Saenz v Bajjaj
2018 NY Slip Op 30668(U)
April 13, 2018
Supreme Court, Queens County
Docket Number: 5198/2015
Judge: Robert J. McDonald

Short Form Order

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

- x

LEYDI SAENZ and RAFAEL GALVEZ, Index No.: 5198/2015

Plaintiffs, Motion Date: 4/9/18

- against - Motion No.: 115

YASSINE BAJJAJ and RAJEN P. MANIAR, Motion Seq No.: 3

Defendants.

- x

The following papers numbered 1 to 9 read on this motion by defendant RAJEN P. MANIAR for an order pursuant to CPLR 3212, granting defendants summary judgment and dismissing the complaint of RAFAEL GALVEZ on the ground that plaintiff RAFAEL GALVEZ did not sustain a serious injury within the meaning of Insurance Law §§ 5104(a) and 5102(d):

	Papers Numbered
Notice of Motion-Affirmation-Exhibits	1 - 4
Affirmation in Opposition-Exhibits	5 - 7
Reply Affirmation	8 - 9

This is a personal injury action in which plaintiffs seek to recover damages for injuries allegedly sustained in a motor vehicle accident that occurred on November 3, 2013 on the Northern State Parkway at or near its intersection with Hillside Avenue, in Nassau County, New York. As a result of the accident, plaintiff Rafael Galvez alleges that he sustained serious injuries his cervical spine, thoracic spine, lumbar spine, and right shoulder.

Plaintiffs commenced this action by filing a summons and complaint on April 28, 2015. Defendant Rajen P. Maniar joined issue by service of a verified answer dated June 23, 2015. Defendant Yassine Bajjaj joined issue by service of a verified answer dated June 24, 2015. Defendant Rajen P. Maniar (hereinafter defendant) now moves for an order pursuant to CPLR 3212, dismissing the complaint of plaintiff Rafael Galvez

(hereinafter plaintiff) on the ground that the injuries claimed fail to satisfy the serious injury threshold requirement of Section 5102(d) of the Insurance Law.

Plaintiff appeared for an examination before trial on May 20, 2016 and testified that he was involved in the subject accident. He missed one day from work as a result of the accident. He returned to work in the same capacity after the accident and for the same amount of hours.

Edward A. Toriello, M.D. performed an independent medical examination on plaintiff on October 7, 2016. Plaintiff reported current complaints of stiffness in his neck, burning in his right hand, and low back pain. Dr. Toriello identifies the records reviewed prior to rendering the report. Dr. Toriello performed range of motion testing with a goniometer or inclinometer and found normal ranges of motion in plaintiff's cervical spine, thoracic spine, lumbar spine, bilateral shoulders, bilateral elbows, bilateral wrists and hands, and lumbosacral spine. All other objective tests were normal. Dr. Toriello opines that plaintiff reveals evidence of resolved cervical strain, resolved thoracic strain, resolved low back strain, and resolved right shoulder contusion. Dr. Toriello further opines that plaintiff reveals no objective evidence of continued disability. Plaintiff is able to return to work and normal daily living activities without restrictions. Plaintiff has reached maximum medical improvement. There is no permanency, and there is no further need for treatment.

Defendant contends that the evidence submitted is sufficient to establish, prima facie, that plaintiff has not sustained an injury which resulted in a fracture; significant disfigurement; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; or significant limitation of use of a body organ, member, function or system. Defendant also contends that plaintiff did not sustain a medically determined injury or impairment of a nonpermanent nature which prevented him for not less than 90 days during the immediate 180 days following the occurrence, from performing substantially all of his usual daily activities.

