

Crisano v Reifman

2018 NY Slip Op 32282(U)

September 10, 2018

Supreme Court, Kings County

Docket Number: 510645/16

Judge: Dawn M. Jimenez-Salta

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At an IAS Term, Part 88 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 10th day of September, 2018.

P R E S E N T:

HON. DAWN JIMENEZ-SALTA,
Justice.

-----X

JOHN A. CRISANO,

Plaintiff,

- against -

ESTHER REIFMAN AND FEIVEL REIFMAN,

Defendants.

-----X

The following papers numbered 1 to 6 read herein:

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____

Papers Numbered

1-2

3-5

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Index No. 510645/16
Mot. Seq. # 4

Upon the foregoing papers, defendants Esther Reifman and Feivel Reifman, move for an order, pursuant to CPLR 3212 and Article 51 of the New York Insurance law, granting summary judgment dismissing the complaint of plaintiff John A. Crisano.

Plaintiff commenced this action to recover damages for personal injuries he sustained as a result of a car accident that occurred on December 28, 2015 at approximately 5:50 p.m. on the Goathals Bridge, in Richmond County, New York. According to the complaint, dated June 22, 2016, a motor vehicle owned by defendant Feivel Reifman, and operated by

defendant, Esther Reifman, struck the motor vehicle owned and operated by plaintiff from behind. Plaintiff asserts a claim for non-economic loss allegedly sustained by the accident.

In his Verified Bill of Particulars and Supplemental Verified Bill of Particulars, plaintiff claims he sustained a serious injury within the meaning of Insurance Law § 5102(d)¹ to his right shoulder, left shoulder, cervical spine, thoracic spine, and lumbar spine: including right shoulder impingement syndrome, tendinopathy, and tendinitis of the supraspinatus tendon of the right shoulder, joint effusion and bursitis of the right shoulder, left shoulder impingement syndrome, tendinopathy, tendinitis of the supraspinatus tendon of the left shoulder, joint effusion and bursitis of the left shoulder, L5-S1, L4-L5, C4-C5, C5-C6 disc herniations, L3-L4 disc bulge, lumbosacral spondylosis, lumbosacral radiculopathy, cervical sprain/strain of the lumbar spine, and cervical radiculitis.

Plaintiff alleges that the foregoing injuries constitute a “serious injury” as defined in Insurance Law § 5102(d) under the following categories: 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) medically determined injury or impairment of a non-permanent

¹ “Serious injury” is defined in Insurance Law § 5102(d) as: (1) death; (2) dismemberment; (3) significant disfigurement; (4) fracture; (5) loss of a fetus; (6) permanent loss of use of a body organ, member, function, or system; (7) permanent consequential limitation of use of a body organ or member; (8) significant limitation of use of a body function or system; or (9) a medically determined injury or impairment of a non-permanent nature which prevents plaintiff from performing substantially all of such person’s usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment.

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 90 days during the 180 days immediately following the occurrence of the injury or impairment.

Defendants move for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury as defined in Insurance Law § 5102(d). In support of the motion, defendants submit, among other things, (1) plaintiff's Verified Bill of Particulars for the within action, dated November 13, 2017, (2) plaintiff's signed examination before trial under oath transcript, dated June 28, 2017, and (3) plaintiff's medical records for treatment he received as a result of the subject December 28, 2015 accident, including the Emergency Room Records from Richmond University Medical Center, dated December 28, 2015, and the affirmed report of defendants' examining orthopedic surgeon, Dr. Alan J. Zimmerman, dated September 13, 2017.

In opposition, plaintiff submits the affirmation of Dr. Mark Gladstein dated May 21, 2018, the medical records prepared by Dr. Cary Chapman, examination reports,² steroid injection reports,³ MRI films and reports of right shoulder, left shoulder and lumbar and

² Examination reports are dated March 1, 2016, March 3, 2016, March 17, 2016, May 12, 2016, August 11, 2016, September 15, 2016 and September 20, 2016.

³ Lumbar Spine Epidural Steroid Injection Reports are dated March 3, 2016 and March 17, 2016; Cervical Spine Epidural Steroid Injection Reports are dated May 12, 2016 and October 4, 2016; and Right Left Shoulder subacromial steroid injection reports is dated August 23, 2016.

cervical spine (performed at NY Manhattan Med., P.L.L.C.),⁴ the report of Dr. Natalio Damien, the final narrative of Dr. Jean-Pierre Georges Barajat dated December 28, 2016, physical therapy treatment, chiropractic treatment and diagnostic testing reports, the Richmond University Medical Center Emergency Room records, the affidavit of plaintiff dated May 23, 2018, and plaintiff's deposition testimony dated June 28, 2018. Plaintiff contends that the documents submitted in opposition to defendants' motion raises issues of fact as to whether the subject accident on December 28, 2015 caused him to suffer a "serious injury" within the meaning of the Insurance Law.

