Ampofo v Key
2017 NY Slip Op 32191(U)
September 26, 2017
Supreme Court, Bronx County
Docket Number: 304544/2015
Judge: Julia I. Rodriguez
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SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM- PART 27

INDEX # 304544/2015

PRINCE AMPOFO,

Plaintiff,

-against-

DECISION and ORDER

THOMAS KEY, JR. and SHARON BARBA,

Defendants.

Present:
Hon. Julia I. Rodriguez
Supreme Court Justice

Recitation, as required by CPLR 2219 (a), of the papers considered in review of the following motions and cross-motion:

Papers Submitted	Numbered
Plaintiff's motion for summary judgment on liability and to strike answer, Affirmation, Affidavit & Exhibits	1
Defendant's Amended cross-motion on threshold, Affirmation & Exhibits	2
Plaintiff's Opposition to cross-motion on threshold	3
Defendants' Reply Affirmation	4

This action arises from a two-vehicle accident which occurred on June 19, 2015. In his Bill of Particulars Plaintiff alleged that he sustained injury to his right foot/ankle, in addition to anxiety and psychological trauma.

In response to Plaintiff's motions for summary judgment on liability and to strike the complaint, Defendants cross-move for summary judgment dismissing the complaint on the ground that Plaintiff did not sustain a "serious injury" as defined in §5102 (d) of the Insurance Law, and therefore has no cause of action pursuant to §5104(a). The court will entertain the issue of threshold first as follows:

In support of summary judgment in their favor Defendants submitted, *inter alia*, a Peer Review by **Julio Westerband**, a Board Certified Orthopedic Surgeon, and a sworn medical report by **Eial Faierman**, a Board Certified Orthopedist Surgeon.

Dr. Westerband performed "an orthopedic peer review to determine the medical necessity and causal relationship for the ankle arthroscopy provided by Steven Yager, DPM on 10/16/2015 for which a bill for $3,408.11 was submitted." Westerband listed the documents he reviewed, including but not limited to, an initial evaluation dated 6/25/2015, x-ray reports of the right ankle and right foot, both 6/25/2015, MRI reports of right foot and right ankle, both dated 8/10/2015 and an operative report dated 10/16/2015. Westerband noted that Dr. Yager's clinical impression on 9/9/2015 was of "internal ankle derangement," and the proposed treatment plan consisted of a "recommendation to consider ankle arthroscopic procedure and repair." The preoperative diagnosis was "right internal ankle derangement." After surgery on 10/16/2015 the post-operative diagnosis was "right internal ankle

derangement with synovitis, soft tissue impingement, anterior talofibular ligament and attenuation." Westerband concluded that the *Ankle arthroscopy* [sic] was "not medically necessary and not causally related;" that the claimant "has ankle sprain" . . . the treatment should be Ace bandage and ice backs [sic] for two weeks. . . [and] there was no evidence of any correctable pathology such as fractures to warrant the need for surgery."

Dr. Faierman conducted an orthopedic examination of Plaintiff on November 11, 2016; he observed that "claimant's gait was normal with no signs of pain or difficulty whatsoever." Faierman conducted range of motion of the right ankle and foot and reported full range of motion, with "no pain on varus stress testing of the ankle ... [and that] lower extremity is neurovascularly intact distally." Faierman listed the medical records he reviewed, including the MRIs and X-ray reports of the right ankle and foot reviewed by Dr. Westerband; Faierman opined that:

> The MRI of the right ankle does reveal ankle sprains in the anterior talofibular ligament and calcaneal fibula ligament. I reviewed this MRI as well as the MRI of the right foot and agree with the radiologist's findings. There is no post traumatic pathology in the right foot related to the accident of 6/19/15. It should be noted that performing an ankle arthoscropy four months after an ankle sprain is quite aggressive. ... the surgeon only performed a capsular shrinkage and likely there is no significant post traumatic pathology noted on the operative photographs. . . Regardless, no actual repairs were done on the right ankle."

Faierman concluded that there were "no objective physical findings of any significant pathology on examination of the right ankle or foot...no further treatment is required for the right ankle or foot ... the claimant will not require any further therapy, injections or surgery. . . he has no residual pathology to the right ankle or foot as it relates to the accident of 6/19/15."

* * * * * * * *

The issue of whether a claimed injury falls within the statutory definition of a "serious injury" is a question of law for the courts which may be decided on a motion for summary judgment. *See Licari v. Elliott*, 57 N.Y.2d 230, 237, 441 N.E.2d 1088, 1091, 455 N.Y.S.2d 570, 573 (1982). This court finds that Defendants met their initial burden of proof that Plaintiff did not sustain a "serious injury." Dr. Faierman observed full range of motion of the right ankle and foot. Regarding Plaintiff's 90/180 claim, Defendant established via Plaintiff's deposition testimony that Plaintiff maintained his full time school

schedule and was not confined to bed or home for any period immediately after the accident. Once a defendant sets forth a *prima facie* case that the claimed injury is not serious, the burden shifts to the plaintiff to demonstrate, by the submission of objective proof, that there are substantial triable issues of fact as to whether the purported injury was serious. *See Toure v. Avis Rent-A-Car Sys.*, Inc., 98 N.Y.2d 345, 746 N.Y.S.2d 865, 774 N.E.2d 119 (2002); *Rubensccastro v. Alfaro*, 29 A.D.3d 436, 437, 815 N.Y.S.2d 514, 515 (1st Dep't 2006).

