Broadwood v Bedoya
2017 NY Slip Op 33444(U)
July 21, 2017
Supreme Court, Westchester County
Docket Number: Index No. 71043/2015
Judge: Terry Jane Ruderman
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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MICHAEL BROADWOOD and JAMIE L. BUNYAN,

Plaintiff,

-against-

JUAN F. BEDOYA and MELIDA MIRANDA,

Defendants.

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DECISION AND ORDER
Sequence Nos. 1 and 2
Index No. 71043/2015

RUDERMAN, J.

The following papers were considered in connection with defendants' motion for summary judgment and plaintiffs' cross-motion for summary judgment:

Papers	Numbered
Notice of Motion, Affirmation in Support and Exhibits A – H	1
Notice of Cross-Motion, Affirmation in Opposition and Exhibits A – J	2

The plaintiffs Michael Broadwood[1] and Jamie L. Bunyan commenced this action on December 28, 2015 to recover damages for personal injuries plaintiff allegedly sustained in a motor vehicle accident that occurred on August 26, 2014, at approximately 1:24 p.m., on I-287 in Mahwah, New Jersey. Plaintiff's bill of particulars alleges that plaintiff suffered the following three statutory categories defining serious injury under New York Insurance Law § 5102(d): (1) "permanent consequential limitation of use of a body organ or member," (2) "significant limitation of use of a body function or system," and (3) "a medically determined injury or impairment of a non-permanent nature" which prevented plaintiff from performing his usual and customary daily activities for not less than 90 days of the first 180 days after the injury. The plaintiff's bill of particulars specifically alleges that plaintiff sustained, *inter alia*, neck sprain/strain, cervical muscle tension bilaterally, straightening of cervical lordosis, and C5-C6 disc protrusion. (Defendants' Exhibit C, ¶ 4.)

[1] Michael Broadwood is the only plaintiff with an alleged serious physical injury, and thus, all references to "plaintiff" are to Broadwood.

The defendants now move for an order, pursuant to CPLR 3212, granting summary judgment based on the absence of a "serious injury" under New York Insurance Law 5102(d). The plaintiff submits written opposition and cross-moves for summary judgment.

In support of their motion, defendants submit plaintiff's deposition testimony (Defendants' Exhibit D) in which he testified that he first sought medical treatment for his injuries at White Plains Hospital Center Urgent Care on August 27, 2014, the day after the accident. Plaintiff did not seek additional treatment until two months later when he saw Konstantino Sofos, M.D. for an initial examination and evaluation of his symptoms. Plaintiff also testified that he returned to work approximately one week after the accident and continued to miss time from work twice a week for a period of six months to attend treatment appointments with Sofos.

Defendants also provide the results of plaintiff's two MRI scans. The first MRI, taken at White Plains Hospital the day after the accident, showed normal C1-C2 articulation and lordosis, unremarkable prevertebral soft tissues, and preserved intervertebral disc spaces, with a final impression of "no acute pathology."(Exhibit E.) The second MRI, taken at White Plains Radiology Associates on November 4, 2014, showed a "straightening of the cervical curvature with small central disc protrusion at C5-6 slightly deforming the sac." (Exhibit F.)

Defendants further submit the examination, evaluation and treatment notes from plaintiff's visits with Chiropractor Konstantino Sofos, D.C. (Exhibit G) from October 22, 2014, through April 10, 2015. The notes detail plaintiff's subjective complaints of pain and state that he suffered from range of motion restrictions. However, the notes fail to provide the methods of examination used, the specific degrees of the motion restrictions, and a comparison of Sofos' findings to normal ranges of motion for the subject body parts.

Lastly, defendants offer the report of their medical expert, Dr. Lisa Nason, M.D., who examined plaintiff on October 17, 2016. (Exhibit H). Dr. Nason's examination of plaintiff's cervical spine revealed no spasms or tenderness, and her report noted that plaintiff's sensory responses were intact, there was no atrophy of the intrinsic muscles, compression tests were negative, plaintiff had no radiating pain, and there was only a 5-degree decrease in the right and left rotation of the cervical spine. Dr. Nason made similar findings with respect to plaintiff's thoracic spine, and noted that related range of motion tests were all normal. Finally, Dr. Nason stated that plaintiff's cervical spine sprain, and thoracic, right and left shoulder pain were all found

to be resolved, and there was no orthopedic causally related disability based on Dr. Nason's physical examination and review of plaintiff's medical documentation.

In opposition, and support of the cross-motion, plaintiff argues that he is entitled to summary judgment on the issue of negligence, because defendants have failed to proffer a non-negligent reason for the rear-end collision with plaintiff's vehicle. Additionally, plaintiff submits the sworn affidavit of Sofos (Plaintiffs' Exhibit I), who opined that, based on her chiropractic care of plaintiff for a period of six months after the accident, and her review of plaintiff's November 2014 MRI scan results, plaintiff sustained serious injuries to his cervical and thoracic spine as a result of the subject motor vehicle accident. Sofos diagnosed a significant range of motion limitation in plaintiff's cervical spine as well as his thoracic spine, as compared to normal, and noted that plaintiff was limited in the performance of his daily activities.

Plaintiff also submits his November 2014 MRI report, showing the existence of a small central disc protrusion at C5-6 slightly deforming the sac (Plaintiff's Exhibit J), and his own deposition testimony, in which he testified that he was unable to run, hike and play golf and squash, had difficulty sleeping and had to modified his work-related travel responsibilities after the accident. (Plaintiff's Exhibit E, pp. 73-78.)

