Mosso-Vargas v Abubakari
2020 NY Slip Op 32489(U)
June 4, 2020
Supreme Court, Bronx County
Docket Number: 301132/15
Judge: Robert T. Johnson

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IAS PART 12 X

SILVESTRE MOSSO-VARGAS

Plaintiff

-against- INDEX NO. 301132/15

ALHASSAN R. ABUBAKARI

Defendant(s).

X

HON. ROBERT T. JOHNSON

The Plaintiff Sylvestre Mosso-Vargas has moved for renewal and reargument of this Court's decision and order dated July 10, 2018 which granted the motion by Defendant Alhassan R. Abubakari for summary judgment, and upon such renewal and reargument, for an order denying the motion.

The Plaintiff contends that he sustained a serious injury within the meaning of Insurance Law Section 5102 (d) when, on November 19, 2013, he was struck from behind by the Defendant's vehicle and knocked from his bicycle onto the road. The accident is alleged to have caused him to sustain a torn rotator cuff in the left shoulder. In moving for summary judgment, the Defendant relied chiefly on the report of Dr. Lisa Nason, who examined the Plaintiff on January 18, 2016. She found that he had at that time normal range of motion, and all objective tests that she conducted, which were specifically identified, were negative. She concluded that any alleged injury to the shoulder was resolved, that there was no evidence of residual disability or permanency, and that the Plaintiff was able to perform his usual occupation and activities of daily living. Finally, given the plaintiff's deposition testimony that he had been confined to bed for only two days following the accident, and had returned to work shortly thereafter, the Court concluded that his subjective claims of injury were insufficient to raise an issue of fact as to the 90/180 day

category of serious injury.[1] The Court also reviewed the report of the Plaintiff's orthopedist, Dr. Stanley Liebowitz, who had examined the Plaintiff two and one half years after the accident, and found a limited range of motion in the left shoulder. However, this was insufficient for the Plaintiff to meet his burden of demonstrating that his injuries were causally related to the accident, Based on its review of the affirmation of Dr. Liebowitz and a copy of the Plaintiff's MRI report that had been performed on February 14, 2014, the Court concluded that this was insufficient to rebut the Defendant's showing, or to raise an issue of fact as to whether the injury was causally related to the accident of November 19, 2013, and the complaint was accordingly dismissed.

In moving to renew and reargue, the Plaintiff argues that the MRI report of February 14, 2014 showed a full thickness tear of the supraspinatus, and that Plaintiff had been advised at that time that surgery might be required if it did not improve with physical therapy, The Plaintiff allegedly underwent physical therapy and chiropractic treatment on eight occasions after the date of the MRI, before discontinuing this due to lack of insurance coverage. Ultimately, on August 31, 2018, after the Defendant's motion for summary judgment had been granted, the Plaintiff underwent arthroscopic surgery on the shoulder.

The Plaintiff also contends that he was unable to provide more complete medical records in support of this application because the earlier dismissal of the case makes such records unobtainable by subpoena.

In moving for reargument, Plaintiff makes the following contentions. First, he takes issue with the Court's finding that the Defendant made a *prima facie* showing of lack of causation, and thus the burden of proving causation should not have shifted to the Plaintiff. The Defendant's expert's opinion is flawed because she did not review any of the plaintiff's medical records, including the MRI results taken within months of the accident. The failure by Dr. Nason to address the MRI results warrants disregarding the defendant expert's papers. The failure by Defendant to make a *prima facie* showing of entitlement to summary judgment made it unnecessary to determine whether the Plaintiff's paper raised an issue of fact. Gilphilin v. Ware, 205 AD 2d 353 (1st Dept 1994). Moreover, he contends that his MRI results, which were obtained three to four months post-accident, were sufficiently contemporaneous with the date of the accident to establish causation. Plaintiff's final contention is that, the evidence of his post-accident medical treatment, which is

[1] This aspect of the Court's decision has not been contested by Plaintiff on renewal and reargument.

included in the medical records furnished to the court in support of this motion to renew/reargument, is sufficient to raise an issue of fact for the jury as to causation. Ramos v. Dekhtyar, 301 AD 2d 428 (1st Dept 2003).

Summary Judgment

In moving for summary judgment, Defendant had argued that Dr. Nason found that the injury had been resolved, and Plaintiff had been left with no functional disability. He contended that the plaintiff's alleged injury was not caused in the accident, that no trauma was sustained, and/or the alleged injuries did not rise to the level of serious injury. Fundamentally, there was no explanation for the discontinuance of treatment after 3-4 months. Dr. Nason based her findings on multiple objective tests with full ranges of motion and no functional disability. Positive MRI findings are not sufficient to establish serious injury absent proof of causation and the extent of resulting limitation. Proof of a tear, by itself, is insufficient evidence of a serious injury without proof of resulting limitations. Farmer v. Ventake, 117 AD 3d 562.