In opposition, plaintiff submits his own affidavit dated January 22, 2018, affirming that immediately after the accident, he was shaken and remained in his vehicle. His wife lost consciousness for several minutes, and he was more concerned about his wife immediately following the accident. He called 911 and accompanied his wife in the ambulance to the emergency room

of Winthrop Hospital. He stayed overnight with his wife, but did not receive any treatment. After leaving the hospital, he remained in bed throughout the next few days. A few days following the accident, he and his wife went to NY Med. The doctor examined him and performed certain tests. The doctor prescribed him a course of physical therapy. He went to physical therapy approximately three times per week. The treatment consisted of electrical stimulation, acupuncture, chiropractic manipulations, massage, and exercises. He had MRIs taken of his neck and lower back. He was referred to a Pain Management Specialist who administered a series of steroid and trigger point injections to his neck and right shoulder. He received physical therapy at NY Med continuously for approximately thirteen months following the accident. Treatment ended at that time because his no-fault benefits were cut-off. He then sought medical treatment at Midtown Rehabilitation Center and with Dr. Doug Schottenstein at Pain Management Center NY Spine Medicine. Dr. Schottenstein administered a series of cervical and lumbar epidural steroid injections. Immediately following the accident, any strenuous activity was difficult to perform, and he refrained from any physical activity for well over three months following the accident. He could not lift anything heavy without having severe pain and discomfort. Sitting was a problem. He could not bend like he used to before the accident. Routine chores were difficult. Sleeping was a problem. At the time of the accident, he was employed as a Scheduler for Pavarini McGovern, a Construction Management Firm. His duties consisted of solely computer work. He missed a few days from work due to the accident. However, he would need to take many breaks due to discomfort and stiffness to his neck and back. Additionally, he would often need to stretch and perform exercises to help with his discomfort. He still has problems with some daily activities, including reduced flexibility and mobility.

Plaintiff submits a medical affidavit from John Ventrudo, M.D. Attached to the motion are records from NY Med, which Dr. Ventrudo affirms are true and accurate copies of his office file. Plaintiff initially sought medical assistance at NY Med on November 6, 2013, three days after the accident. Range of motion testing revealed restricted ranges of motion in plaintiff's cervical spine, thoracolumbar spine, and right shoulder. The Office Visit reports from NY Med, signed by Drs. Subhas Chandra, M.D., Stephen Wilson, M.D., and John M. Ventrudo, M.D., demonstrate that plaintiff continued to exhibit restricted range of motion in his cervical spine, thoracolumbar spine, and right shoulder from the initial examination through January 2015. Drs. Chandra, Wilson, and Ventrudo each opined that the subject accident was the cause of the noted injuries. Dr. Wilson also

opined on January 14, 2015 that plaintiff has a total disability and the prognosis for recovery is guarded.

On December 17, 2016, Doug Schottenstein, M.D. from the Pain Management Center NY Spine Medicine first examined plaintiff. Dr. Schottenstein performed range of motion testing and found diminished range of motion in plaintiff's cervical spine and thoracolumbar spine. Dr. Schottenstein noted that plaintiff is partially disabled and is working. He affirms that the subject accident is the substantial cause of plaintiff's condition. Dr. Schottenstein also examined plaintiff on June 7, 2017 and found continued diminished range of motion in plaintiff's cervical spine and thoracolumbar spine.

Radiologist David R. Payne, M.D. submits an affirmation stating that the MRI of plaintiff's cervical spine taken on December 12, 2013 reveals bulging discs at C3-4, C4-5, and C5-6 without stenosis. The MRI of plaintiff's lumbar spine taken on December 12, 2013 reveals bulging discs at L2-3, L3-4, and L5-S1 without stenosis. There is also a central herniation L4-5 with thecal sac impingement.

Most recently, Dr. Ventrudo performed an examination of plaintiff on January 3, 2018 and found restricted range of motion in plaintiff's cervical spine, lumbar spine, and right shoulder. He identifies the records reviewed prior to rendering his affidavit and notes that plaintiff continued his physical therapy regimen for approximately fourteen months at NY Med. He affirms that the injuries alleged were caused by the subject accident. Plaintiff did sustain cervical injuries, lumbar injuries, and right shoulder injuries which significantly limited and restricted his ability to participate in customary home and recreational activities for more than the first six months following the accident. Plaintiff was rendered disabled for over six months following the accident. It is also Dr. Ventrudo's opinion that plaintiff had received the maximum medical benefit and that is why treatment ended at that time.

