Alsbrooks v Zysk
2016 NY Slip Op 32452(U)
December 13, 2016
Supreme Court, New York County
Docket Number: 155080/14
Judge: Leticia M. Ramirez

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

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BARBARA ALSBROOKS and KIMBERELY MALONE,

Plaintiff,

Index #: 155080/14

-against-

Motion Seq. 01

DECISION/ORDER
HON. LETICIA M. RAMIREZ

ANTHONY J. ZYSK, ANTONIO WEST, MEADE SERVICES CORP. and SUSAN ZYSK,

Defendants.

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Defendants Antonio West and Meade Services Corp.'s motion, pursuant to CPLR §3212, seeking summary judgment on the basis that plaintiff Kimberely Malone only ("plaintiff") did not sustain a "serious injury" in accordance with Insurance Law §5102(d) and defendants Anthony J. Zysk and Susan Zysk's cross- motion for the same relief. The motions are decided as follows:

It is well settled that summary judgment is a drastic remedy and cannot be granted where there is any doubt as to the existence of a triable issue of fact or if there is even arguably such an issue. *Hourigan v McGarry, 106 A.D.2d 845*, appeal dismissed *65 N.Y.2d 637 (1985); Andre v Pomeroy, 35 N.Y.2d 361 (1974)*. The function of the court in deciding a summary judgment motion is to determine whether any issues of fact exist that preclude summary resolution of the dispute between the parties on the merits. *Consolidated Edison Co. v Zebler, 40 Misc.3d 1230A (Sup. Ct. N.Y. 2013); Menzel v Plotnick, 202 A.D.2d 558 (2nd Dept. 1994)*. In deciding motions for summary judgment, the Court must accept, as true, the non-moving party's recounting of the facts and must draw all reasonable inferences in favor of the non-moving party. *Warney v Haddad, 237 A.D.2d 123 (1st Dept. 1997); Assaf v Ropog Cab Corp., 153 A.D.2d 520 (1st Dept. 1989)*.

An acute sprain or strain that causes a significant physical limitation may constitute a "serious injury" within the meaning of §5102(d) of the New York State Insurance Law. *Licari v*

Elliot, 57 N.Y.2d 230 (1982); Smith-Carter v Valdez, 2008 NY Slip OP 31231U (Sup. Ct. N.Y. 2008); Rodriguez v Russell, 2013 NY Slip Op 33954U, (Sup. Ct. Bronx 2013); Maenza v Letkajornsook, 172 A.D.2d 500 (2nd Dept. 1991); Konco v E.T.C. Leasing Corp., 160 A.D.2d 680 (2nd Dept. 1990). Furthermore, a tendon or ligament tear or a bulging or herniated disc may also constitute evidence of a "serious injury" in accordance with the Insurance Law. *Jacobs v Perciballi Container Service, Inc., 2013 NY Slip Op. 31350U (Sup. Ct. NY 2013); Chen v Caroprese, 2012 NY Slip Op. 31142U (Sup. Ct. NY 2012); Cruz v Lugo, 29 Misc.3d 1225(A) (Sup. Ct. Bronx 2008); Shvartsman v Vildman, 47 A.D.3d 700 (2nd Dept. 2008); Tobias v Chupenko, 41 A.D.3d 583 (2nd Dept. 2007); Lewis v White, 274 A.D.2d 455 (2nd Dept. 2000).* However, such claims must be supported by objective competent medical evidence demonstrating a significant physical limitation resulting therefrom. *Licari v Elliot, 57 N.Y.2d 230 (1982); Pommells v Perez, 4 N.Y.3d 566 (2005).*

In this action, plaintiff sufficiently raised triable issues of fact as to whether he sustained, *inter alia*, a disc herniation at C3-4; disc bulges at C4-5, C5-6, C6-7, L4-5 and L5-S1; an acute cervical strain; an acute lumbar strain; or a right knee meniscal tear as a result of the subject accident on December 21, 2013 and whether he sustained a "significant limitation" or a "permanent consequential limitation" of his cervical spine, lumbar spine or right knee as a result of the subject accident with the affirmation of Dr. Gautam Khakhar dated July 18, 2016, the affirmed report of Dr. Gautam Khakhar dated June 23, 2016, the unsworn cervical spine MRI report dated February 11, 2014, the unsworn lumbar spine MRI report dated February 24, 2014 and the unsworn right knee MRI report dated March 3, 2014.