Defendants now assert that the application for renewal is not meritorious, because there are no new facts that were not offered initially that would change the Court's determination. The left shoulder surgery of August 31, 2018, more than four years post-accident, is without relevance to the Court's finding that the plaintiff failed to establish causation in that he did not submit evidence of contemporaneous treatment. Moreover, reargument should not be granted, because the burden was not on the defendant to show lack of causation; the burden of demonstrating causation was on the plaintiff. Dr. Nason's report was sufficient as objective evidence that plaintiff did not suffer a serious injury, and the plaintiff's attempt to rebut this evidence was inadequate to raise an issue of fact. Significantly, the uncertified MRI report regarding the left shoulder does not offer an opinion as to causation, and, is not the equivalent of a contemporaneous medical examination.

Discussion

A motion for leave to renew shall be based upon new facts not offered on the prior motion that would change the prior determination CPLR 2221 [e][2] and shall contain justification for the failure to present such facts on the prior motion. CPLR 2221 [e][3]. However, a motion for leave

to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation. Coccia v. Liotti, 70 AD 3d 747 (2nd Dept 2010).

A motion seeking leave to reargue is addressed to the Court's sound discretion and can be granted only if it is shown that the Court overlooked or misapprehended the facts or misapplied any controlling principal of law or was otherwise mistaken in its earlier decision. William P. Pahl Equipment Corp v. Kassis, 182 AD 2d 22 (1st Dept 1992) lv to app dism in part and den in part 80 NY 2d 782 (1992). It is not designed to furnish the unsuccessful party with successive opportunity to reargue issues previously decided or consideration of arguments different from those originally entertained.

With respect to a summary judgment motion seeking dismissal for failure to meet the threshold requirements of Insurance Law Section 5102 (d), it is well-established that a defendant satisfies his initial burden by presenting an affirmation of a doctor which recites that the plaintiff has normal range of motion in the effected body parts, and identifies the objective tests performed to arrive at this conclusion. Lamb v. Rajinder, 51 AD 3d 430 (1st Dept 2008); Malupa v. Oppong, 106 AD 3d 538 (1st Dept 2013).

If a defendant satisfies this burden, the plaintiff must present evidence of *contemporaneous* treatment – quantitative or qualitative – to establish that the plaintiff's injuries were causally related to the accident, together with recent examination to establish permanency. Perl v. Meher, 18 NY 3d 208 (2011). However, this does not abrogate the need for at least a qualitative assessment of injuries soon after an accident. Rosa v. Mejia, 95 AD 3d 402 (1st Dept 2012); Santos v. Traylor-Pagan, 152 AD 3d 406 (1st Dept 1017).

The Court concluded in its prior ruling, and reaffirms now, that the Defendant made out his prima facie showing, and that the plaintiff failed to raise a triable issue of fact, in that he did not furnish proof in evidentiary form of a contemporaneous quantified or qualitative assessment of any limitation of use resulting from injuries causally related to the accident of November 19,, 2013. Callahan v. Shekhmanm 149 AD 3d 454 (1st Dept 2017); Brown v. Bawa, 144 AD 3d 448 (1st Dept 2016). Moreover, the MRI report alleging a tear in the shoulder, without any evidence of limitations, is insufficient to raise a triable issue of fact. Corporan v. Erichsen 148 AD 3d 549 (1st Dept 2017); Acosta v. Zulu Servs. Inc., 129 AD 3d 640 (1st Dept 2015).

The un-certified medical records annexed to the moving papers do not satisfy the gap in the plaintiff's case of demonstrating contemporaneous assessment and causation. Such proof has

already been considered by the Court and deemed insufficient. Finally, there is no requirement that the defendant's examining physician address the MRI findings in the context of her conclusions, which were based on objective testing. See Onishi v. N & B Taxi Inc., 51 AD 3d 594 (1st Dept 2008) and cases cited thereunder. The other assertions of Plaintiff are without merit.

Accordingly, the Court declines to grant renewal or reargument, and it adheres to its prior determination.

The motion by plaintiff is denied in all respects.

This will constitute the Decision and Order of this Court.

Date: June 4, 2020

HON. ROBERT T JOHNSON J.S.C.