

Itwaru v Ramsaran

2017 NY Slip Op 32658(U)

November 24, 2017

Supreme Court, Bronx County

Docket Number: 301020/2014

Judge: Jr., Kenneth L. Thompson

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Dismiss 90/180 day category



SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX – PART 20

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ROMAINDRA ITWARU,
Plaintiff,

Index No. 301020/2014

- against -

DECISION/ ORDER

JOHN RAMSARAN AND ZALINA RAMSARAN,

Present:
HON. KENNETH L. THOMPSON, JR.

Defendants.

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The following papers numbered 1 to 3 read on this **motion for summary judgment**

No	On Calendar of August 18, 2017	PAPERS NUMBER
	Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed-----	<u>1</u>
	Answering Affidavit and Exhibits-----	<u>2</u>
	Replying Affidavit and Exhibits-----	<u>3</u>
	Affidavit-----	_____
	Pleadings -- Exhibit-----	_____
	Memorandum of Law-----	_____
	Stipulation -- Referee's Report --Minutes-----	_____
	Filed papers-----	_____

Upon the foregoing papers, defendants seek summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as required by Insurance Law § 5104(a).

This action arises from a motor vehicle accident that occurred on November 28, 2012. Plaintiff alleges that he was standing outside of his parked vehicle retrieving bags from the rear, driver side seat, when defendants' vehicle, operated by Zalina Ramsaran, allegedly reversed down the street and struck plaintiff's door. The impact allegedly caused the door to close on plaintiff's head and body. The next morning plaintiff presented to North Central Bronx Hospital with complaints

of swelling to the right side of his face, headaches, shoulder pain, knee pain and lower back pain.

Plaintiff alleges serious injuries as defined by Insurance Law § 5102(d), in that he suffered, *inter alia*, a left shoulder labral tear and subdeltoid bursitis; anterior inferior labral undermining of the right shoulder; lumbar disc herniations at L5-S1; a lumbar disc bulge at L2-3; thoracolumbar myofascial derangement; and cephalgia. Plaintiff contends that he was confined to his bed and home for approximately four weeks immediately following the accident and remains partially disabled to date. Plaintiff further alleges that at the time of the accident he was employed by Citibank, as an Assistant Branch Manager, and missed four weeks of work.

A defendant seeking summary judgment in an action governed by Insurance Law § 5102 must demonstrate that the plaintiff, as a matter of law, did not sustain a “serious injury” or that the plaintiff’s injuries were not causally related to the accident at issue (*see Baez v Rahamatali*, 6 NY3d 868 [2006]; *Pommells v Perez*, 4 NY3d 566 [2005]). The failure of the proponent to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v NY Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Correa v Saifuddin*, 95 AD3d at 408, *Penava Mech. Corp. v Afgo Mech. Servs., Inc.*, 71

AD3d 493, 496 [2010]).

The court's function in determining a summary judgment motion "is one of issue finding rather than issue determination, and if there is any doubt as to the existence of factual issues, this 'drastic remedy' should not be granted" (*Lugo v LJM Toys, Ltd.*, 146 AD2d 168, 169 [1st Dept 1989]; see *O'Brien v Port Auth. of NY & New Jersey*, 29 NY3d 27, 37 [2017]).

Defendants seek summary judgment dismissing the complaint. In support of their motion, defendants submit, *inter alia*, the pleadings; a \$400.00 automobile repair estimate, dated November 30, 2016; a New York Motor Vehicle No-Fault Insurance Law, Employer's Wage Verification Report, dated January 28, 2013, indicating that plaintiff was absent from work from December 4, 2012 through December 17, 2012; the sworn MRI reports of Dr. Steven L. Mendelsohn related to plaintiff's January 24, 2013 lumbar spine, December 8, 2012 left shoulder, and December 8, 2012 right shoulder MRI studies; the affirmed reports of orthopaedic surgeon Dr. Thomas Nipper, neurologist Dr. Daniel J. Feuer, neurologist Dr. Rene Elkin, and orthopedic surgeon Jeffrey Salkin; and the unsworn reports of neurologist Dr. Peter C. Kwan. Defendants further submit the transcript from defendant Zalina Ramsaran's October 24, 2016 examination before trial.

Defendants submissions fail to demonstrate, *prima facie*, the absence of a

serious injury as a result of plaintiff's injuries to his lumbar spine and left shoulder. Dr. Nipper examined plaintiff on February 5, 2013. He found a normal orthopedic examination, normal range of motion in the lumbar spine and shoulders, a negative straight leg raising test, no spasms and no tenderness. Dr. Nipper notes, however, a left shoulder MRI report of December 8, 2012 which was positive for a posterior inferior quadrant labral tear and subacromial-subdeltoid bursitis. Dr. Nipper diagnosed plaintiff with resolved lumbar spine sprain, and resolved right and left shoulder sprains, that he causally related to the subject accident.

