Becco v Zhi Shou Liu
2020 NY Slip Op 33401(U)
October 16, 2020
Supreme Court, Kings County
Docket Number: 523820/18
Judge: Bruce M. Balter

At an IAS Term, Part 13 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 16th day of October, 2020.

P R E S E N T:

HON. BRUCE M. BALTER,

Justice.

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JAREL S. BECCO,

Plaintiff,

Index No. 523820/18

- against -

ZHI SHOU LIU,

Defendant.

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The following e-filed papers read herein:	NYSCEF Doc. No.
Notice of Motion/Order to Show Cause/ Petition and Affidavits (Affirmations) Annexed	12-19
Opposing Affidavits (Affirmations)	21-27
Reply Affidavits (Affirmations)	29

Upon the foregoing papers, defendant Zhi Shou Liu (Liu) moves, in motion (mot.) sequence (seq.) one, for an order, pursuant to CPLR 3212, seeking summary judgment dismissing the complaint of plaintiff Jarel S. Becco (Becco), on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d).[1]

[1] 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."

Background and Procedural History

On July 24, 2018, plaintiff, then twenty-nine years old, allegedly sustained various injuries when the car that he was driving was involved in a motor vehicle accident with a vehicle owned and operated by defendant Liu. According to the complaint, the accident occurred when the defendant's vehicle came into contact with plaintiff's vehicle. Plaintiff sought treatment for his neck, spine and lower back two days after the accident on July 26, 2018. By summons and complaint, dated November 21, 2018, plaintiff commenced the instant action against defendant seeking to recover damages for the injuries that he allegedly sustained in the accident. On or about January 8, 2019, defendant interposed an answer, with demands. Subsequently, plaintiff filed a bill of particulars alleging various injuries.

Plaintiff alleges that his injuries meet the threshold serious injury requirements of Insurance Law Insurance Law § 5102 (d). Specifically, plaintiff alleges that he sustained (1) permanent loss of use of a body organ, member, function or system, (2) permanent consequential limitation of use of a body organ or member, (3) significant limitation of a use of a body function or system, and /or (4) an injury which prevented him from performing substantially all of the material acts which constitute his daily activities for not less than 90 days during the 180 days following the accident. Discovery ensued with plaintiff appearing for independent medical examinations and disclosing his medical records. Defendant retained physicians to conduct the examinations, review the records, and submit affirmed opinions regarding plaintiff's alleged injuries and has now moved for summary judgment on serious injury grounds.

Defendant's Contentions

Defendant, in support of his summary judgment motion to dismiss the action, submits, among other items, plaintiff's verified bills of particulars, a transcript of plaintiff's examination before trial, and two affirmed medical reports, one from Dr. Dana A. Mannor, a board-certified orthopedic surgeon, and the other from Dr. Jessica F. Berkowitz, a licensed radiologist. Plaintiff's verified bills of particulars assert that, because of the accident, plaintiff suffered (among others injuries) damage to his thoracic, cervical and lumbar spine, including disc herniation and bulging and straightening of the cervical and lumbar lordosis.

Defendant contends that plaintiff's injuries do not rise to the legal level required to meet the serious injury threshold and that plaintiff's claim is belied by his lapse and cessation of treatment for over a year's period. In addition, defendant utilizes his experts' findings to both challenge plaintiff's injury causation claim and contend that the injuries were resolved. Dr. Mannor in this regard recounts that he examined plaintiff on October 10, 2019 and found no limitation in plaintiff's range of motion.[2]

Dr. Mannor states that he performed the objective range of motion tests on plaintiff with a goniometer in determining whether there were any limitations. The report states that, for the entire spine, there was no muscle spasm, no atrophy, deformity or soft

[2] More specifically, Dr. Mannor reports that his examination revealed lumbar spine flexion of 60 degrees with normal being 60 degrees; lumbar spine extension of 25 degrees with normal being 25 degrees; cervical flexion of 60 degrees with normal being 60 degrees, right lateral bending of 25 degrees with normal being 25 degrees, and left lateral bending of 25 degrees with normal being 25 degrees.

As to the cervical spine, Dr. Mannor's report indicates flexion of 50 degrees with normal being 50 degrees; extension to 60 degrees with normal being 60 degrees, right lateral flexion to 45 degrees with 45 degrees being normal, right rotation to 80 degrees with 80 degrees being normal, and left rotation to 80 degrees with normal being 80 degrees. No ranges of motion measurements for the thoracic spine are included.

tissue swelling noted. Dr. Mannor concludes in his report that the thoracic, cervical and lumbar spine sprains/strains are resolved and that plaintiff has functional use of the examined body parts for normal daily activities including usual daily work duties.

