Diaz v Diajkite
2018 NY Slip Op 31331(U)
May 15, 2018
Supreme Court, Bronx County
Docket Number: 304289/2013
Judge: Howard H. Sherman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX - PART 4

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LUIS DIAZ,

Plaintiff,

-against-

DECISION AND ORDER
Index No. 304289/2013

MAMADOU DIAJKITE and K-HOP TRANS CORP.,

Defendants.

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Defendants move for summary judgment pursuant to CPLR 3212 dismissing the complaint on the ground of absence of serious injury under Insurance Law 5102 (d). Plaintiff submits written opposition.

In this personal injury action, plaintiff seeks damages for alleged "serious injury" incurred as a result of a "pedestrian knock-down" accident which occurred at approximately 1:30 P.M., on November 3, 2010, on the Grand Concourse near the intersection of Bedford Park Boulevard in Bronx County. In his bill of particulars, plaintiff alleges injuries of his left rotator cuff, knees, neck and back, and alleges, further, that he was confined to bed for three months, and to home, for six. He contends that these injuries qualify as "serious" in five statutory categories: significant disfigurement; fracture; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system, and a medically determined injury or impairment of a non-permanent nature which prevented him from performing substantially all of the material acts which constitute his 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.[1]

After the accident, plaintiff was hospitalized for five days, where his treatment was confined for the most part , to alcohol-dependency. On November 23, 2010, 20 days post-accident, he was seen by a physiatrist. An MRI of his lumbar spine taken on January 12, 2011, that indicated disc herniations at L2-L3 and L5-S1. A left shoulder MRI taken on February 18, 2011, revealed a small tear of the supraspinatus muscle, and an MRI of the cervical spine conducted on March 18, 2011, evidenced a bulging disc at C5-C6. All treatment for accident-related injuries was suspended sometime in 2011 .

In support of the motion, defendants submit the pleadings and bills of particulars; the deposition testimony of the plaintiff; emergency room records , and contemporaneous medical reports and diagnostic studies, and the affirmed report of Dr. J. Serge Parisien, defendants' expert orthopedist. Dr. Parisien examined the plaintiff on May 11, 2015, and found full range of motion in all of the affected areas, and the absence of any orthopedic disability. He concluded that all of the injuries were resolved strains and sprains of the affected areas.

Defendants contend that plaintiff sustained no serious injuries based on the report of Dr. Parisien, and argue that the record offers no reasonable explanation for the cessation of all treatment for "permanent " accident-related injuries as of 2012 (

[1]There is no issue of fact that the soft-tissue injuries asserted rendered plaintiff significantly disfigured, nor on this record if there an issue of fact that plaintiff sustained an accident-related fracture. As a consequence, consideration will be confined to the three remaining categories alleged [Verified Bill of Particulars ¶ 13].

Bent v. Jackson, 15 A.D.3d 46, 788 N.Y.S.2d 56 [1st Dept. 2005]). With respect to 90/180-day category, defendants argue that plaintiff has neither established any limitations, nor has he demonstrated that he was unable to perform his customary activities for the requisite period.

In opposition, plaintiff submits the affirmed report of his treating physiatrist dated November 23, 2010, which shows limitations of motion of the plaintiff's lumbosacral spine, left shoulder, and knees [Exhibit G]. He also submits the affirmed report of another treating physician, Thomas Nipper, M.D., dated March 8, 2011, incorporating findings of loss of range of motion in plaintiff's lumbar spine, left shoulder, and left knee [Exhibit K]. Dr, Nipper also concludes that the foregoing injuries are a result of the accident. In addition, plaintiff tenders the affirmed report of David T. Neuman, M.D., another treating physician, who, based on an examination of December 7, 2015, concluded that there is a loss of range of motion in plaintiff's left shoulder and left knee and that these losses are permanent [Exhibit H].

The court's function on this motion for summary judgment is issue finding rather than issue determination. (*Sillman v. Twentieth Century Fox Film Corp.*, 3 N.Y.2d 395, 144 N.E.2d 387, 165 N.Y.S.2d 49 [1957]). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. (*Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223, 385 N.E.2d 1068, 413 N.Y.S.2d 141 [1978].) Thus, when the existence of an issue of fact is even arguable or debatable, summary

judgment should be denied. (*Stone v. Goodson*, 8 N.Y.2d 8, 167 N.E.2d 328, 200 N.Y.S.2d 627 [1960].)

