

Degachi v Faridi

2020 NY Slip Op 33081(U)

September 17, 2020

Supreme Court, Kings County

Docket Number: 516623/2017

Judge: Lillian Wan

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 17

Index No.: 516623/2017
Motion Date: 7-23-20
Motion Seq.: 01 & 02

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MONDHER DEGACHI,

Plaintiff,

DECISION AND ORDER

-against-

BAKIBILLAH MD FARIDI,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 01 and 02) 21-28, 31-46, and 48-50 were read on this motion by defendant for summary judgment, and plaintiff's cross-motion for summary judgment.

In this action to recover damages for personal injuries arising out of a motor vehicle accident that occurred on December 13, 2016, the defendant, Bakibillah Md Faridi, seeks an order, pursuant to CPLR § 3212, granting summary judgment on the grounds that the injuries sustained by the plaintiff, Mondher Degachi, fail to meet the serious injury threshold of Insurance Law § 5102(d). The plaintiff cross moves for summary judgment, pursuant to CPLR § 3212, and seeks an assessment of damages, asserting that there are no genuine issues of material fact that plaintiff's injuries meet the serious injury threshold under § 5102(d). For the reasons set forth below, the defendant's motion and the plaintiff's cross-motion are denied.

According to his initial bill of particulars and supplemental bill of particulars, the plaintiff's injuries include, right shoulder rotator cuff tear with impingement requiring surgery; left shoulder bursitis, joint arthrosis and adhesive capsulitis, requiring two cortisone injections; cervical and lumbar disc bulges and herniations; and bilateral median motor nerve neuropathy.

In support of his motion the defendant relies primarily on the affirmed reports of Dr. Alan J. Zimmerman, a board certified orthopedic surgeon, Dr. Jessica F. Berkowitz, a board certified radiologist, and the plaintiff's deposition testimony. On July 2, 2019, Dr. Zimmerman performed an orthopedic examination of the plaintiff. Using a goniometer, Dr. Zimmerman determined that the examination was objectively normal. He performed a host of other medical tests which did not generate any positive findings. Dr. Zimmerman opined that there were no orthopedic limitations of the cervical and lumbar spine, or the right and left shoulders and wrists. He noted, without further elaboration, that prior to the examination the plaintiff received injections to the left and right shoulder. Dr. Zimmerman concluded that the plaintiff was capable of functional use of the examined body parts for normal activities of daily living, as well as all usual daily activities including regular work duties. He does not specifically render an opinion as to whether the plaintiff's injuries are causally related to the accident.

The report of Dr. Jessica F. Berkowitz dated December 4, 2018, indicates that she reviewed the MRIs of the plaintiff's lumbar spine and left and right shoulder. Upon review of the MRI of the plaintiff's lumbar spine, which was taken on February 6, 2017, she opined that the film showed, *inter alia*, disc bulges, spondylosis and foraminal narrowing which were degenerative in nature and unrelated to acute traumatic injury. Dr. Berkowitz concluded that there was no causal relationship between the plaintiff's accident and the MRI findings. With respect to her examination of the MRIs of the plaintiff's left shoulder taken on February 20, 2017, Dr. Berkowitz opined that she observed adhesive capsulitis, an inflammatory condition of uncertain etiology, and concluded that there was no definite causal relationship between the accident and plaintiff's injury. Upon review of the MRI films of the plaintiff's right shoulder, taken on February 13, 2017, Dr. Berkowitz found there to be an articular-sided footplate tear of the distal supraspinatus tendon related to chronic repetitive microtrauma to the rotator cuff. Dr. Berkowitz concluded that there was no evidence of acute traumatic injury to the shoulder, and that the injury was not caused by the plaintiff's accident. Dr. Berkowitz's reports do not discuss the history of the plaintiff's present illness, or the treatments and surgery he received in the past.

On July 17, 2019, the plaintiff was also examined by the defendant's neurologist, Dr. Michael J. Carciente. As part of the history taken by Dr. Carciente, the plaintiff stated that after the accident he went to physical therapy for approximately two months. After conducting a neurological examination that included the plaintiff's upper and lower extremities, cervical, thoracic and lumbar spine, Dr. Carciente opined that upon objective testing the plaintiff had a completely normal neurological examination. According to Dr. Carciente, there is no correlation between the disc bulges and herniations alleged in the bill of particulars and the examination he performed, and the median neuropathies found in the nerve conduction study of December 13, 2016 are unrelated to the accident.