The reports from Dr. Berkowitz, both dated May 30, 2019, review plaintiff's Magnetic Resonance Images (MRIs), taken of the lumbar spine on September 5, 2018, and of the cervical spine on August 8, 2018. Dr. Berkowitz's report about the lumbar spine notes no disc bulges or herniation present in that image, a normal lordosis, no neural foraminal stenosis, and that the soft tissues were unremarkable. The report states that the MRI of the lumbar spine was unremarkable, that there were longstanding degenerative changes, no finding of trauma and no causal relationship between plaintiff's condition and the MRI findings.

The cervical spine report mentions straightening of the normal lordosis, disc bulges, one minimal and one extremely minimal, and a very slight uncovertebral joint hypertrophic change. Both the disc bulges and hypertropic change are regarded as chronic and degenerative in nature. Dr. Berkowitz also concludes that the accident did not cause the cervical spine condition given the claimed degeneration. The defense further asserts that plaintiff did not experience a substantial loss of work and that he has failed to meet the requirements in any of the Insurance Law § 5102 (d) categories. Defendant thus argues that, based upon the submissions, plaintiff cannot establish that he sustained a serious injury within the meaning of Insurance Law § 5102 (d).

Plaintiff's Opposition

Plaintiff, in opposition, argues that defendant has failed to establish prima facie entitlement to summary judgment dismissing his complaint, and, in contrast, his medical

evidence demonstrates permanent injury to his back, neck and spine. Plaintiff provides certified medical records including his physicians' affirmed reports, MRI and X-ray studies as well as his own affidavit. Plaintiff claims that he continues to experience symptoms from his injuries, that, contrary to defendant's assertions, his injuries have not been resolved, and he denies any prior or subsequent injury to the affected body parts. Plaintiff also contends that he meets the requirements of the "90/180 day" category because he missed about two days of work following the accident, was not able to work overtime for four months after the accident, and thereafter needed assistance lifting. Plaintiff states that he is only able to perform lifting duties at work with the help of two or three coworkers and that he cannot perform routine activities such as going to his gym, doing exercises and playing pickup football games with his friends.

Plaintiff, who asserts that he was asymptomatic before the accident, disputes that he exhibited a normal range of motion to Dr. Mannor, that all the sprains/strains were resolved and that his injuries were not caused by the accident. Likewise, plaintiff views Dr. Berkowitz's assertions about his conditions being chronic and degenerative as lacking evidence and faults her for not providing a medical or factual basis for her opinion.

Plaintiff in this regard seeks to demonstrate his reduced range of motion over an extended period through medical reports and affirmations of his own doctors. An initial, July 26, 2018 examination by Dr. Ana I. Romeo, an internal medicine physician, two days after the accident, noted limitations in his lumbar spine motion,[3] and diagnosed him

[3] More specifically, Dr. Romeo found plaintiff's lumbosacral spine flexion as 80 degrees (90 degrees being normal) and his lumbosacral spine extension as 20 degrees (30 degrees being normal) (*see* NYSCEF Doc. No. 23, plaintiff's certified medical records from North Flushing Primary Med. Care P.C. for July 26, 2018 at 4, annexed as exhibit B to plaintiff's opposition papers).

then with a strain of the cervical spine, thoracic spine and lumbar spine, respectively. Plaintiff's ensuing medical treatment included 38 physical therapy visits, and an August 30, 2018 follow-up examination again showed limited range of motion in his cervical and lumbar spine[4] as did an October 1, 2018 follow-up examination.[5] Plaintiff also references an August 8, 2018 MRI and X ray study by Dr. Andrew McDonnell, a board-certified neuroradiologist, which shows a herniated disc and disc bulges as well as straightening of the cervical lordosis (i.e. an abnormal neck curve) with prominent spasm and leviscoliosis (i.e an abnormal sideways spinal curvature) (*see* NYSCEF Doc. No. 26, Dr. McDonnell's affirmation at 2, ¶ 6 and accompanying report, annexed as exhibit E to plaintiff's opposition papers). Dr. McDonnell also discusses a September 5, 2018 MRI of plaintiff's lumbar spine showing herniation and straightening of the lumbar lordosis with severe spasm, disc bulges and leviscoliosis (*id.*).

