Maraj v Fletcher
2019 NY Slip Op 30764(U)
February 25, 2019
Supreme Court, Bronx County
Docket Number: 300507/17
Judge: John R. Higgitt
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 14

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RAJ G. MARAJ,

Plaintiff,

- against -

JOSEPH FLETCHER,

Defendant.

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DECISION AND ORDER

Index No. 300507/17

John R. Higgitt, J.

Upon defendant's June 6, 2018 notice of motion and the affirmation and exhibits submitted in support thereof; plaintiff's December 3, 2018 affirmation in opposition and the exhibits submitted therewith; and due deliberation; defendant's motion to dismiss the complaint on the ground that plaintiff did not sustain a "serious injury" in the subject motor vehicle accident is granted.

This action relates to a motor vehicle accident that occurred on October 1, 2016 when plaintiff's vehicle allegedly struck the open passenger door of defendant's stationary vehicle. Plaintiff alleges that as a result of the accident he suffered injuries to his left shoulder necessitating arthroscopy, and injuries to the lumbar and cervical aspects of his spine. Plaintiff asserts that his injuries satisfy one or more of the following Insurance Law § 5102(d) "serious injury" categories: permanent loss, permanent consequential limitation, significant limitation, and 90/180-day injury.[1]

Defendant established prima facie that plaintiff did not sustain a "serious injury" to his cervical spine, lumbar spine, or left shoulder as a result of the accident through the affirmed expert reports of an orthopedic surgeon (John H. Buckner, M.D.), neurologist (Michael J. Carciente, M.D.), emergency medicine specialist (Timothy G. Haydock, M.D.), and radiologist (Mark Decker, M.D., D.A.B.R.) (*see Hayes v Gaceur*, 162 AD3d 437, 438 [1st Dept 2018]; *Andrade v Lugo*, 160 AD3d

[1] Although plaintiff alleges post-surgical "scarring," he does not allege that such scarring resulted in "disfigurement" within the meaning of the statute.

535, 535-536 [1st Dept 2018]; *Latus v Ishtarq*, 159 AD3d 433 [1st Dept 2018]; *Dziuma v Jet Taxi, Inc.*, 148 AD3d 573, 573-574 [1st Dept 2017]; *Hernandez v Cespedes*, 141 AD3d 483, 484 [1st Dept 2016]; *Michels v Marton*, 130 AD3d 476, 476-477 [1st Dept 2015]). Defendant also relies upon plaintiff's Montefiore emergency department treatment records; unsworn MRI reports of Allen C. Pomerantz, M.D., from imaging of plaintiff's left shoulder, cervical spine and lumbar spine; and the operative report of Mark Kramer, M.D., dated February 6, 2017.

Dr. Buckner examined plaintiff on April 9, 2018, performed objective testing, and measured range of motion with the use of a goniometer. Although he does not compare the results of plaintiff's range of motion testing to "normal" guidelines, he notes that plaintiff's cervical, lumbar and left shoulder examinations were all normal and demonstrated no objective evidence of injury (*see Rodriguez v Konate*, 161 AD3d 565, 566 [1st Dept 2018]). Dr. Buckner's examination was entirely normal, including all dependent functions of muscle strength, sensation and reflex, without pathologic reflexes. Moreover, Dr. Buckner opines that plaintiff did not sustain causally-related injury or disability as a result of the accident because his initial presentation, test results, and treatment are inconsistent with the alleged injuries. In addition, Dr. Buckner asserts that plaintiff did not sustain the alleged injuries as a result of the accident because plaintiff's MRI reports show mild degenerative changes and no signs of recent trauma.

Dr. Carciente performed a neurological examination of plaintiff on March 27, 2018, also finding normal results, no weakness or sensory deficits, and no evidence of an ongoing neurological injury, disability or permanency.

Dr. Haydock opines that plaintiff's post-accident medical records showed no complaints of lower back pain and normal cervical and left shoulder examinations. Dr. Haydock concludes that such findings are inconsistent with any claim of traumatic or significant injury to the alleged areas (*see Moore-Brown v Sofi Hacking Corp.*, 151 AD3d 567, 567 [1st Dept 2017]). More specifically,

Dr. Haydock notes that plaintiff presented to Montefiore six days after the accident where examinations of his neck and left shoulder showed normal range of motion, full and symmetric muscle strength in the shoulder with mild tenderness in the left acromioclavicular joint, without swelling, redness or lesions. He asserts that had plaintiff sustained significant injury from the accident he would have immediately experienced severe pain. Plaintiff, however, reported gradual, moderate and aching pain. Moreover, plaintiff's initial presentation lacked evidence of swelling, bruising, tenderness, contusions, deformities, or midline bony tenderness. Additionally, the examination revealed no evidence of neurologic deficits, weakness, numbness or tingling, as would have been anticipated with significant injury. Dr. Haydock notes that the left shoulder x-ray was normal and that neither further imaging studies nor an orthopedic consultation were ordered. Finally, plaintiff was not provided with a brace, collar, or sling. Accordingly, Dr. Haydock concludes that, other than the diagnosed left shoulder strain, plaintiff's claimed injuries are inconsistent with the alleged injuries.