In opposition to the motion, the plaintiff submits, *inter alia*, the affirmed reports of Daniel W. Wilen, a board certified orthopedic surgeon, dated February 6, 2020 and March 26, 2020. Dr. Wilen treated the plaintiff for his injuries from March 17, 2017 through June of 2017. Also submitted is a certified copy of Dr. Wilen's medical records. Included in Dr. Wilen's certified records are narrative reports of his treatment of the plaintiff subsequent to the accident, and the operative report of May 31, 2017. The records contain MRI reports relating to the plaintiff's left and right shoulder, and cervical and lumbar spine that were performed at Bay Ridge Medical Imaging, P.C. The report of Dr. Nassef F. Hassan, dated March 15, 2017, who is board certified in physical medicine and rehabilitation and pain medicine, is included in Dr. Wilen's records. Dr. Hassan performed nerve conduction studies (EMG) of the plaintiff's upper and lower extremities, and concluded that the findings were consistent with bilateral median motor nerve neuropathy of the upper extremities. The studies of the lower extremities were found to be normal. The nerve conduction study is made part of Dr. Hassan's report.

Dr. Wilen's orthopedic examination of the plaintiff on February 6, 2020, included a review of the previous diagnostic studies performed, such as MRIs of the plaintiff's cervical and lumbar spine, the left and right shoulder and the EMG studies of the plaintiff's upper and lower extremities. Recent x-rays of the cervical and lumbar spine and right shoulder showed the

development of degenerative arthritis due to the motor vehicle accident. Dr. Wilen's report references his findings relating to the surgery performed on the plaintiff's right shoulder to repair the rotator cuff tear and impingement. He opines that the plaintiff suffered multiple herniated discs to the cervical and lumbar spine and *inter alia*, a torn rotator to the right shoulder with impingement and severe bursitis and tendonitis to the left shoulder as a result of the accident. Dr. Wilen further opines that as a result of these injuries the plaintiff may require left shoulder surgery in the future due to impingement, epidural injections to the cervical, lumbar and thoracic spine, and cervical and lumbar fusion surgery.

According to the most recent affirmed report of Dr. Wilen of March 26, 2020, he reviewed the MRIs of the plaintiff's left shoulder and right shoulder, and cervical and lumbar spine. He clinically observed that the plaintiff sustained severe bursitis and tendonitis of the left shoulder, and a rotator cuff tear of the right shoulder with tendonitis and impingement. He also clinically observed that the MRI of the plaintiff's cervical and lumbar spine revealed multiple disc herniations at C5-6, C6-7, C3-4 and C4-5, and L1-L2, L2-3, and L3-4. Lastly, he reviewed the EMG of the upper extremities conducted by Dr. Hassan, and clinically observed that the plaintiff sustained bilateral median motor nerve neuropathy.

Dr. Wilen's report further states that he performed a cortisone injection of the plaintiff's right shoulder on April 27, 2017, and the left shoulder on April 20, 2017. On May 31, 2017, he performed an arthroscopic surgical repair of the rotator cuff tear of the plaintiff's right shoulder. Based on Dr. Wilen's observations during the surgery and his review of the MRI, he refutes the MRI interpretations of defendant's radiologist, Dr. Jessica F. Berkowitz, that the right shoulder injury is not the result of an acute traumatic injury and is degenerative in nature, concluding that it is in fact an acute traumatic injury.

Dr. Wilen's report of March 26, 2020 incorporates the results of his previous examinations of the plaintiff. He avers that he performed range of motion examinations with a goniometer of the plaintiff's left and right shoulder and cervical, thoracic and lumbar spine on May 25, 2017, June 5, 2017, and February 6, 2020, which revealed limitations of range of motion of all areas examined. He opines that the plaintiff stopped medical treatment with him in June of 2017 because conservative treatments had failed, and the plaintiff's injuries had reached maximum medical improvement. He concludes that, within a reasonable degree of medical certainty, the plaintiff's injuries and limitations, including that of his right shoulder, are permanent and causally related to the accident. He points out that the defendant's radiologist, Dr. Berkowitz, did not find that the left shoulder injury was not causally related to the accident.