Analysis

A party moving for summary judgment pursuant to CPLR 3212 must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate that there is no genuine dispute as to any material fact. (*Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324 [1986].) Once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. (*Alvarez*, 68 N.Y.2d at 324, citing *Zuckerman v. City of New York*, supra, 49 N.Y.2d 557, 562 [1980].) In assessing the record to determine whether there are material issues of fact for trial, the court must view the facts in the light most favorable to the non-moving party. (*Jacobsen v. New York City Health & Hosps. Corp.*, 22 N.Y.3d 824 [2014].)

To prevail on a motion for summary judgment on the basis that plaintiff cannot recover for non-economic loss in connection with a motor vehicle accident under New York's No-Fault Law, a defendant must establish prima facie that the plaintiff did not sustain a serious injury within the meaning of New York Insurance Law § 5102(d). In support of its motion, a defendant may rely on

the unsworn reports of plaintiff's physicians (*McGovern v. Walls*, 201 A.D.2d 628 [2d Dept. 1994]) or on the sworn affidavits or affirmations of the defendant's own retained physicians. (*Marsh v. Wolfson*, 186 A.D.2d 115 [2d Dept. 1992].)

If the defendant makes the requisite showing, the burden shifts to the plaintiff to present evidence of: (1) contemporaneous treatment – qualitative or quantitative – to establish that plaintiff's injuries were causally related to the accident, and (2) recent examination to establish permanency. There is no requirement that "contemporaneous" quantitative measures be made. (*Perl v. Meher*, 18 N.Y.3d 208 [2011] [permissible to observe and recording a patient's symptoms in qualitative terms shortly after the accident, and later perform more specific, quantitative measurements in preparation for litigation].) Moreover, while a herniated or bulging disc may constitute a serious injury within the meaning of Insurance Law § 5102(d), "a plaintiff must provide objective evidence of the extent or degree of the alleged physical limitations resulting from the disc injury and its duration." (*Bacon v. Bostany*, 104 A.D.3d 625 627 [2d Dept. 2013].)

Here, the report of defendants' expert, finding full range of motion and the absence of an orthopedic causally related disability, established a prima facie case of the absence of serious injury. (*Kearse v. New York City Tr. Auth.*, 16 A.D.3d 45, 49 – 50 [2d Dept. 2005] ["A defendant who submits admissible proof that the plaintiff has a full range of motion, and that she or he suffers from no disabilities causally related to the motor vehicle accident, has established a prima facie case that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d), despite the existence of an MRI which shows herniated or bulging discs."] [*citations omitted*].)

Plaintiff has failed to raise a triable issue of fact in opposition or demonstrate any entitlement to relief on the cross-motion. Although plaintiff submitted his MRI results showing the existence of a bulging disc, and Sofos' finding of range of motion limitations, plaintiff failed to offer objective evidence of the extent or degree of those alleged limitations. Indeed, Sofos did not provide a comparison of the alleged physical limitations of movement with stated norms. (*Starkey v. Curry*, 94 A.D.3d 866 [2d Dept. 2012]; *Tinyanoff v. Kuna,* 98 A.D.3d 501 [2d Dept. 2012] [affidavit of plaintiff's treating chiropractor failed to quantify, on the basis of objective testing, the limitations which he found in plaintiff's cervical spine during a recent examination, and failed to compare those limitations to what would be considered normal]; *Ambroselli v. Team Massapequa, Inc.*, 88 A.D.3d 927 [2d Dept. 2011] [expert examined plaintiff's lumbar range of motion and set forth range of motion findings with respect to that region of plaintiff's body, but

failed to compare those findings to what is normal]; *Quintana v. Arena Transp., Inc.*, 89 A.D.3d 1002 [2d Dept. 2011] ["plaintiff's treating orthopedist . . . failed to set forth the actual ranges of motion achieved by plaintiff, and failed to compare these findings to the normal range of motion. Thus, the orthopedist's report was insufficient to raise a triable issue of fact as to whether the injuries to plaintiff's cervical spine and right wrist constituted a serious injury under the permanent or significant limitation of use categories . . ."].)

As to the 90/180 category of serious injury, in order to make a prima facie case, defendant properly relies on plaintiff's own deposition testimony in which he admits that he returned to work approximately one week after the accident. (*Kabir v. Vanderhost*, 105 A.D.3d 811 [2d Dept. 2013] [defendant established that the plaintiff missed only six to eight days of work following the accident and, therefore, did not sustain a serious injury under the 90/180-day category of Insurance Law § 5102 (d)].) Plaintiff's testimony that he was unable to play golf and squash, go running or hiking, and that he had difficulties sleeping, and travelling extensively for work, does not establish that plaintiff was unable to perform substantially all of the material acts that constitute his usual and customary daily activities for at least 90 of the first 180 days following the occurrence the alleged injury. (*Frier v. Teague*, 288 A.D.2d 177, 179 [2d Dept. 2001], citing *Licari v. Elliott*, 57 N.Y.2d 230, 236 [1982] ["the words 'substantially all' should be construed to mean that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment"].)

Based upon the foregoing, it is hereby,

ORDERED that defendants' motion for summary judgment dismissing the complaint is granted; and it is further

ORDERED that plaintiffs' cross-motion for summary judgment is denied.

Dated: White Plains, New York
July 21, 2017

HON. TERRY JANE RUDERMAN, J.S.C.