Whitman v Epstein
2018 NY Slip Op 34305(U)
September 20, 2018
Supreme Court, Westchester County
Docket Number: Index No. 57948/2016
Judge: Sam D. Walker
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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
WESTCHESTER COUNTY
PRESENT: HON. SAM D. WALKER , J.S.C.

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LAWRENCE WHITMAN,
Plaintiff,
-against-

ARLENE EPSTEIN and ARLENE EPSTEIN APPRAISALS, LLC,
Defendants.

DECISION & ORDER
Index No. 57948/2016
Motion Sequences 1

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The following papers were read and considered in deciding the present motion:

Notice of Motion/Affirmation/Exhibits A-E	1-7
Affirmations in Opposition/Exhibits A	8-9
Reply Affirmation	10

Based on the foregoing submissions the defendants' motion for summary judgment is granted in part and denied in part.

FACTUAL AND PROCEDURAL BACKGROUND

The plaintiff, Lawrence Whitman ("Whitman"), commenced this action seeking damages for alleged injuries sustained in an accident, which occurred on June 19, 2013. As a result of the accident, Whitman alleges that he sustained serious personal injuries including but not limited to:

> L4-5 herniation, pain in the lower back, pain radiating to the left lower extremity, difficulty standing for extended periods of time, difficulty walking, difficulty sitting for extended periods of time, pain and suffering both physical and mental, inability to conduct normal daily activities, difficulty lifting and carrying

Whitman alleges that on June 19, 2013, while sitting in the driver's seat of a parked car, another vehicle, driven by the defendant, Arlene Epstein, backed out of a driveway and

into the driver's door of the vehicle in which he was sitting. Whitman testified that he did not have immediate pain and drove home from the scene of the accident. He testified that he developed lower back pain the day following the accident and went to Westmed Medical Group Urgent Care on June 21, 2013, where he was evaluated and released with medication for his pain. Whitman then went to Christopher Mattern, M.D., of Westmed Medical Group on July 9, 2013 and had an MRI on August 29, 2013. Whitman also engaged in physical therapy for two and a half to three months and testified that he stopped going because the insurance stopped paying. He testified that he initially had some relief from the pain after the physical therapy, but he continued to have some pain, which got worse over time.

On May19, 2014 and July 18, 2014, Whitman went to see Dr. Mattern again, at which time he was still experiencing lower back pain. On June 21, 2016, Whitman went back to Dr. Mattern, who referred him for an MRI of the lower back and has had three MRI studies of his lower back. Whitman was referred to Andrew Sama, M.D. at the Hospital for Special Surgery, who did further testing and recommended epidural injections or surgery.

The defendants now file the instant motion for summary judgment seeking dismissal of the action on the ground that the plaintiff has not sustained a serious injury, pursuant to Insurance Law §§ 5102(d) and 5104(a).

In support of the motion, the defendants rely upon, among other things, Whitman's MRI report, the report of Martin Barschi, M.D., the plaintiff's deposition transcript, an attorney's affirmation, and copies of the pleadings. The attorney's affirmation states that a neurological report was submitted as an exhibit, but the defendants' failed to attach such report.

The defendants argue that the plaintiff's injuries do not constitute a serious injury under Insurance Law § 5102(d) and his alleged injuries are not causally related to the accident on June 19, 2013. The defendants assert that there is no objective evidence to show that the plaintiff sustained a permanent loss of use of a body organ, member, function or system; or a permanent, consequential limitation of use of a body organ or member; or significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which would qualify him under the 90/180 day rule.

In opposition, the plaintiff submitted an affirmation of Christopher J. Mattern, M.D./M.B.A, and an attorney's affirmation. The defendants also submitted a reply to the plaintiff's opposition.

Discussion

A party on a motion for summary judgment must assemble affirmative proof to establish his entitlement to judgment as a matter of law (*see Zuckerman v City of N.Y.*, 49 NY2d 557 [1980]). Furthermore, "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact," (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers, (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

"Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form

sufficient to establish the existence of material issues of fact which require a trial of the action" (*see Alvarez v Prospect Hosp.*, 68 NY2d at 324, citing to *Zuckerman v City of New York*, 49 NY2d at 562). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion (*see Mgrditchian v Donato* , 141 AD2d 513 [2d Dept 1988]).

Insurance Law §5104(a) provides in pertinent part that:

> Notwithstanding any other law, in any action by or on behalf of a covered person against another covered person for personal injuries arising out of negligence in the use of operation of a motor vehicle in this state, there shall be no right to recovery for non-economic loss, except in the case of a serious injury, or for basic economic loss....(McKinney's Insurance Law §5104[a])

Insurance Law §5102(d) defines "serious injury" as

> a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or 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. (McKinney's Insurance Law §5102[d])

"The determination of whether [a] plaintiff sustained a serious injury within the meaning of the statute is, as a rule, a question for the jury." (31 N.Y.Prac., New York Insurance Law § 32:32 [2015-2016 ed.]; *see also*, *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345 [2002]). "[O]n a motion for summary judgment the defendant has the burden

to show that the plaintiff has not sustained a serious injury as a matter of law" (*Id.*).