Finally, Dr. Decker's independent review of plaintiff's MRIs demonstrates that plaintiff had diffuse degenerative disc disease with multilevel bulging and a degenerative herniation in the cervical spine; and degenerative disc disease with a bulge and facet hypertrophy, and a degenerative grade 1 anterior spondylolisthesis with a bulge in the lumbar spine. Dr. Decker's review of plaintiff's left shoulder MRI also revealed degenerative and longstanding conditions, as well as an articular tear of the supraspinatus tendon of indeterminate age. While plaintiff's radiological and operative reports confirm the presence of a supraspinatus tendon partial tear, evidence of a shoulder tear, standing alone, without any evidence of quantative or qualitative limitations caused by the tear, is not sufficient to demonstrate serious injury (*see Green v Domino's Pizza, LLC*, 140 AD3d 546, 546-547 [1st Dept 2016]; *Acosta v Zulu Servs., Inc.*, 129 AD3d 640, 640 [1st Dept 2015]; *Mulligan v City of New York*, 120 AD3d 1155, 1156 [1st Dept 2014]; *Linton*

v Nawaz, 62 AD3d 434, 445 [1st Dept 2009], *affd* 14 NY3d 821 [2010]; *Seecoomar v Ly*, 43 AD3d 900, 902 [2nd Dept 2007]).

Defendant's submissions, indicating normal ranges of motion and no objective evidence of injury in the subject body parts, are sufficient to establish, prima facie, that plaintiff did not suffer a "serious injury" to his cervical or lumbar spine or left shoulder (*see Hernandez v Marcano*, 161 AD3d 676, 677 [1st Dept 2018]; *Reyes v Se Park*, 127 AD3d 459 [1st Dept 2015]). Moreover, defendant demonstrates prima facie a lack of causal relationship regarding the claimed injuries to plaintiff's cervical and lumbar spine through the affidavits Drs. Buckner and Decker who opine that such injuries were preexisting and not traumatically induced (*see Sosa-Sanchez v Reyes*, 162 AD3d 414, 414 [1st Dept 2018]; *Hessing v Carroll*, 161 AD3d 462, 462 [1st Dept 2018]; *Alvarez v NYLL Mgt. Ltd.*, 120 AD3d 1043, 1044 [1st Dept 2014], *affd* 24 NY3d 1191 [2015]; *Andrade v Lugo*, 160 AD3d at 535–36; *Moore–Brown v Sofi Hacking Corp.*, 151 AD3d at 567; *Fernandez v Hernandez*, 151 AD3d 581, 582 [1st Dept 2017]). As to the left shoulder, defendant fails to shift the burden on causation as there is contemporaneous evidence of a partial tear of an indeterminate age.

In opposition, plaintiff submits the affirmed reports of his November 23, 2016 MRIs; certified copies of various treatment and physical therapy records; and the affirmed report of his orthopedic surgeon, Dr. Kramer. Dr. Kramer reviewed plaintiff's treatment records and some of plaintiff's physical therapy and pain management treatment records. Dr. Kramer performed a recent examination of plaintiff on October 16, 2018, finding restricted range of motion in flexion of the left shoulder with mild tenderness anteriorly, positive impingement and Neer signs. Dr. Kramer also found range of motion deficits in the cervical spine and lumbar spine. Dr. Kramer opines that plaintiff sustained a deceleration injury to the cervical and lumbosacral spines that has resulted in permanent loss of mobility and herniated discs. Further, Dr. Kramer opines that plaintiff sustained

a traumatic impingement of the left shoulder with rotator cuff and labrum tears requiring surgery. While plaintiff sustained a prior injury to his lower back, Dr. Kramer contends that plaintiff was fully recovered and had renewed back pain that increased in severity following the subject accident. He asserts, based upon plaintiff's reported history of no prior injury to his cervical spine and his surgical findings, that the accident was the competent producing cause of the above noted injuries. Dr. Kramer concludes that plaintiff's injuries are permanent. Reports from plaintiff's lumbar and cervical spine MRIs, taken within 60 days of the accident, show bulges and herniations.[2]

