Peterson v Acer Packaging & Supplies, Inc.
2020 NY Slip Op 33937(U)
October 1, 2020
Supreme Court, Bronx County
Docket Number: 26661/2018E
Judge: Veronica G. Hummel
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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
COUNTY OF BRONX IAS PART 31

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KASHMIR PETERSON,

Plaintiff,

-against -

ACER PACKAGING & SUPPLIES, INC., and MATTHEW A. MASI,

Defendants.

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Index No. 26661/2018E
DECISION/ORDER
Motion Seq. 1

VERONICA G. HUMMEL, A.S.C.J.

In accordance with CPLR 2219 (a), the decision herein is made upon consideration of all papers filed by the parties in NYSCEF, in support of and in opposition to the motion by defendants ACER PACKAGING & SUPPLIES, INC., and MATTHEW A. MASI (defendants) [Mot. Seq. 1], made pursuant to CPLR 3212, seeking an order dismissing the complaint on the ground that plaintiff KASHMIR PETERSON (plaintiff) has not sustained a "serious injury" as defined by Insurance Law 5102(d).

Plaintiff commenced this action to recover damages for personal injuries he allegedly sustained as a result of a March 16, 2018, motor vehicle accident (the March 2018 Accident). Plaintiff claims that he suffered injuries to the lumbar spine, and asserts that the injury satisfies one or more of the following Insurance Law 5102(d) threshold categories: permanent consequential limitation, significant limitation, permanent loss of use, and 90/180 days. Plaintiff was in a subsequent motor vehicle accident on June 2, 2020, which he claims re-injured and exacerbated his lumbar spine injury from the March 2018 accident (the June 2020 Accident).

Defendants move for summary judgment dismissing the complaint on the grounds that plaintiff's claimed injury is not "serious," and any injuries or conditions from which plaintiff suffers are not causally related to the accident. Defendants also assert that plaintiff's testimony

that he only missed two days of work proves that plaintiff cannot satisfy the criteria under the 90/180-day definition of "serious injury". In support of the motion, defendants submit an affirmation of defendants' counsel, the pleadings, plaintiff's deposition transcript, the medical report of Dr. Arnold Berman (an orthopedist), and a memorandum of law.

Berman examined plaintiff on February 13, 2020, almost two years after the relevant accident, but before plaintiff's June 2020 Accident. The doctor took range-of-motion measurements of the cervical and lumbar aspects of plaintiff's spine, finding that plaintiff had full range of motion. The doctor's specified objective provocative tests were negative, indicating that plaintiff had no cervical or lumbar injuries. Berman stated that the CT Scan of the lumbar spine, done on March 16, 2018, showed only degenerative changes and L3-4 and L4-5 disc herniations. Berman diagnosed plaintiff, in sum and substance, with resolved sprain and strain injuries with no aggravation to preexisting L3-4 and L4-5 disc herniations. He found no clinical correlation between the MRI and EMG findings of L3-4 and L4-5 disc herniations on MRI and L5 radiculopathy on EMG with the normal clinical exam. He concluded that plaintiff: did not sustain any permanent injury; has no disability as a result of the accident; did not sustain a disability within the first three months and the first six months of the accident; and was not prevented from his primary daily activities during the first 90 out of 180 days following the accident.

The court finds that defendants met the *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 by submitting the medical findings and the opinions of the expert and plaintiff's testimony (*Perl v Meher*, 18 NY3d 208 [2011]; *Toure v Avis Rent A Car, Inc.*, 98 NY2d 345 [2002]; *DeJesus v Pauino*, 61 AD3d 605 [1st Dept 2009]).

Plaintiff opposes the motion by submitting: his affidavit; the affirmations of Dr. Gautam Khakhar, M.D. (dated September 8, 2020 and June 29, 2020), Khakhar's medical reports (dated March 26th, May 7th, May 21st, July 9th, September 10th, and November 26th of 2018, February 11, 2019; and June 29th, August 13th, and September 17th of 2020); an EMG report

(EMG taken on May 14, 2018) by the same physician; an affirmed June 21, 2018, report of Dr. Derek Johnston (Physical Medicine & Rehabilitation); and an MRI report and affirmation by Dr. Narayan Paruchuri (MRI of the lumbar spine taken April 2, 2018).

Plaintiff's evidence raises triable issues of fact as to his claims of "serious injury" under the threshold categories of permanent consequential limitation and significant limitation with regards to his lumbar spine. Plaintiff's evidence demonstrates that he received medical treatment for his claimed lumbar injuries shortly after the accident, and that he had substantial limitations in motion at a recent examination (*see Perl v Meher*, 18 NY3d 208 [2011]). Drs. Johnson (June 2018) and Khakhra (June 2020) treated the plaintiff, reviewed the medical records and MRI report, and found a direct causal relationship between the March 2018 Accident and their pathological findings. In addition, in the September 2020 affirmed report, Khakhra again found that the lumbar injuries were traumatically induced, permanent in nature, and causally related to the March 2018 Accident, and opined that the June 2020 Accident exacerbated plaintiff's pre-existing injuries to the lumbar spine from the March 2018 Accident (*see Aquino v Alvarez*, 162 AD3d 451, 452 [1st Dept 2018]). Additionally, plaintiff's affidavit raises triable issues of fact as to whether he has a reasonable explanation for his gap in treatment (*see Ramkumar v Grand Style Transportation, Enterprises, Inc.,* 22 NY3d 905 [2013]). Hence, plaintiff generates a question of fact as to whether he suffered a permanent consequential limitation or significant limitation with regards to his lumbar spine sufficient to constitute a "serious injury" under the Insurance Law.

It is obvious, however, that plaintiff did not sustain a permanent loss of use (*see Riollano v Leavey,* 173 AD3d 494 [1st Dept 2019]). Such loss must be total (*Swift v N.Y. Transit Auth.,* 115 AD3d 507 [1st Dept 2014]; *see Oberly v Bangs Ambulance Inc.,* 96 NY2d 295 [2001]), and evidence of mere limitations of use is insufficient (*see Melo v Grullon*, 101 AD3d 452 [1st Dept 2012]; *Byong Yol Yi v Canela*, 70 AD3d 584 [1st Dept 2010]).

As for the 90/180 day category, plaintiff's deposition testimony and the verified bill of particulars confirm that he missed only two days of work as a result of the accident (*Gordon v*

Reyes Hernandez, 181 AD3d 424 [1st Dept 2020]; *Morales v Cabral*, 177 AD3d 556 [1st Dept 2019]; *see Grandad v Villegas*, 2018 WL 1883530 [Sup. Ct. Queens County 2018]). Therefore, plaintiff has failed to raise an issue of fact as to whether he sustained a "serious injury" as required by Insurance Law 5102(d) under the 90/180-day category (*Gordon v Reyes Hernandez, supra; see Grandad v Villegas*, *supra*).

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the court, it is hereby denied. Accordingly, it is hereby

ORDERED that the motion by defendants ACER PACKAGING & SUPPLIES, INC., and MATTHEW A. MASI [Mot. Seq. 1], made pursuant to CPLR 3212, seeking an order dismissing the complaint on the ground that plaintiff KASHMIR PETERSON has not sustained a "serious injury" as defined by Insurance Law 5102(d) is granted solely with respect to the plaintiff's claims of permanent loss of use, and 90/180 days and is otherwise denied.

The foregoing constitutes the decision and order of the court.

Dated: October 1, 2020

ENTER,

Hon. Veronica G. Hummel

Hon. Veronica G. Hummel

Peterson v Acer 26661/2018E