Dr. Elkin examined plaintiff on April 13, 2017, at which time plaintiff complained of periodic, but spontaneous, headaches, lower back pain and left shoulder pain. Dr. Elkin reviewed the relevant radiological studies and medical records, and performed range of motion testing using visual inspection, self-demonstration and a goniometer. Dr. Elkin's examination revealed that range of motion in the left shoulder was restricted in elevation and abduction,¹ with pain, and the left shoulder demonstrated tenderness to palpation. Range of motion in the lower back was also restricted in forward flexion, retroflexion lateral bending and lateral rotation, with pain, and tenderness to palpation of the lumbar spine was

¹ Elevation was 90 degrees (normal 180 degrees), and abduction was 110 degrees (normal 180 degrees).

noted.² The straight leg raising test was 90 degrees. Nevertheless, Dr. Elkin opines that there are no objective findings for any structural neurological injury to the spine as a result of the subject accident, no evidence of structural intracranial injury that might account for plaintiff's headaches, no evidence for a neurological injury that would explain his range of motion restrictions, and no objective neurological findings to collaborate the right sided disc herniation at L5-S1. Dr. Elkin points out that plaintiff's lower back symptoms, with regard to the straight leg test, was left-sided, rather than right-sided. Dr. Elkin concludes that plaintiff can function fully at his pre-accident level, without restrictions.

Dr. Salkin reviewed the relevant records and performed an orthopedic examination of plaintiff on April 18, 2017. Dr. Salkin notes the MRI findings of Dr. David R. Payne³ that plaintiff suffered a left shoulder posterior inferior quadrant labral tear and subacromial subdeltoid bursitis; a bulging disc at L2-3; and a right parasagittal herniation at L5-S1, with thecal sac indentation. Dr. Salkin found range of motion restrictions in plaintiff's lumbar spine flexion and in the left shoulder, in all directions.⁴ His examination of the left shoulder also revealed

² Forward flexion was 40 degrees (normal 60 degrees); retroflexion was 10 degrees (normal 25 degrees); and lateral bending and lateral rotation was 10 degrees (normal 25 degrees).

³ Dr. Payne reviewed plaintiff's December 8, 2012 left shoulder MRI, and his January 14, 2013 lumbosacral spine MRI.

⁴ Lumbar spine flexion was 30 degrees (normal is 60 degrees). Range of motion findings of the left shoulder were abduction 120 degrees (normal is 180 degrees), adduction 10 degrees (normal is 30

tenderness to palpation. Dr. Salkin diagnosed plaintiff with thoracolumbar, right shoulder, and left shoulder sprains and strains, all of which he deemed causally related to the subject accident, despite the presence of pre-existing degenerative changes in the lumbar spine. Dr. Salkin opines that the range of motion findings are the result of plaintiff's "suboptimal effort" and notes the absence of objective findings such as weakness, atrophy or spasms, in the spine. Dr. Salkin deemed plaintiff's injuries resolved and concludes that there is no evidence of an orthopedic disability.

Defendants fail to meet their *prima facie* burden in that their experts present objective evidence of injury to plaintiff's lumbar spine and left shoulder through the positive MRI findings and causally relate such injuries to the subject accident. In addition, the defendants' experts present evidence of significant, quantified range of motion limitations to the relevant areas. Dr. Elkin does not offer any explanation for his findings of range of motion limitations in plaintiff's lumbar spine and left shoulder (*see Collazo v Anderson*, 103 AD3d 527, 528 [1st Dept 2013]; *Jackson v Leung*, 99 AD3d 489 [1st Dept 2012]). Dr. Salkin's opinion that plaintiff's significant range of motion limitations were due to "suboptimal effort" is not supported by an objective medical explanation or otherwise substantiated (*see*

degrees), forward flexion 120 degrees (normal is 180 degrees), extension 20 degrees (normal is 40 degrees), internal rotation 40 degrees (normal is 80 degrees), and external rotation 45 degrees (normal is 90 degrees).

Protonentis v Battaglia, 150 AD3d 1286, 1286 [2nd Dept 2017]; *Collazo v Anderson*, 103 AD3d at 528; *Jackson v Leung*, 99 AD3d at 489). Neither of defendants' experts reconciles the opinions of Dr. Nipper and Dr. Feuer that plaintiff demonstrated normal range of motion throughout and no evidence of a disability, six months after the subject accident, with the current range of motion limitations. The failure of defendants to demonstrate *prima facie* that plaintiff did not sustained a permanent consequential or significant limitation of use of a body organ, member, function or system requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v NY Univ. Med. Ctr.*, 64 NY2d at 853; *Correa v Saifuddin*, 95 AD3d 407, 408 [1st Dept 2012], *Penava Mech. Corp. v Afgo Mech. Servs., Inc.*, 71 AD3d 493, 496 [2010]).

However, defendants have established entitlement to dismissal of the 90/180-day injury claim by submitting plaintiff's verified bill of particulars alleging that plaintiff was confined to bed and home and was substantially disabled for only four weeks immediately following the accident (*see Vasquez v Almanzar*, 107 AD3d 538, 540-541 [1st Dept 2013]; *Haniff v Khan*, 101 AD3d 643, 644 [1st Dept 2012]). Plaintiff's affidavit is insufficient to raise a triable issue of fact as to this category (*id.*).

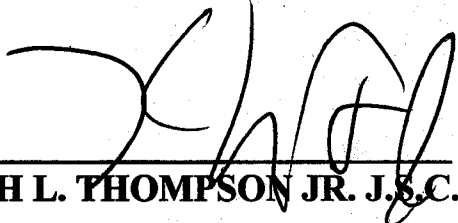
Accordingly, it is hereby ordered that the motion for summary judgment is

granted to the extent of dismissing all claims of "serious injury" predicated on the 90/180-day category of serious injury; and it is further,

ORDERED that the motion is otherwise denied.

The foregoing constitutes the decision and order of the Court.

Dated: 11/24/2017



KENNETH L. THOMPSON JR. J.S.C.