Discussion

At the outset, defendants cite plaintiff's emergency room records from Richmond University Medical Center to demonstrate that plaintiff was discharged from the hospital after being diagnosed with a lumbar sprain, and with no diagnosed injuries to his left shoulder, right shoulder, cervical spine, or thoracic spine as alleged in plaintiff's complaint. Defendants indicate that plaintiff presented at the emergency room post-accident complaining of back pain; he was examined and received an x-ray, which was interpreted by Dr. Thomas Giaimo. According to the radiology report signed by Dr. Giaimo, there was a normal curve and alignment of the lumbar vertebral bodies with no fracture, spondylolysis or spondylolisthesis; and vertebral body heights and disc spaces were preserved.

⁴ MRI films and/or reports are respectively dated January 4, 2016, January 12, 2016 and February 4, 2016.

Accordingly, defendants maintain that plaintiff was diagnosed with solely a lumbosacral sprain.

Further, defendants argue that any alleged injuries to plaintiff's right shoulder mirror the same injury that he claimed to have sustained in a work-related accident in 2013 or 2014. Defendants refer to plaintiff's deposition testimony wherein he testified that he underwent months of rehabilitation and treatment for a right shoulder injury. According to his testimony, plaintiff subsequently received worker's compensation and missed time from work.

According to defendants, plaintiff did not sustain a serious injury that prevented him from performing substantially all of his usual and customary activities for not less than 90 days immediately following the accident. In support, they cite to plaintiff's testimony that, a few days after the accident, he returned to work as a maintenance worker for New York City Housing Authority.

Lastly, defendants argue plaintiff has failed to establish that he has sustained a "serious injury" as a result of said accident. In support, they refer to the normal range of motion findings reported by defendants' examining orthopedic surgeon, Dr. Alan J. Zimmerman. Dr. Zimmerman examined plaintiff on September 13, 2017, and performed quantitative and comparative range-of-motion tests using a goniometer, as well as other clinical tests. Dr. Zimmerman concluded that plaintiff had normal ranges of motion in his cervical spine, thoracic spine, lumbar spine, right shoulder, and left shoulder. He further

concluded that plaintiff had resolved cervical spine, resolved thoracic allegations, resolved lumbar sprain, and resolved right and left shoulder sprains with no evidence of disability.

Defendants also refer to plaintiff's affidavit wherein he avers that he was treated for his alleged injuries for only approximately seven months during which time he received (1) treatment with heating pads and electrical stimulation; (2) two epidurals in his neck and three epidurals in his back over the course of the treatment; (3) treatment from a pain management doctor, Dr. Chapman, six or seven times; and (4) chiropractic care and acupuncture. Plaintiff also testified that he received a partial discectomy in May of 2017. In addition, defendants note that plaintiff testified that, as of his June 28, 2017 deposition, he was recently able to return to playing softball and umpiring.

In opposition, plaintiff submits that, among other things, the affirmation of Mark Gladstein, M.D. raises issues of fact as to whether the subject accident caused him to suffer a "serious injury" within the meaning of the Insurance Law. According to his May 21, 2018 affirmation, Dr. Gladstein examined plaintiff on April 4, 2018 and reviewed the MRI films and reports of the lumbar spine, medical records of plaintiff's treatment, including plaintiff's rehabilitation and treatment records, and hospital records. Dr. Gladstein opined, in his professional medical opinion, that the injuries plaintiff received to his lumbar spine cannot be attributed to any degenerative changes, and that said injuries could only be caused by the December 28, 2015 accident.

Dr. Gladstein used a goniometer and found that the range of motion of plaintiff's lumbar and cervical spine was significantly restricted. In this regard, the range of motion of lumbar spine revealed that plaintiff's flexion was restricted at 50 degrees (normal is 90 degrees); extension was restricted at 10 degrees (normal is 30 degrees); right lateral flexion was restricted at 20 degrees (normal is 35 degrees); left lateral flexion was restricted at 15 degrees (normal is 35 degrees). Dr. Gladstein stated that, based upon the results of the clinical examinations with positive orthopedic findings and the significant lack of plaintiff's improvement to conservative non-surgical treatment, including rehabilitation treatment, injections and surgical procedure, it was necessary to perform a lumbar discectomy procedure "to provide the most specific and maximally effective treatment" of plaintiff.

