

Rivera v Klausner

2018 NY Slip Op 31075(U)

April 20, 2018

Supreme Court, Bronx County

Docket Number: 25418/2016E

Judge: Julia I. Rodriguez

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

-----X **Index No. 25418/2016E**
Uziel Joshua Rivera,
Plaintiff,

-against-

DECISION & ORDER

Lois Klausner and "JOHN DOE" first and last names
fictitious as real names are unknown,

Defendants.

Present:
Hon. Julia I. Rodriguez
Supreme Court Justice

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Recitation, as required by CPLR 2219(a), of the papers considered in review of defendant Lois Klausner's motion for summary judgment dismissing the complaint for failure to establish serious injury.

<u>Papers Submitted</u>	<u>Numbered</u>
Notice of Motion, Affirmation & Exhibits	1
Affirmation in Opposition & Exhibits	2
Reply Affirmation	3

This action arises from an accident which occurred on February 29, 2016. In his Bill of Particulars, Plaintiff alleges he sustained injuries to his back and left knee.

After discovery, Defendant Lois Klausner seeks an order granting summary judgment and dismissing Plaintiff's complaint for failure to satisfy the serious injury threshold under Insurance Law §5104(a) and §5102(d).

In support of summary judgment, Defendant submitted, *inter alia*, Plaintiff's deposition testimony and the affirmed medical reports of doctors **Martin Barschi, M.D.**, an Orthopedist, and **Scott C. Coyne, M.D.**, a Board-Certified Radiologist.

Dr. Barschi reviewed Plaintiff's medical records, and conducted an orthopedic examination on or about 10/26/17. Barschi reported limitations in range of motion of the lumbar spine but concluded that these were "subjective complaints only . . . as he has no evidence of any muscle atrophy, muscle spasm, or loss of reflexes." Barschi noted that Plaintiff's medical records revealed treatment for "lower back pain radiating to the left lower extremity" and that, in November 2016, Plaintiff had been "given epidural injections" due to worsening lower back and

left knee pain. Barschi also noted that an MRI of the lumbar spine taken on 3/18/16 revealed a “disc herniation centrally at L4-L5 with impingement on both traversing nerve roots.” Notably, Barschi concluded that Plaintiff “sustained soft tissue injuries to his lower back and left knee” as a result of the accident.

Dr. Coyne reviewed Plaintiff’s x-ray and MRI examinations of the spine and left knee. Coyne’s impression was that the left knee “demonstrates mild degenerative intrasubstance meniscus change which is typical for age [24]” and that the “lumbosacral spine radiology examinations demonstrate degenerative disc disease and facet joint changes, isolated mainly at L4-5 and L5-S1.” Coyne also found that “[c]hronic shallow levoconvex scoliosis contributes to the focal degenerative changes.” Coyne concluded that “[a]ll of these degenerative changes and other findings of the left knee and lumbosacral spine are certainly chronic, long-standing, preexistent and not causally related to the accident on February 29, 2016.”

At his deposition, Plaintiff testified that he missed two weeks from his job, was confined to his home for two weeks following the accident, and was confined to his bed for two to three days.

In opposition to summary judgment, Plaintiff submitted, *inter alia*, the affirmed medical reports of doctors (1) **Rafael Abramov, D.O.**, (2) **Christopher Lee, M.D.**, (3) **Dandan Tu, M.D.**, and (4) **Mark J. Katzman, M.D.**, a Board-Certified Neuroradiologist. Dr. Abramov examined Plaintiff on March 16, 2016, May 4, 2016 and June 8, 2016, and Plaintiff received physical therapy at Abramov’s offices from 3/16/16 through 11/30/16. Upon each examination, Abramov reported range of motion limitations in the left knee and lumbar spine which he attributed to the accident. In an affirmed “EMG NOTE” dated June 6, 2016, Abramov stated that “electrodiagnostic testing performed on June 3, 2016 revealed evidence of left L5 radiculopathy.” Dr. Lee examined Plaintiff on June 10, 2016 and reported range of motion limitations in the lumbar spine. In his report, Lee indicated that an EMG revealed Left L5 radiculopathy and that an MRI of the lumbar spine revealed a disc herniation at L4-L5 impressing on the ventral thecal sac and a disc herniation at L5-S1 impinging upon the transversing right S1 nerve root. His impression was that Plaintiff was “status post a motor

vehicle accident on February 29, 2016 with lumbar derangement, multilevel lumbar disc herniation, and lumbar radiculopathy.” Dr. Tu examined Plaintiff on October 31, 2016 and reported range of motion limitations in the lumbar spine. Tu’s impression was that Plaintiff was “status post a motor vehicle accident on February 29, 2016 with lumbar derangement, multilevel lumbar disc herniation, left knee sprain and tendinosis, posttraumatic headaches, and left L5 radiculopathy on the needle EMG.” Dr. Katzman interpreted the MRIs of the lumbar spine and left knee, both taken on 3/18/16. Katzman concluded that the MRI of the lumbar spine “reveals a recent-appearing central disc herniation at L4-5 with associated nerve root impingement” and “recent-appearing right sided disc herniations at L5-S1 with associated nerve root impingement,” which he attributed to the accident. Katzman also reported injury to the left knee which he attributed to the accident. Katzman made no findings of scoliosis or degenerative disc disease. Medical records submitted by plaintiff indicate that, in April 2017, plaintiff was referred for surgery, a Left-Hemi-laminectomy L4-S1, due to “failed conservative treatments” including six months of physical therapy and epidural injections.

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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). The Court finds that Defendant met her initial burden of proof that Plaintiff did not sustain a “serious injury” with respect to the 90/180 category only. Significantly, Defendant’s own orthopedic expert reported significant limitations in range of motion of the spine, and concluded that Plaintiff sustained injuries to his lower back and left knee as a result of the accident. As such, Defendant failed to meet her *prima facie* burden to establish that Plaintiff did not sustain a “permanent consequential limitation of use of a body organ or member” or a “significant limitation of use of a body function or system.” Therefore, the burden has not shifted to Plaintiff to raise an issue of fact with respect to those categories. In any event, in opposition to the motion, plaintiff raised issues of fact as to those categories.

FILED: BRONX COUNTY CLERK 04/25/2018 11:48 AM

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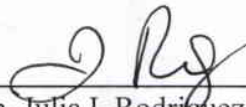
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However, the Court finds that Plaintiff failed to meet his burden of rebuttal regarding the 90/180 claim, i.e., that he suffered “a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.” As noted by Defendant, at his deposition Plaintiff testified that he returned to work two weeks after the accident.

For the foregoing reasons, Defendant’s motion for summary judgment dismissing the complaint for Plaintiff’s failure to meet the “serious injury” threshold of Insurance Law §5102(d) is **granted** solely to the extent that Plaintiff’s 90/180 claim is **dismissed**. Defendant’s motion is otherwise **denied**, as herein above described.

Dated: Bronx, New York
April 20, 2018



Hon. Julia I. Rodriguez, J.S.C.