Plaintiff separately cites a December 23, 2019 report of Dr. Donald I. Goldman, an orthopedic surgery specialist. Dr. Goldman recounts that a December 18, 2019

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[4] Again, more specifically, Dr. Romeo found restrictions: plaintiff's cervical spine revealed restrictions with flexion at 40 degrees (45 degrees being normal); extension at 50 degrees (55 degrees being normal); right and left rotation at 60 degrees (normal being 70 degrees); and right and left lateral flexion at 30 degrees (40 degrees being normal). Likewise, plaintiff's lumbosacral spine flexion was 80 degrees (90 degrees being normal); extension was 20 degrees (30 degrees being normal); right and left rotation was 25 degrees (30 being normal); right and left lateral flexion was 30 degrees (35 degrees being normal) (*id*. for August 30, 2018 at 2-3, also annexed as part of exhibit B to plaintiff's opposition papers).

[5] Still again, more specifically, Dr. Romeo found restrictions: plaintiff's cervical spine revealed restrictions with flexion at 40 degrees (45 degrees being normal); extension at 50 degrees (55 degrees being normal); right and left rotation at 65 degrees (normal being 70 degrees); and right and left lateral flexion at 35 degrees (40 degrees being normal). Likewise, plaintiff's lumbosacral spine flexion was 85 degrees (90 being normal); extension was 25 degrees (30 degrees being normal); right and left rotation was 25 degrees (30 being normal); right and left lateral flexion was 30 degrees (35 degrees being normal) (*id*. for October 1, 2018 at 2-3, also annexed as part of exhibit B to plaintiff's opposition papers).

examination of plaintiff with a goniometer, as Dr. Mannor, defendant's doctor had used, showed motion loss in his cervical and lumbar spine.[6] Indeed, Dr. Goldman references the MRI report of a cervical herniated disc at C5-C6 and a lumbar herniated disc at L4-L5 and summarizes that plaintiff exhibits a more than a 25% painful functional motion restriction in his cervical spine and a more than 20% such restriction in his lumbar spine (*see* NYSCEF Doc. No. 27, Dr. Goldman's affirmed report at 3-4, annexed as exhibit F to plaintiff's opposition papers). Dr. Goldman further asserts that "the injury to both [plaintiff's] cervical and lumbar spine was causally related to the accident on July 24, 2018, and . . . should be considered permanent" (*id.* at 4). Plaintiff maintains that his submissions, while contradicting defendant's showing, more importantly, meet the serious injury threshold, raise material factual issues and bar summary judgment.

In addition, plaintiff discounts any treatment gap by mentioning that, as he had reached the maximum recovery and improvement, he discontinued treatment because there was nothing else his doctors could do to alleviate his pain, and, in any event, his insurance was no longer paying for his treatment.[7]

Plaintiff further relies upon the injuries' effect on his usual and customary daily activities during 90 of the first 180 days after the accident. He both rejects assertions of

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[6] More specifically, Dr. Goldman found restrictions in plaintiff's cervical spine: left lateral bending was restricted to 25 degrees (50 degrees being normal) and left rotation was restricted to 55 degrees (80 degrees being normal); and restrictions in plaintiff's lumbar spine: flexion was restricted to 65 to 70 degrees (90 degrees being normal); extension was restricted to 15 to 20 degrees (45 degrees being normal); and right rotation was restricted to 30 degrees (45 degrees being normal) (*see* NYSCEF Doc. No. 27, Dr. Goldman's affirmed report at 2, annexed as exhibit F to plaintiff's opposition papers).

[7] Plaintiff's affidavit states in this regard that "I only stopped treating at the medical facility because there was nothing else my medical providers could do for me to alleviate my pain and they also mentioned that insurance was no longer paying for my treatment . . ." (NYSCEF Doc. No. 22, plaintiff's affidavit at 2, ¶ 8, annexed as exhibit A to his opposition papers).

defendant's doctors about his condition during the 90/180-day period because they did not examine him during that period and argues that defendant failed to provide evidence to refute his 90/180-day claim. Plaintiff contends that the medical records confirm his injuries and range of motion loss, rebut claims by defendant's doctors and create triable issues as to the 90/180-day category.

Additionally, plaintiff denies having any injuries or reinjuries to the same body parts as those injured in the July 24, 2018 accident (*see* NYSCEF Doc. No. 17, plaintiff's deposition tr at 47, line 22, through 48, line 10). Plaintiff argues that, as defendant fails to controvert his claim that he was not injured before or after the accident and that his injuries are causally related to the accident, defendant's claims about degenerative changes should be nullified and the summary judgment motion denied. Lastly, plaintiff argues that disc bulges, causally related to an accident, especially with loss in range of motion constitute serious injury, and the motion should also be denied on this basis.