"On a motion for summary judgment dismissing a complaint that alleges a serious injury under Insurance Law § 5102 (d), the defendant bears the initial 'burden of establishing by competent medical evidence that plaintiff did not sustain a serious injury caused by the accident' " (*Haddadnia v. Saville*, 29 A.D.3d 1211, 1211, 815 N.Y.S.2d 319 [3d Dept. 2006]; *Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d 345, 352, 774 N.E.2d 1197, 746 N.Y.S.2d 865 [2002]). The defendant may satisfy that burden if the defendant presents the affirmation of a doctor which recites that the plaintiff has normal ranges of motion in the affected body parts, and identifies the objective tests performed to arrive at that conclusion. (See *Lamb v Rajinder*, 51 A.D.3d 430, 859 N.Y.S.2d 4 [1st Dept. 2008]).

If a defendant satisfies this burden, the plaintiff must present evidence of (1) contemporaneous treatment – qualitative or quantitative – to establish that the plaintiff's injuries were causally related to the accident and (2) recent examination to establish permanency (but not necessarily where the claim is for "significant limitation," which does not require a showing of permanence). There is no requirement that "contemporaneous" quantitative measurements be made. (*Perl v. Meher*, 18 N.Y.3d 208, 936 N.Y.S.2d 655, 960 N.E.2d 424 [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]; *Rosa v. Mejia*, 95

A.D.3d 402, 943 N.Y.S.2d 470 [1st Dept. 2012] ["*Perl* did not abrogate the need for at least a qualitative assessment of injuries soon after an accident."]; *Santos v. Traylor-Pagan*, 152 A.D.3d 406, 2017 N.Y. App. Div. LEXIS 5336 [1st Dept. 2017] [plaintiff had no medical treatment following receipt of sutures at emergency room until he first saw an orthopedist 13 1/2 months after the accident, and then allegedly had a few months of physical therapy, although there are no details of any such therapy in the record; he did not see a neurologist about his carpal tunnel syndrome until almost four years after the accident].)[2] "[T]he lack of a recent examination, while sometimes relevant, is not dispositive by itself in determining whether a plaintiff has raised a triable issue of fact in opposing a defendant's prima facie evidence under the 'significant limitation' category." (*Vasquez v Almanzar*, 107 A.D.3d 538, 540, 967 N.Y.S.2d 361, 363 [1st Dept. 2013].)

Defendant established a prima facie case through the affirmed report of Dr. Parisien. Contrary to plaintiff's arguments, Dr. Parisien in fact set forth normal ranges of motion. (*Fernandez v. Hernandez*, 151 A.D.3d 581, 57 N.Y.S.3d 469 [1st Dept. 2017] [defendants established a prima facie case by submitting the affirmed report of an orthopedic surgeon who found normal ranges of motion, negative objective test results, and resolved sprains, strains, and contusions to those body parts; plaintiff's own medical records showed that the claimed injuries were the result of preexisting

[2] Certified medical records may be considered for the purpose of demonstrating that plaintiff sought medical treatment for his claimed injuries contemporaneously with the accident and continuing for a significant period of time thereafter. (*Ortiz v Salahuddin*, 102 AD3d 617, 959 N.Y.S.2d 64 [1st Dept. 2013]).

degeneration]; *Dziuma v. Jet Taxi, Inc.*, 148 A.D.3d 573, 50 N.Y.S.3d 341 [1st Dept. 2017] [defendant made a prima facie showing that plaintiff did not suffer any serious injury through the affirmed report of its orthopedist, who found full range of motion in all affected body parts, its radiologist, who opined that the conditions shown in the spinal MRIs were degenerative and that there was no evidence of traumatic injury in the left shoulder, and its psychologist, who opined that plaintiff did "not present with any evidence for any psychological disability" due to the subject accident]; *Stephanie N. v. Davis*, 126 A.D.3d 502, 5 N.Y.S.3d 412 [1st Dept. 2016] [orthopedic surgeon's finding of minor limitations in range-of-motion in two planes did not defeat defendants' showing that she did not have significant or permanent limitation in use of her back, and that any sprain/strain had resolved].) Although defendants established a prima facie case, with respect to the "significant" and "permanent consequential " loss of use categories, the records of contemporaneous, quantified limitation of motion, together with Dr. Neuman's findings on recent examination of continuing limited motion of the left shoulder and knee as supported by sworn MRI reports, raise issues of fact as to serious injury on these affected areas (*Lavali v. Lavali*, 89 A.D.3d 574, 933 N.Y.S.2d 21 [1st Dept. 2011] [plaintiff's chiropractor's affidavit, together with the affirmed reports of her neurologist and physiatrists, was sufficient to raise a triable issue of fact as to injury to the cervical and lumbar spine]; Aviles *v. Villapando*, 112 A.D.3d 534, 977 N.Y.S.2d 244 [1st Dept. 2013] [plaintiff raised an issue of fact by submitting affirmations by the