On a motion for summary judgment, where the issue is whether the plaintiff has sustained a serious injury under the no-fault law, the defendant bears the initial burden of presenting competent evidence that there is no cause of action (Wadford v Gruz, 35 AD3d 258 [1st Dept. 2006]). "[A] defendant can establish that a plaintiff's injuries are not serious within the meaning of Insurance Law § 5102 (d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (Grossman v Wright, 268 AD2d 79 [1st Dept.

2000]). Whether a plaintiff has sustained a serious injury is initially a question of law for the Court (Licari v Elliott, 57 NY2d 230 [1982]).

Here, the competent proof submitted by defendant, including the affirmed medical report of Dr. Toriello and plaintiff's own testimony that he only missed one day of work as a result of the subject accident, is sufficient to meet defendant's prima facie burden by demonstrating that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler,79 NY2d 955 [1992]; Carballo v Pacheco, 85 AD3d 703 [2d Dept. 2011]; Ranford v Tim's Tree & Lawn Serv., Inc., 71 AD3d 973 [2d Dept. 2010]).

In opposition, this Court finds that plaintiff raised triable issues of fact as to whether he sustained a serious injury to his cervical spine, lumbar spine, thoracic spine, and right shoulder by submitting the medical reports attesting to the fact that plaintiff sustained injuries as a result of the subject accident, finding that plaintiff had significant limitations in ranges of motion both contemporaneous to the accident and in a recent examination, and concluding that the limitations are permanent and causally related to the accident (see Perl v Meher, 18 NY3d 208 [2011]; David v Caceres, 96 AD3d 990 [2d Dept. 2012]; Martin v Portexit Corp., 98 AD3d 63 [1st Dept. 2012]; Ortiz v Zorbas, 62 AD3d 770 [2d Dept. 2009]; Azor v Torado,59 AD2d 367 [2d Dept. 2009]).

Additionally, Dr. Ventrudo adequately explained the gap in treatment by affirming that on the last date of treatment, plaintiff was deemed to obtain maximum benefit from treatment (see Abdelaziz v Fazel, 78 AD3d 1086 [2d Dept. 2010]; Tai Ho Kang v Young Sun Cho, 74 AD3d 1328 [2d Dept. 2010]; Domanas v Delgado Travel Agency, Inc., 56 AD3d 717 [2d Dept. 2008]; Black v Robinson, 305 AD2d 438 [2d Dept. 2003]).

As such, plaintiff demonstrated issues of fact as to whether he sustained a serious injury to his cervical spine, thoracic spine, lumbar spine, and right shoulder under the permanent consequential and/or the significant limitation of use categories of Insurance Law § 5102(d) as a result of the subject accident (see Khavosov v Castillo, 81 AD3d 903[2d Dept. 2011]; Mahmood v Vicks, 81 AD3d 606 [2d Dept. 2011]; Compass v GAE Transp., Inc., 79 AD3d 1091 [2d Dept. 2010]; Evans v Pitt, 77 AD3d 611 [2d Dept. 2010]). Moreover, based on Dr. Ventrudo's opinion that plaintiff's ability to participate in customary home and recreational activities for more than the first six months

following the accident was significantly limited and restricted and that plaintiff was rendered disabled for over six months following the accident, issues of fact remain as to whether plaintiff sustained a serious injury under the 90/180 category of Insurance Law § 5102(d).

Accordingly, for the reasons set forth above, it is hereby,

ORDERED, that the summary judgment motion by defendant RAJEN P. MANIAR is denied.

Dated: April 13, 2018
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C.