The degree or seriousness of an injury may be shown in one of two ways: either by an expert's designation of a numeric percentage of a plaintiff's loss of range of motion or by an expert's qualitative assessment of a plaintiff's condition provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 357 [2002]). A defendant can establish that a plaintiff's injuries are not serious within the meaning of New York State Insurance Law § 5102(d), by the submission of an affirmed medical report from a medical expert who has examined the plaintiff and has determined that there are no objective medical findings to support the plaintiff's alleged claim (*see Rodriguez v Huerfano*, 46 AD3d 794 [2d Dept 2007]).

Here, the defendants submitted an independent medical expert's examination report in support of the motion. Dr. Barschi examined Whitman on November 21, 2017 with the use of a goniometer and with visual examination. He reports that Whitman had tenderness to palpation in the L4 to L5 area of the lower back to the left of the midline and could flex the lumbosacral spine to 50 degrees (normal 50 to 60 degrees); extension was 18 degrees (normal 20 to 25 degrees); and lateral bending to the left was 12 degrees and to the right was 22 degrees (normal 20 to 25 degrees). Dr. Barschi states that the motions were not associated with any paraspinal muscle spasm, but Whitman did complain of some left lower back pain on flexion, extension and left lateral bending.

Dr. Barschi concludes, based on a reasonable degree of medical certainty, that

Whitman continues to have chronic left lumbosacral radiculopathy, but does not present with positive objective findings on physical examination, such as muscle atrophy, muscle spasm or loss of reflexes.

In opposition, the plaintiff submitted the affirmation of Dr. Mattern, who states that after the subject accident, Whitman developed low back pain and radiculopathy due to an underlying left L4-5 disc herniation impinging on the left L5 nerve root and that despite multiple rounds of physical therapy, he continued to experience low back pain and radicular symptoms and continuing decreased range of motion, which have limited his activities of daily living. Dr. Mattern opines, within a reasonable degree of medical certainty, that the motor vehicle accident caused Whitman to have low back pain and a disc herniation and he will likely need ongoing treatment, including physical therapy, lumbar epidurals and possibly lumbar decompression surgery.

Upon review, and viewing the facts in the light most favorable to the plaintiff, this Court finds that the defendants have failed to make a prima facie showing of entitlement to judgment as a matter of law with respect to the plaintiff suffering a permanent loss of use of a body organ, member, function or system or a permanent, consequential limitation of a body organ or member. Dr. Barschi's report failed to establish that Whitman did not suffer a serious injury on June 19, 2013. Dr. Barschi reported that Whitman continued to have chronic left lumbosacral radiculopathy and found range of motion restrictions. He failed to provide an opinion on whether the plaintiff's injuries were causally related to the subject accident and simply stated that Whitman did not even seek medical treatment for a few days after the accident. Since the defendants did not sustain their prima facie burden, the Court need not examine the sufficiency of the plaintiff's papers in opposition

as it pertains to that portion of the motion (*see Silan v Sylvester*, 122 AD3d 713 [2d Dept 2014]).

With regard to the plaintiff's claim that the injury was of a nonpermanent nature preventing him from performing substantially all of the material acts which constitute his usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident, the Court finds that the defendants have made a prima facie showing of entitlement to judgment as a matter of law and the plaintiff has failed to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the issue.

The defendants offered the plaintiff's deposition testimony to support this part of the motion. Whitman testified that following the accident, he was not able to run, ski, lift weights, chop wood, golf, swim for a prolonged period or drive for a prolonged period. However, he provided no objective medical evidence or doctor's affirmation to support this. Whitman was unable to recall if any doctor told him not to run and stated that he does not think any doctor told him not to ski. Curtailment of recreational and household activities and an inability to lift heavy weights or other items is insufficient to meet his burden (*Omar v Goodman*, 295 AD2d 413 [2d Dept 2002]). Whitman also did not claim that he was unable to work or that he lost earnings as a result of his alleged injuries.

Therefore, the defendants have demonstrated that Whitman's injuries did not prevent him from performing substantially all of the material acts constituting his usual and customary daily activities during the 90 out of the first 180 days following the accident (*see Cantave v Gelle*, 60 AD3d 988 [2d Dept 2009]). In opposition, Whitman failed to provide

medical evidence to create a question of fact as to the claim.

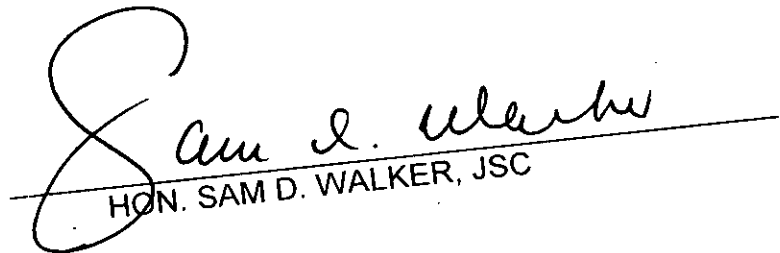
Accordingly, it is

ORDERED, that the motion for summary judgment is granted in part and denied in part.

The parties are directed to appear before the Settlement Conference Part in Courtroom 1600 on October 30, 2018 at 9:15 a.m.

The foregoing shall constitute the Decision and Order of the Court.

Dated: White Plains, New York
September 20, 2018



HON. SAM D. WALKER, JSC