chiropractor who treated him after his accident and a radiologist].) In addition, plaintiff submits copies of No-Fault Denial of Claim forms confirming that benefits for physical therapy and orthopedic care were suspended as of May 9, 2011 raising an issue of fact of a reasonable explanation for the gap in treatment (see, Serbia v. Mudge, 95 A.D.3d 786, 786–787, 945 N.Y.S.2d 296 [1st Dept. 2012]).

As to the 90/180 category of serious injury, in order to make a prima facie case, the defendant must either point to evidence that the plaintiff in fact performed plaintiff's usual and customary activities (usually by pointing to plaintiff's own testimony), or submit medical evidence that the plaintiff did not sustain a medically determined injury or impairment of a non-permanent nature. (*Fernandez v. Hernandez*, 151 A.D.3d 581, 57 N.Y.S.3d 469 [1st Dept. 2017]

[defendants made a prima facie showing that plaintiff did not suffer a 90/180-day injury, given her admission in the bill of particulars that she was only confined to her bed or home for a period of five weeks]; *Callahan v. Shekhman*, 149 A.D.3d 454, 52 N.Y.S.3d 41 [1st Dept. 2017] [dismissing 90/180 claim where plaintiff's employment records showed that she returned to work part time less than 90 days after the accident]; *Brownie v. Redman*, 145 A.D.3d 636, 42 N.Y.S.3d 820 41 [1st Dept. 2016] [defendants established that plaintiff did not suffer a 90/180-day claim by relying on her admission in her verified bill of particulars that she was confined to home and bed for just one

week after the accident]; *Reyes v Esquilin*, 54 A.D.3d. 615, 866 NYS2d 4 [1st Dept. 2008]; Nelson v Distant, 308 A.D.2d 338, 764 N.Y.S.2d 258 [1st Dept. 2003]).

Defendants' reliance on the plaintiff's EBT shows only the absence of treatment for medical conditions. It is defendant's burden to establish that plaintiff was able to perform his usual and customary activities, which defendants have failed to do. Further, as plaintiff argues, defendants' reliance solely on examinations made years after the injury is insufficient. For this purpose (see, *Steinbergin v Ali*, 99 A.D.3d 609, 953 N.Y.S.2d 25 [1st Dept. 2012]; *Singer v Gae Limo Corp.*, 91 A.D.3d 526, 937 N.Y.S.2d 39 [1st Dept. 2012]; *Quinones v Ksieniewicz*, 80 A.D.3d 506, 915 N.Y.S.2d 70 [1st Dept. 2011]; *but see, Coley v. DeLarosa*, 105 A.D.3d 527, 964 N.Y.S.2d 25 [1st Dept. 2013] [defendant's doctors relied on contemporaneous medical records].)

The Court notes that the findings of restrictions in range-of-motion testing on recent examination was confined to plaintiff's left shoulder and left knee, and as a consequence, the court's findings with respect to the permanent consequential loss of use category are correspondingly circumscribed (see, Vasquez v. Almanzar, 107 A.D.3d 538, 967 N.Y.S.2d 361 [1st Dept.2013]).

Accordingly, it is

ORDERED that the motion is granted to the extent of (1) dismissing the claims of serious injury in the "significant disfigurement" and "fracture" categories, and (2) limiting consideration of the alleged injuries of the lumbar and cervical spine to the

categories of significant limitation and 90/180 days, and (3) limiting consideration of any claims under the permanent consequential loss of use category to the alleged injuries to the left shoulder and left knee.

This shall constitute the decision and order of this court.

Dated: May 15, 2018

Howard H. Sherman, J.S.C.