At his deposition, the plaintiff testified that he was employed as a security officer for Ports America, a shipping management company, and initially missed 30 days of work as a result of his injuries. He attended physical therapy three times a week after the accident, however he could not recall how long he received physical therapy treatments. The plaintiff testified that after the surgery on his right shoulder he missed two days of work, and that upon his return to work he was unable to perform his usual duties, such as lifting and opening and closing gates. He stated that it was necessary to seek assistance from another colleague to perform these activities. As of the date of the deposition on April 23, 2019, he continued to work in a modified

capacity. Plaintiff also testified that he has difficulty in his day-to-day activities because of his inability to lift heavy objects.

Based on the foregoing, the defendant has met his *prima facie* burden that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d). See *Toure v Avis Rent A Car Sys.*, 98 NY2d 345 (2002); *Gaddy v Eyer*, 79 NY2d 955 (1992); *Fest v Agnew*, 68 AD3d 1051 (2d Dept 2009). The defendant has submitted competent medical evidence, including the affirmed reports of his examining medical experts, Dr. Zimmerman and Dr. Carciente, establishing that the alleged injuries to the plaintiff's cervical and lumbar spine, right and left shoulder and upper extremities, do not constitute a serious injury under either the permanent consequential limitation of use or significant limitation of use categories within the meaning of Insurance Law § 5102(d). See *Hayes v Vasilios*, 96 AD3d 1010 (2d Dept 2012); *Staff v Yshua*, 59 AD3d 614 (2d Dept 2009); *Rodriguez v Huerfano*, 46 AD3d 794 (2d Dept 2007).

The defendant also met his *prima facie* burden that the plaintiff did not sustain a serious injury under the 90/180 day category of Insurance Law § 5102(d). This was established through the transcript of the plaintiff's deposition testimony that the plaintiff missed only 30 days of work immediately following the accident. See *Marin v Ieni*, 108 AD3d 656 (2d Dept 2013); *Bamundo v Fiero*, 88 AD3d 831 (2d Dept 2011); *Lewars v Trans. Facility Mgt. Corp.*, 84 AD3d 1176 (2d Dept 2011).

However, through the submission of Dr. Wilen's affirmed reports, the plaintiff raised a triable issue of fact as to whether the plaintiff suffered serious injuries as a result of the accident. See *Lopez v Senatore*, 65 NY2d 1017 (1985); *Khorami v Gizmo Cab Corp.*, 240 AD2d 470 (2d Dept 1997); *Grullon v Chu*, 240 AD2d 367 (2d Dept 1997). Dr. Wilen treated the plaintiff from March, 2017 through June, 2017, and performed the right shoulder surgery on the plaintiff on May 25, 2017. He examined the plaintiff in February, 2020 and March, 2020, incorporating the results of his previous examinations of May 25, 2017 and June 6, 2017 into his March 26, 2020 affirmation. He set forth quantitative findings, through the use of a goniometer, which revealed substantial range of motion limitations of the plaintiff's right and left shoulder and cervical and lumbar spine. Dr. Wilen concluded, based on his contemporaneous and most recent examination of the plaintiff, that the plaintiff has significant range of motion limitations in his right and left shoulder and cervical and lumbar spine, and that his injuries are permanent. *Dixon v Fuller*, 79 AD3d 1094 (2d Dept 2010).

The plaintiff also raised a triable issue of fact as to the category of limitation of use of a body function or system under Insurance Law § 5102(d). A significant limitation need not be permanent in order to constitute a "serious injury." *Partlow v Meehan*, 155 AD2d 647, 647 (2d Dept 1989) quoting Insurance Law § 5102(d) (internal quotation marks omitted). "[A]ny assessment of the significance of a bodily limitation necessarily requires consideration not only of the extent or degree of limitation, but of its duration as well, notwithstanding the fact that Insurance Law § 5102(d) does not expressly set forth any temporal requirement for a significant limitation." *Griffiths v Munoz*, 98 AD3d 997, 998 (2d Dept 2012) (internal quotation marks omitted); see *Lively v. Fernandez*, 85 AD3d 981, 982 (2d Dept 2011); *Partlow* at 648.

