (Notice of Motion, Exhibit E, 1). Moreover, based upon her objective ROM testing, Dr. Freeman found that plaintiff had “full dorsiflexion, palmar flexion, radial and ulnar deviation” in both wrists, as well as “full motor [function] in the upper and lower extremit[ies]” and full ROM in both knees (*id.* at 3). However, Dr. Freeman noted that, with respect to the left knee, plaintiff had “a positive patellofemoral grind and tenderness at the joint line medial femoral condyle, medial tibial side” (*id.*). Dr. Freeman further noted that plaintiff “could perform [a] single leg stance with slightly less stability on the left than compared to the right” (*id.* at 4). Notwithstanding these findings, Dr. Freeman concluded that plaintiff’s “surgery addressed preexisting arthritic changes from [plaintiff’s] prior arthroscopic surgical intervention” (*id.*). Dr. Freeman further opined that plaintiff did not display a disability, had no physical activity restrictions and would not require additional intervention (*id.*).

Based upon a review of the record submitted by the parties, the Court finds that defendant has met his initial prima facie burden of demonstrating that plaintiff did not sustain serious injuries as a result of the subject accident (*see Gaddy v Eyler*, 79 NY2d 955 956-57 [1992]; *Grossman v Wright*, 268 AD2d 79, 85 [2d Dept 2002]; *Napoli v Cunningham*, 273 AD2d 366, 366 [2d Dept 2000]).

However, in opposition to the instant motion, the Court finds that plaintiff submitted sufficient evidence in admissible form to raise triable issues of fact as to whether he sustained serious injuries

²The Court notes that this surgery was performed on October 26, 2005, in order to treat a torn medial meniscus in plaintiff’s left knee, among other things (*see* Notice of Motion, Exhibit G: Flushing Hospital Medical Center Operation Record).

as a result of the subject accident. Plaintiff proffers, among other things³, his own affidavit, a copy of his hospital records from Lenox Hill Hospital, as well as an affirmation by Dr. Xethalis. In his affidavit, plaintiff states that “[s]ince the accident [he] ha[s] been unable to maintain [his] membership in the gym, do[es] not play basketball or other rigorous activities and ha[s] difficulty walking long distances, climbing stairs and functioning at work” (Velasquez Affidavit, ¶ 11). Plaintiff further states that he developed “an irritating clicking in [her] knee joint,” swelling in his knee area and significant loss of ROM in his left knee (*id.* at ¶13 ¶15). Moreover, in Dr. Xethalis’s affirmation, he points to his post-operative treatment of plaintiff in which he diagnosed plaintiff with the following: (1) torn medial meniscus; (2) torn anterior cruciate ligament; and (3) traumatic chondral changes over the medial femoral condyle and over the patellofemoral joint (Xethalis Affirmation, ¶ 15). Dr. Xethalis opined to “a reasonable degree of medical certainty that [plaintiff] sustained the above noted injuries as a result of the automobile accident which occurred on November 5, 2013” (*id.* at ¶ 16). Dr. Xethalis also conducted a recent examination of plaintiff on March 22, 2016, which he references in his affirmation. Among other things, Dr. Xethalis found that plaintiff continues to display restrictions in the ROM of his left knee (noting a flexion of 110 degrees⁴), in addition to “patellofemoral crepitus and one plus tenderness of the patellar tendon,” and “one plus tenderness over the posterior medi[al] joint line of the left knee” (*id.* at ¶ 20). Dr. Xethalis ultimately concluded that the pathology of plaintiff’s left knee was permanent and might require future surgical intervention (*id.*). In light of the foregoing, the Court finds that there are triable

³The Court received correspondence from plaintiff dated September 22, 2016, indicating that he had another MRI conducted due to “continuing back pain,” in which it was revealed that plaintiff had the following injuries: (1) “[m]oderate-sized midline predominantly left paracentral left sided disc herniation with posterior displacement of the ipsilateral S1 nerve root”; (2) “mild degenerative changes”; and (3) “straightening thoracolumbar lordosis which may be positioned or secondary to spasm” (Notice of Additional Injuries or Conditions). It should be noted that the Court did not consider this evidence in rendering its decision.

⁴In a supplemental affirmation, Dr. Xethalis asserted that his range of motion tests were conducted using a device called a goniometer (*see* Affirmation in Opp, Exhibit 4: Supplemental Affirmation of Physician, ¶ 3).

issues of fact, including, but not limited to, whether the subject accident caused plaintiff to sustain a serious injury to his left knee under the significant limitation of use or permanent consequential limitation of use categories of the Insurance Law (see *Perl v Meher*, 18 NY3d 208, 219 [2011]).

Accordingly, defendant's motion for summary judgment dismissing the complaint is denied.

The foregoing constitutes the decision and order of the Court.

ENTER,

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Motion Seq. #

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HON. LARRY D. MARTIN,
J.S.C.