In opposition to summary judgment Plaintiff submitted, *inter alia,* the emergency room records from Bronx Lebanon Hospital dated 6/22/2015, three days post-accident, which listed his main complaint as "right foot pain since Friday." Plaintiff also submitted: (1) physical therapy records from Physical Medicine & Rehabilitation of NY, PC; (2) MRI reports of the right foot and right ankle, both dated 8/10/2015; (3) a Procedure Note by Steven Yager, D.P.M. for the right ankle arthroscopy performed on October 16, 2015; (4) Dr. Yager"s Affirmation reporting Plaintiff's recent examination on March 4, 2017; and (5) Plaintiff's affirmation.

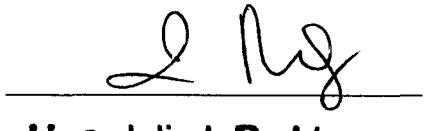
After consideration of Plaintiff's submission, the Court finds that Plaintiff failed in his burden of rebuttal, and therefore, failed to raise an issue of fact to defeat summary judgment in defendant's favor with respect to whether he sustained a "permanent consequential limitation of use of a body organ or member," a "significant limitation of use of a body organ function or system" or met the 90/180 threshold pursuant to the Insurance Law. [5102(d)]. *See Pommells v. Perez*, 4 N.Y.3d 566, 577, 797 N.Y.S.2d 380, 386-387, 830 N.E.2d 278, 284-285 (2005). As an initial matter, Plaintiff's examination at Bronx Lebanon on 6/22/2015 revealed "no apparent injury" after the motor vehicle accident and was "unremarkable"; the right foot exhibited "minimal swelling and tenderness to palpation but neurovascularly intact" [Plaintiff's Exh. A]. At Physical Medicine he was diagnosed and treated for "right ankle/foot sprain" [7/30/2015] and "right ankle sprain" [9/8/2015] [Plaintiff's Exh. B]. Dr. Yager first examined Plaintiff's right ankle on Sept. 9, 2015 and diagnosed an "internal ankle derangement;" Dr. Yager next examined Plaintiff on Oct. 13, 2015 and diagnosed "right internal ankle derangement, peroneal tenosynovitis." In his Procedure Note dated Oct. 16, 2015 Dr. Yager described performing right ankle arthoscropy "with extensive debridement, excision of soft tissue impingement, synovectomy, capsular shrinkage of the anterior talofibular ligament. . . the talar dome and tibial plafond were intact . . laterally, the anterior talofibular, although intact, was severely attenuated and was repaired by capsular shrinkage." Under these circumstances, Dr. Yager failed to rebut Defendants' doctors' assessment that Plaintiff suffered merely a strain and/or sprain of the right ankle, and that Dr. Yager failed to identify an

actual repair necessitated by the accident, or a condition caused by the accident . Indeed, in paragraph 7 of his affirmation dated March 14, 2017 Dr. Yager himself described "right ankle sprains . ..underlying scarring of the talofibular ligament . . contusions . . . " as revealed by the MRI of the right ankle. While Dr. Yager then states that "these sprains and contusions were clearly of a traumatic nature," it remains that sprains, sprains and contusions, without more, are insufficient to establish a serious injury. Significantly, range of motion testing of the right ankle conducted on March 14, 2017 showed full range of the plantar flexion (40 degrees), and minimal limitation of the dorsiflexion (15 degrees vs. 20 degrees normal. Cf. *Santos v. Manga*, 152 A.D.3d 416, 58 N.Y.S.3d 354 (1st Dept. 2017) (knee surgery insufficient to establish serious injury where surgeon's post-operative diagnosis consistent with arthritis and not trauma); *Cividanes v. City of New York*, 95 A.D.3d 1,4, 940 N.Y.S.2d 619, 622 (1st Dept. 2012) (plaintiff failed to raise an issue of fact that she suffered a serious injury where ankle MRI did not reveal tendinopathy, ligamentous injury or fracture, and medical evidence revealed only "some swelling" and "moderate limitation in range of ankle"); *Franklin v. Gareyua*, 136 A.D.3d 464, 24 N.Y.S.3d 304 (1st Dept. 2016) (plaintiff failed to raise a triable issue of fact as to causation where MRI of left shoulder showed no fracture or other evidence of traumatic injury); *Griffo v. Colby*, 118 A.D.3d 1421, 988 N.Y.S.2d 763 (4th Dept. 2014), cites omitted (plaintiff cannot establish serious injury where only injury sustained are sprains and strains, and limitations in range of motion were evidenced solely by subjective complaints of pain); *Danvers v. New York City Transit Authority*, 57 A.D.3d 252, 869 N.Y.S.2d 41 (1st Dept. 2008) (arthroscopic surgery performed eight months after accident to repair a partially torn ligament in ankle and a history of pain by themselves do not establish a serious injury); *O'Bradovich v. Mrijaj*, 35 A.D.3d 274, 827 N.Y.S.2d 38 (1st Dept. 2006) (operative report which makes no mention of fracture and shows only ankle surgery to debride an osteophyte and remove bone spurs insufficient to establish serious injury).

For the foregoing reasons, in line with the pertinent case law, this court finds that Plaintiff failed to raise an issue of fact as to whether he suffered a "serious injury" within the meaning of Insurance Law §5102 (d). Therefore, Defendants' motion for summary judgment dismissing the complaint on threshold pursuant to CPLR 3212(b) is granted, and it is

ORDERED that the complaint is dismissed.

Dated: September 26, 2017



Hon. Julia I. Rodriguez