In opposition to the instant motion, plaintiff submitted a "certification" for his cervical spine, lumbar spine and right knee MRI reports. However, the certification is not proper, pursuant to CPLR §3122-a, as it is not notarized. Furthermore, as said MRI reports contain medical opinions and/or diagnoses, they cannot be admitted as business records under CPLR §4518. *Rickert v Diaz, 112 A.D.3d 451 (1st Dept. 2013).* However, although said MRI reports are unsworn due to plaintiff's failure to have the reports affirmed pursuant to CPLR §2106, as said MRIs were reviewed and considered by the defendants' expert, Dr. David Fisher, they are properly before the Court for consideration. *Nelson v Distant, 308 A.D.2d 308 (1st Dept. 2003).*

Notably, in his reports regarding his review of plaintiff's cervical spine MRI conducted on February 11, 2014, lumbar spine MRI conducted on February 24, 2014 and right knee MRI conducted on March 3, 2014, Dr. Fisher opines that the cervical spine MRI did not reveal any disc herniations, the lumbar spine MRI did not reveal any disc bulges and the right knee MRI did not reveal any tears. Dr. Fisher's opinion conflicts with plaintiff's radiologist, who noted in the reports of said MRIs findings of a disc herniation at C3-4, disc bulges at L4-5 and L5-S1 and a right knee meniscal tear. It is well settled that the finder of fact must resolve conflicts in expert medical opinions. *Ugarriza v. Schmider, 46 N.Y.2d 471 (1979); Andre v. Pomeroy, 35 N.Y.2d 361 (1974); Moreno v. Chemtob, 706 N.Y.S.2d 150 (2nd Dept. 2000).*

The unsworn report of Dr. Vincent Huang of Physical Medicine & Rehabilitation of NY, P.C. dated December 30, 2013 and the unsworn report of Dr. Bozena Agustyniak from Southern 788 Medical PC dated January 22, 2014, submitted by defendants, further raise triable issues of fact as to whether plaintiff sustained a "significant limitation" or a "permanent consequential limitation" of his cervical spine, lumbar spine or right knee as a result of the subject accident. [A defendant can satisfy his initial burden of demonstrating the absence of a "serious injury" by relying on the plaintiff's doctor's unsworn records or reports. *Nelson v Distant, 308 A.D.2d 338 (1st Dept. 2003).*]

Accordingly, those portions of defendants' motions seeking dismissal of plaintiff's claim of sustaining a "serious injury" based upon the "significant limitation" and "permanent consequential limitation" categories are denied. *Hourigan v. McGarry, 106 A.D.2d 845*, appeal dismissed *65 N.Y.2d 637 (1985); Andre v. Pomeroy, 35 N.Y.2d 361, 320 N.E.2d 853, 362 N.Y.S.2d 131 (1974).*

However, that portion of defendants' motions seeking dismissal of plaintiff's claim of sustaining a "serious injury" based upon the "90/180" category is granted. Plaintiff failed to raise a triable issue of fact as to whether he was prevented from performing substantially all of his usual and customary daily activities for not less than 90 days during the 180 days immediately following the subject accident. Plaintiff testified that he only missed approximately two and a half weeks from work as a result of the subject accident during the requisite time period. As such, plaintiff's claim of sustaining a "serious injury" based upon the "90/180" category is

dismissed.

Accordingly, defendants' summary judgment motions are denied in part and granted in part, as explained herein.

As defendants improperly raised the issue of a gap in medical treatment for the first time in their reply papers, they failed to properly submit that issue to this Court, and, thus, their argument as to that issue was not considered. *McNair v Lee, 24 A.D.3d 159 (1st Dept. 2005); Ritt v Lenox Hill Hospital, 182 A.D.2d 560 (1st Dept. 1992).*

The Court has considered the parties' remaining arguments and finds them to be without merit.

All parties are directed to appear for the next DCM Status Conference on February 6, 2017.

Plaintiff is directed to serve a copy of this Decision with Notice of Entry upon all parties within 20 days of this Decision.

This constitutes the Decision and Order if this Court.

Dated: December 13, 2016
New York, New York

HON. LETICIA M. RAMIREZ, J.S.C.