The plaintiff has established that an issue of fact exists under the 90/180 day category of Insurance Law § 5102(d) as well. The plaintiff's deposition testimony shows that upon his return to work 30 days after the accident, he was not able to perform all of the duties of his employment, and continues to work in a modified capacity. The plaintiff testified that as of the date of his deposition on April 23, 2019, he still required assistance in carrying out certain work related activities, such as lifting and opening and closing gates. Moreover, the plaintiff testified that since the accident he continues to have neck and back pain when walking, and left shoulder pain at night when he is sleeping. The plaintiff has right shoulder pain daily, despite the arthroscopic repair, which is precipitated by lifting or raising his arm.

To the extent that the defendant argues, through the report of his retained radiologist, Dr. Berkowitz, that the injuries to the plaintiff's lumbar spine and left and right shoulders are degenerative in nature, Dr. Wilen's affirmation of March 26, 2020 refutes that argument. He states that he reviewed the MRI films referred to by Dr. Berkowitz, as well as Dr. Berkowitz's interpretation of those films, and concludes that the plaintiff's injuries are caused by the subject accident. In his affirmation, Dr. Wilen notes that Dr. Berkowitz did not state that the left shoulder injury was not related to the accident. Dr. Wilen also affirms that during the surgery to the plaintiff's right shoulder he clinically observed that the injury was not degenerative, and was in fact the result of an acute traumatic injury. Thus, Dr. Wilen adequately addressed the issue of degeneration and refuted the defendant's assertions in that respect. See *Tai Ho Kang v Young Sun Cho*, 74 AD3d 1328 (2d Dept 2010); *Whitehead v Olsen*, 70 AD3d 678 (2d Dept 2010); *Modeste v Mercier*, 67 AD3d 871 (2d Dept 2009).

The defendant's assertion that there is a gap in treatment is without merit. Dr. Wilen's affirmation of March 26, 2020, concludes that the plaintiff stopped medical treatment in June of 2017 because conservative treatments failed, and the plaintiff's pain had reached a plateau. Dr. Wilen opines that further treatment will help alleviate the pain temporarily, however the injuries have reached maximum medical improvement. Dr. Wilen discharged the plaintiff with instructions to perform home exercises for pain relief.

The plaintiff has cross moved for summary judgment, asserting that he sustained a serious injury under the category of fracture of Insurance Law § 5102(d). Plaintiff argues that he sustained a fracture during the course of the surgery to his right shoulder when 0.5mm of bone was removed twice in order to correct the impingement condition. In support of the cross-motion the plaintiff relies on Dr. Wilen's report of March 26, 2020. Dr. Wilen's report states that the removal of the bone created a fracture, which is a medical condition where the continuity of the bone is broken. Plaintiff's initial and supplemental bill of particulars do not properly plead that a fracture injury was sustained as a result of the accident. The documents submitted include what appear to be cut and pasted sections of Dr. Wilen's operative report describing the surgery that was performed after the accident. The alleged fracture injury is being raised for the first time in the instant motion for summary judgment.

The plaintiff has not established his *prima facie* entitlement to summary judgment based on the serious injury category of fracture, as set forth in Insurance Law § 5102(d). The plaintiff never sought to amend the bill of particulars to include the alleged fracture injury, and as such any medical evidence submitted by the plaintiff concerning the injury must be rejected. *Moran v*

Kollar, 96 AD3d 811 (2d Dept 2012); *Knight v M & M Sanitation Corp.*, 122 AD3d 683 (2d Dept 2014).

Additionally, a fracture was not addressed or even mentioned in the medical records of Dr. Wilen, or any other physician, prior to March 26, 2020, when the alleged injury was raised for the first time by Dr. Wilen in opposing the defendant's summary judgment motion. The plaintiff's motion must fail because he has not presented competent medical evidence contemporaneous with the accident that he sustained a fracture to his right shoulder. *Kaplun v Septama*, 38 AD3d 847 (2d Dept 2007).

The remaining contentions are without merit.

Accordingly, it is hereby

ORDERED that defendant's motion and plaintiff's cross-motion are denied.

This constitutes the decision and order of the Court.

Dated: September 17, 2020



HON. LILLIAN WAN, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020.