Plaintiff's submissions are insufficient to raise a triable issue of fact as to whether plaintiff sustained a permanent loss of use, or a permanent consequential or significant limitation to his cervical spine, lumbar spine or left shoulder, because he fails to submit evidence of significant limitations to the affected areas (*see Booth v Milstein*, 146 AD3d 652, 652-653 [1st Dept 2017]; *see generally Vasquez v Almanzar*, 107 AD3d 538, 540 [1st Dept 2013]). In order to raise a triable issue of fact a plaintiff is required to submit objectively-based evidence demonstrating the extent or degree of a physical limitation by either relying upon "an expert's designation of a numeric percentage of a plaintiff's loss of range of motion or a qualitative assessment of the plaintiff's condition" (*Parreno v Jumbo Trucking, Inc.*, 40 AD3d 520, 523 [1st Dept 2007]; *see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350 [2002]). Dr. Kramer quantifies current limitations in the affected areas and asserts that such limitations are causally related to the accident. Dr. Kramer also found that when he first examined plaintiff on December 7, 2016, two months post-accident, plaintiff's left shoulder abduction and forward flexion were reduced. However, on October 26, 2016 another treating physician found full range of motion in the cervical spine, lumbar spine and

[2] The report from the MRI of plaintiff's cervical spine notes that at the C5-6 level there is a "disc osteophyte complex superimposed upon annular bulging ... and right foraminal stenosis." However, it also shows annular bulging at the C2-5 levels and C6-7 level without degenerative findings.

left shoulder. Plaintiff's lumbar spine range of motion was restricted to a minor degree in December 2016 (six degrees less than normal) and in May 2017 (ten degrees less than normal). On May 10, 2017 plaintiff's cervical spine symptoms were deemed resolved. As to the left shoulder, plaintiff's physical therapy records, purportedly reviewed by Dr. Kramer, also indicate that plaintiff's range of motion in his left shoulder was normal on November 16, 2016, January 25, 2017, and June 12, 2017. On January 30, 2017, plaintiff's left shoulder range of motion was listed as 170 degrees and 40 degrees and strength was four out of five. Additionally, examinations November 14, 2016 and December 7, 2016 demonstrated ranges of motion in plaintiff left shoulder that, while reduced when compared to normal, were equal to or greater than those of plaintiff's right, uninjured shoulder.

Dr. Kramer's failure to explain or reconcile these prior normal or near normal range of motion findings and the similar findings in both the left and right shoulders with his present findings renders speculative his conclusions and thus insufficient to raise an issue of fact (*see Alverio v Martinez*, 160 AD3d 454, 455 [1st Dept 2018]; *Rose v Tall*, 149 AD3d 554, 555 [1st Dept 2017]; *Frias v Gonzalez-Vargas*, 147 AD3d 500, 501-502 [1st Dept 2017]; *Booth v Milstein*, 146 AD3d 652, 653 [1st Dept 2017]).

With regard to his 90/180-day injury claim, plaintiff alleges that at the time of the accident he was employed as a doorman and incapacitated from work and confined to his bed and home for a total of three weeks following his February 6, 2017 shoulder surgery, and also incapacitated "intermittently from the date of the accident to present." Defendant met his prima facie burden with respect to plaintiff's 90/180-day claim; plaintiff testified that he immediately returned to work as a doorman on a full-time basis following the accident. While he alleges that he missed work intermittently from the date of the accident to present, his deposition testimony demonstrates that he was not prevented from performing *substantially* all of the material acts that constituted his

usual and customary daily activities for at least 90 of the 180 days immediately following the accident (*see Hayes v Gaceur*, 162 AD3d at 438; *Holloman v American United Transp., Inc.*,162 AD3d 423 [lst Dept 2018]; *Latus v Ishtarq*, l59 AD3d 433; *Frias v Son Tien Liu*, 707 AD3d 589 [1st Dept 2013]). In opposition, plaintiff fails to raise a triable issue of fact as to whether he was unable perform substantially all of his daily activities for at least 90 of the 180 days immediately following the accident (*see Henry v Carr*, 161 AD3d 424 [1st Dept 2018]; *Byong Yol Yi v Canela*, 70 AD3d 584, 585 [1st Dept 2010]).

It is obvious that plaintiff did not sustain a permanent loss of use. Such loss must be total (*see Oberly v Bangs Ambulance Inc.*, 96 NY2d 295 [2001]), and evidence of mere limitations of use are insufficient (*see Byong Yol Yi v Canela*, 70 AD3d 584).

Accordingly, it is

ORDERED, that the motion of the defendant seeking summary judgment is granted, and the complaint is dismissed; and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of defendant dismissing the complaint.

This constitutes the decision and order of the court.

Dated: February 25, 2019

John R. Higgitt, A.J.S.C.