Defendant's Reply

Replying to plaintiff's opposition, defendant argues that he properly raised the serious injury issue and has met his burden through his physicians' affirmations showing plaintiff's examination was normal. Defendant also argues that summary judgment is warranted in his favor because plaintiff has failed to meet his burden. The defense asserts that plaintiff misleads by attempting to impeach defendant's experts and that those experts were not required to review plaintiff's medical records as they conducted their own examination. Additionally, the defense argues that the MRI evidence does not, as required, causally relate the accident to a resulting serious injury. The defense also submits that plaintiff's expert must address the degenerative causation challenges raised

and that plaintiff's affidavit and his counsel's affirmation are inadmissible probative evidence on medical issues. Finally, the defense regards its submitted proof as sufficient to establish that no factual issue exists of fact regarding the "90/180 day curtailment."

Discussion

"A defendant can establish that the plaintiff's injuries are not serious within the meaning of Insurance Law 5102 (d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (*Nuñez v Teel*, 162 AD3d 1058, 1059 [2d Dept 2018], quoting *Grossman v Wright*, 268 AD2d 79, 83 [2d Dept 2000]). Once the defendant has established this point, the burden shifts to plaintiff to present objective evidence to demonstrate a triable factual issue that a serious injury was sustained within the Insurance Law's meaning (*see Grossman,* 268 AD2d at 84).

A plaintiff seeking to recover under the "permanent loss of use" category, must show a total loss of use of a body organ, member, function or system (*Oberly v Bangs Ambulance*, 96 NY2d 295, 299 [2001]). A plaintiff claiming injury within the "permanent consequential limitation" or "significant limitation" of use categories of the statute must substantiate his or his complaints of pain with objective medical evidence demonstrating the extent or degree of the limitation of movement caused by the injury and its duration (*see Schilling v Labrador*, 136 AD3d 884, 885 [2d Dept 2016]*; Rovelo v Volcy*, 83 AD3d 1034, 1035 [2d Dept 2011]; *McLoud v Reyes*, 82 AD3d 848, 849 [2d Dept 2011]). In order to prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system" categories, either a specific

percentage of the loss of range of motion must be determined, or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (*see Perl v Meher*, 18 NY3d 208, 217 [2011]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute and will not suffice to demonstrate a serious injury (*Licari v Elliott*, 57 NY2d 230, 236 [1982]; *Cebron v Tuncoglu*, 109 AD3d 631, 633 [2d Dept 2013]). Finally, a plaintiff seeking to recover under the 90/180 category must submit competent objective medical evidence of "a medically determined injury or impairment of a non-permanent nature" that prevented him from performing his usual and customary activities for 90 of the 180 days following the subject accident (Insurance Law § 5102 [d]; *see also Toure v Avis Rent A Car Sys*., 98 NY2d 345, 357 [2002]; *Licari*, 57 NY2d at 238-239 [1982]; *John v Linden*, 124 AD3d 598, 599 [2d Dept 2015]; *Strenk v Rodas*, 111 AD3d 920, 921[2d Dept 2013]; *Gavin v Sati*, 29 AD3d 734, 735 [2d Dept 2006]).

Here, defendant has met his prima facie burden of showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (*see Toure*, 98 NY2d at 345; *Gaddy v Eyler*, 79 NY2d 955, 956-957 [1992]) through Dr. Mannor and Dr. Berkowitz's presentations. Dr. Mannor reported objective findings disclosing no range of motion limitations in both plaintiff's cervical and lumbar spine (*see* n 2). Dr. Berkowitz's MRI report of the lumbar spine showed no disc bulges or herniation and a normal lordosis and enabled her to characterize that MRI as unremarkable. Her lumbar spine MRI report found minimal or very minimal disc bulges and straightening of the normal lordosis, and she described them all as chronic and

degenerative in nature. Dr. Berkowitz also concluded that the accident did not cause the cervical spine condition given the claimed degeneration.

It is well established that

> "[a] defendant who submits admissible proof that the plaintiff has a full range of motion, and that she or he suffers from no disabilities causally related to the motor vehicle accident, has established a prima facie case that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) despite the existence of an MRI which shows herniated or bulging discs" (*Kearse v. New York City Tr. Auth.*, 16 AD3d 45, 49-50 [2d Dept 2005]).