According to Dr. Gladstein's range of motion testing of plaintiff's cervical spine, flexion was restricted at 40 degrees (normal is 50 degrees); extension was restricted at 45 degrees (normal is 60 degrees); right and left lateral extension was restricted at 30 degrees (normal is 45 degrees); right and left rotation was restricted to 65 degrees (normal is 80 degrees).

The range of motion of plaintiff's left shoulder revealed that plaintiff's abduction was restricted at 160 degrees (normal is 180 degrees); forward flexion was restricted at 155 degrees (normal is 180 degrees); extension was restricted at 40 degrees (normal is 60 degrees); internal rotation was restricted at 70 degrees (normal is 90 degrees); and external rotation was restricted at 65 degrees (normal is 90 degrees). The range of motion of

plaintiff's right shoulder revealed that plaintiff's abduction was restricted at 160 degrees (normal is 180 degrees); forward flexion was restricted at 160 degrees (normal is 180 degrees); extension was restricted at 45 degrees (normal is 60 degrees); internal rotation was restricted at 70 degrees (normal is 90 degrees); external rotation was restricted at 70 degrees (normal is 90 degrees). According to Dr. Gladstein, the range of motion of the left and right shoulders was limited and painful.

Based upon his review of the records, and objective testing performed on April 4, 2018, Dr. Gladstein concluded, in his professional medical opinion, that the injuries plaintiff received to his lumbar and cervical spine and his left shoulder are not degenerative and could only be caused by the December 28, 2015 accident. With respect to plaintiff's right shoulder, Dr. Gladstein specifically determined an activation/aggravation of pre-existing asymptomatic right shoulder grade 1 right shoulder impingement syndrome with tendinopathy/tendinitis of the supraspinatus tendon. Further, Dr. Gladstein stated that plaintiff's right shoulder effusion, as indicated per MRI testing, "created susceptibility to injury and/or made his right shoulder injuries more serious than otherwise would have been." Dr. Gladstein further opined that plaintiff's prognosis is poor and his condition is permanent, and that the injuries he sustained have, and will continue to interfere with plaintiff's ability to perform daily functions and activities.

Next, plaintiff also refers to the January 6, 2016 report of his radiologist, Natalio Damian, M.D., who reviewed the MRI films of plaintiff's right shoulder, left shoulder and

lumbar and cervical spine, and found injuries with no mention of degenerative change. Plaintiff contends that defendants did not produce any expert testimony in the field of radiology to contradict Dr. Damian's findings and, therefore, defendants' assertions that his injuries are not causally related to the subject accident, or that they are degenerative in nature, lack any evidentiary proof.

Plaintiff further argues that defendants' expert, Dr. Zimmerman, never observed or examined him within the initial 90 out of 180 days after the accident. Accordingly, plaintiff asserts that Dr. Zimmerman is not qualified to comment on causation or the extent of his injuries.

Plaintiff also refers to his rehabilitation treatment with Dr. Jean-Pierre Georges Barakat, and states that, according to Dr. Barakat's final narrative report, he discontinued his rehabilitation treatment approximately seven months after the accident based upon Dr. Barakat's conclusion that he had achieved maximum medical benefit from continuous medical intervention. According to Dr. Barakat, further conservative treatment would be palliative.

Lastly, plaintiff refers to his May 23, 2018 affidavit and deposition testimony in support of his contention that, due to the injuries he sustained in the December 28, 2015 accident, his ability to perform his regular daily activities was dramatically affected, and he continues to experience great difficulty in performing said activities. In this regard, plaintiff notes that he experiences difficulty with daily activities such as: lifting heavy items,

sleeping, walking, turning his head, sitting and standing for a prolonged period of time, exercising, bathing, brushing his teeth, bending down, doing household chores, driving, working, playing with his children, and lifting his arms above shoulder level. Plaintiff maintains that he often has to take breaks away from his work as a maintenance worker for the New York City Housing Authority to take pain medication and perform stretching exercises in order to relieve pain, stiffness and fatigue.

With respect to plaintiff's prior work-related injury to his right shoulder in 2013 or 2014, plaintiff states that he was cleared to return to full duties after only a few months of rehabilitation treatment. Plaintiff maintains that, at the time of the December 28, 2015 accident, he did not have any complaints of pain to his right shoulder, nor had he received any treatment to his right shoulder.