Hence, defendant presents a prima facie case that plaintiff did not sustain a serious injury to his cervical and lumbar spine under either the permanent consequential limitation of use or significant limitation of use categories of Insurance Law § 5102 (d).

However, plaintiff presented Dr. Romeo's and Dr. Goldman's objective medical evidence demonstrating limitations in range of motion to his lumbar and cervical spine (*see* notes 3-6). In addition, plaintiff presented Dr. McDonnell's MRI and X-ray study reports as to plaintiff's cervical spine, which identified a herniated disc and disc bulges as well as straightening of the cervical lordosis, and a separate MRI of plaintiff's lumbar spine, which, most significantly, showed herniation and straightening of plaintiff's lumbar lordosis. This evidence collectively raised a triable factual issue by showing, as Dr. Goldman summarized regarding his December 18, 2019 examination, which thus occurred about 18 months after the accident, the presence of a more than 25% painful functional motion restriction in plaintiff's cervical spine and a more than 20% such restriction in his lumbar spine. Dr. Goldman has further, and equally significantly, asserted that "the injury to both [plaintiff's] cervical and lumbar spine was causally related to the accident on July 24, 2018, and . . . should be considered permanent."

Indeed, comparable Appellate Division Second Department decisions presenting similar range of motion restrictions affecting the same body areas as in this case have denied summary judgment citing the *Perl* decision (*see Kelly v Andrew*, 172 AD3d 833, 834 [2d Dept 2019] [22% deficit in flexion of the lumbar region of the plaintiff's spine four years after accident]; *Kholdarov v Hyman*, 165 AD3d 1087, 1088 [2d Dept 2018] [20% deficit in flexion of plaintiff's cervical spine six and a half years after accident]). Moreover, plaintiff reasonably explained any gap in treatment stating that "there was nothing else my medical providers could do for me to alleviate my pain and they also mentioned that insurance was no longer paying for my treatment" (*see* n 7 and NYSCEF Doc. No. 22, plaintiff's aff at 2, ¶ 8) (*see Abdelaziz v Fazel*, 78 AD3d 1086 [2d Dept 2010]; *Vaco v Arellano*, 74 AD3d791, 792 [2d Dept 2010]. The contradictory findings of defendant's and plaintiff's examining physicians present triable factual issues and therefore make summary judgment inappropriate regarding permanent consequential limitation of use of a body organ or member and significant limitation of a use of a body function or system.

Plaintiff testified regarding his claim of "serious injury" under the 90/180-day category that he returned to work, as a Machine Porter at Jamaica Hospital, two days after the accident. Further, he failed to testify that his treating physicians directed him not to return to work following the accident. Rather, it was simply recommended that he perform light work as accomplished. Indeed, his testimony reveals that after his accident, he worked full time and simply was not able to work overtime for about four months although he claims he needed assistance from coworkers with lifting. This evidence fails to establish that plaintiff sustained a 90/180-day injury (*see Knijnikov v Mushtaq*, 35

AD3d 545, 548 [2d Dept 2006]; *Felix v New York City Tr. Auth.*,32 AD3d 527, 528 [2d Dept 2006];*Thompson v Abbasi*, 15 AD3d 95, 100-101 [1st Dept 2005] [holding that "(w)]hen construing the statutory definition of a 90/180 day claim, the words 'substantially all' should be construed to mean that the person has been prevented from performing his usual activities to a great extent, rather than some slight curtailment"]).

In opposition, plaintiff submits no evidence of a medically determined injury that prevented him from performing substantially all of his customary daily activities within the relevant period (*see Toussaint v Zomah*, 183 AD3d 657, 658 [2d Dept 2020]; *Marin v Ieni*, 108 AD3d 656, 657 [2d Dept 2013]; *Amato v Fast Repair Inc.*, 42 AD3d 477, 478 [2d Dept 2007]). Accordingly, that branch of defendant' summary judgment motion to dismiss plaintiff's complaint relating to an alleged serious injury under the 90/180 category is warranted.

The court has considered the parties' remaining contentions and finds them unavailing. All relief not expressly granted herein is denied. Accordingly, it is

ORDERED that the branch of defendant's summary judgment motion, mot. seq. one, to dismiss plaintiff's serious injury claims based upon permanent consequential limitation of use of a body organ or member and significant limitation of a use of a body function or system is denied; and it is further

ORDERED that the branch of defendant's summary judgment motion to dismiss plaintiff's complaint relating to an alleged serious injury under the 90/180 category is granted.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.