In reply, defendants contend that plaintiff failed to demonstrate that he sustained any injuries that prevented him from performing substantially all of his usual and customary activities for at least 90 of the first 180 days following the accident. They argue that plaintiff's expert, Dr. Gladstein, first examined plaintiff in January of 2017, well over one year after the accident, thereby rendering speculative his opinion as to the causation of plaintiff's purported restrictions to his cervical spine, thoracic spine, lumbar spine, and both shoulders. Defendants also argue that Dr. Gladstein failed to take a history from plaintiff with respect to whether he re-injured his cervical spine, thoracic spine, lumbar spine and both shoulders after the accident and/or before he was first examined by Dr. Gladstein on

January 18, 2017, or before plaintiff was subsequently re-examined on April 13, 107 and April 4, 2018. In addition, defendants counter that Dr. Gladstein relied on 167 pages of unsworn/unaffirmed reports of hospital personnel, physicians, physical therapists, and radiologists. Further, defendants note that Dr. Gladstein failed to review the medical treatment records generated as a result of plaintiff's prior 2013 or 2014 accident. Lastly, defendants maintain that the various MRI reports submitted by plaintiff all failed to causally relate radiological findings to the accident.

On a motion for summary judgment, the defendants have the initial burden of making a prima facie showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) (*see Gaddy v Eyler*, 79 NY2d 955 [1992]; *Akhtar v Santos*, 57 AD3d 593 [2008]). The defendants may satisfy this burden by submitting the plaintiff's own deposition testimony and the affirmed medical report of the defendant's examining physician (*see Moore v Edison*, 25 AD3d 672 [2006]; *Faroze v Kamran*, 22 AD3d 458 [2005]). The plaintiff must then come forward with sufficient evidence to establish that "serious injury" was indeed sustained.

Here, the court finds that the defendants have met their prima facie burden of showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject 2015 accident (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy*, 79 NY2d at 956-957). Defendants submitted, among other

things, the affirmed report of their examining orthopedist, Dr. Zimmerman, who examined the plaintiff on September 13, 2017, and performed quantitative range-of-motion tests using a goniometer, compared his findings to normal range-of-motion values and concluded that plaintiff has normal range of motion in his cervical spine, thoracic spine, lumbar spine, left shoulder and right shoulder. Dr. Zimmerman concluded that there is no evidence of disability, and the plaintiff is capable of participating in work related duties without restrictions (*see Perez v Rodriguez*, 25 AD3d 506 [2006]).

Further, defendants have also established that plaintiff did not sustain a medically determined injury which prevented him from performing substantially all of his usual and customary activities for at least 90 of the first 180 days following the accident (*see Licari v Elliot*, 57 NY2d 230 [1982]; *see also Gaddy*, 79 NY2d at 958; *Grozer v Levi*, 133 AD2d 67 [1987]; *De Filippo v White*, 101 AD2d 801 [1984]). Specifically, defendants refer to plaintiff's testimony that he returned to work a few days after the accident.

In light of the foregoing, the defendants met their initial burden by submitting competent proof in admissible form showing that the plaintiff's injuries did not fall within the statutory definition of serious injury. The burden now shifts to the plaintiff to offer proof in admissible form sufficient to create a material issue of fact.

In opposition, plaintiff has failed to raise a triable issue of fact sufficient to preclude summary judgment. First, the medical evidence fails to establish causation between plaintiff's injuries and the accident herein. It is well settled that in order to establish a

serious injury, plaintiff must tender medical evidence contemporaneous with the accident alleged (*see Nemchyonok v Ying*, 2 AD3d 421 [2003]; *Pajda v Pedone*, 303 AD2d 729 [2003]; *Jimenez v Kambli*, 272 AD2d 581 [2000]). Plaintiff failed to submit medical findings based upon his examinations which were contemporaneous to the accident. The affirmation of Dr. Gladstein, which was based on examinations of the plaintiff that were conducted years after the subject accident, is therefore speculative and conclusory on the issue of whether the plaintiff's condition was the result of the subject accident (*see Barry v Future Cab Corp.*, 71 AD3d 710 [2010]; *Piperis v Wan*, 49 AD3d 840 [2008]).

Second, the Court of Appeals has stated that there is no serious injury under the 90/180 limitation qualifier where the plaintiff returned to work within a month after the accident and admitted that he "resumed his usual schedule" thereafter (*Licari v Elliot*, 57 NY2d 203 [1982]). Here, plaintiff testified that he returned to work a few days after the accident. In light of plaintiff's admission that he only missed a few days of work, his unsubstantiated claim that his injuries prevented him from performing substantially all of the material acts constituting his customary daily activities during at least 90 out of the first 180 days following the accident is insufficient to raise a triable issue of fact (*see Thompson v Abbassi*, 15 AD3d 95 [2005]).

Based upon the foregoing, the court finds that the plaintiff has failed to raise a triable issue of fact to defeat defendants' prima facie entitlement. Accordingly, defendants' motion for summary judgment dismissing the complaint is hereby granted.

The foregoing constitutes the decision, order and judgment of the court.

ENTER
Dawn Jimenez-Salta
J. S. C.
Hon. Dawn Jimenez-Salta

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