Fils-Aime v Hossan
2020 NY Slip Op 34095(U)
December 3, 2020
Supreme Court, Kings County
Docket Number: 519580/2016
Judge: Reginald A. Boddie

At an IAS Trial Term, Part 95 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York, on the 3rd day of December 2020.

P R E S E N T:
Honorable Reginald A. Boddie, JSC

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JUNIOR G. FILS-AIME,

Plaintiff(s),

Against

MOHAMMED SAZZAD HOSSAN a/k/a MD SAZZAD HOSSAN, CARD TRANS CORP., GIAN SINGH, and MORRIS BRODSKY,

Defendant(s).

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Index No. 519580/2016
Cal. No. 17, 18 MS 2, 3

DECISION AND ORDER

Papers	Numbered
MS 2	Docs. # 30-40, 42-43, 55-56
MS 3	Docs. # 44-47
Pl.'s Opp	Doc. # 49

Upon the foregoing cited papers, the decision and order on defendants' threshold motions for summary judgment (MS 2, 3), pursuant to CPLR 3212 and Insurance Law § 5102 (d), is as follows:

Plaintiff commenced this action to recover damages for personal injuries he allegedly sustained in a rear-end collision on November 7, 2014, at or near the intersection of 5th Avenue and East 26th Street in New York, New York. He alleged soft tissue injuries to the left shoulder and left knee. Defendants moved for summary judgment on the ground that plaintiff did not sustain serious injuries pursuant to Insurance Law § 5102 (d). Defendants proffered the reports of Drs. Robert Tantleff, Joseph Elfenbein and Chandra Sharma.

On July 27, 2017, Dr. Tantleff, a board certified radiologist, performed an independent radiology review of the radiology reports of x-rays of plaintiff's left shoulder and left knee, dated

December 29, 2014, approximately seven weeks post-accident. Both reports indicated there was no evidence of fracture or dislocation. Dr. Tantleff concluded the x-ray examination of the left shoulder revealed a normal x-ray examination without evidence of acute or recent injury or post-traumatic abnormality. He further concluded the x-ray examination of the left knee revealed a normal x-ray examination without evidence of fractures or dislocation, there were no markers of acute or recent injury, fractures or dislocation, and the regional soft tissue planes were maintained.

On August 23, 2018, Dr. Elfenbein, a board certified orthopedic surgeon, examined plaintiff. In the history section of his August 29, 2018 report, Dr. Elfenbein indicated that plaintiff reported that he had diagnostic tests, which consisted of x-rays and MRIs of the neck, back and shoulder. At the time of the examination, plaintiff complained of pain in his left shoulder and left knee.

Dr. Elfenbein's examination of the left shoulder revealed there was no heat, swelling, effusion, erythema, or crepitus, range of motion demonstrated forward flexion at 180 degrees (180 degrees normal), extension at 40 degrees (40 degrees normal), abduction at 180 degrees (180 degrees normal), adduction at 30 degrees (30 degrees normal), internal rotation at 80 degrees (80 degrees normal), and external rotation at 90 degrees (90 degrees normal). His examination of the left knee revealed no heat, swelling, effusion, erythema, or crepitus, no complaint of tenderness upon palpation, and range of motion demonstrated flexion at 150 degrees (150 degrees normal), and extension at 0 degrees (0 degrees normal).

Dr. Elfenbein reported his examination revealed normal ranges of motion and negative neurological tests in the left shoulder and left knee. He concluded the left shoulder and left knee sprain were resolved. He opined, "[t]he orthopedic examination is objectively normal and indicates no findings which would result in no orthopedic limitations in use of the body parts examined. The

examinee is capable of functional use of the examined body parts for normal activities of daily living as well as usual daily activities including regular work duties."

On September 21, 2018, Dr. Sharma, a board certified neurologist, examined plaintiff's cervical and lumbar spine. Plaintiff complained of ongoing intermittent pain in the neck, lower back and shoulders. Dr. Sharma found normal ranges of motion in plaintiff's cervical and lumbar spine and opined plaintiff's cervical and lumbar sprain/strain were resolved. She further opined that despite subjective complaints, there were no objective findings to support them, plaintiff was capable of working and performing his activities of daily living without any restrictions or limitations, and his current medical status is that of a neurologically normal person.

To prevail on a "threshold" motion for summary judgment, defendant must submit competent medical evidence establishing, prima facie, that plaintiff's alleged injuries did not constitute serious injuries under Insurance Law § 5102 (d) (*Chung v Reed*, 178 AD3d 661, 661 [2d Dept 2019]). Upon defendants' showing of prima facie entitlement to summary judgment, the burden shifts to plaintiff to raise a triable issue of fact as to whether he sustained serious injuries under Insurance Law § 5102 (d) (*Chung*, 178 AD3d at 662). Here, defendant proffered the reports of its independent medical examiners who concluded plaintiff's injuries had resolved without residual limitations or restrictions.

In opposition, plaintiff proffered the report of Dr. Rafael Abramov, a physical medicine and rehabilitation physician, who examined plaintiff's left shoulder and left knee on November 15, 2014, approximately two weeks following the accident. He found limited ranges of motion in the left shoulder. Specifically, forward flexion of 90 degrees (normal 180 degrees) and abduction of 90 degrees (normal 180 degrees), internal and external rotations painful, and positive impingement signs. He found the left knee was tender, range of motion 0 to 110 (normal 140

degrees), no instability and no laxity. He noted plaintiff complained of pain in the left shoulder and left knee and had returned to work due to financial necessity. He recommended plaintiff for physical therapy, diagnostic testing to rule out fracture, osseous pathology, or misalignment, and advised plaintiff to refrain from any strenuous activities which may aggravate the injuries and cause worsening of symptoms, and perform tasks to the best of tolerance and limitations only.

On December 17, 2014, Dr. Stella Mansukhani performed an examination on plaintiff's left shoulder and left knee. Plaintiff complained of intermittent pain in the left shoulder, exacerbated when lifting the arm. He indicated pain in the left knee was improving and that he sometimes felt pain after prolonged sitting or with walking. She noted that plaintiff had returned to work part time.

Dr. Mansukhani's examination revealed tenderness to palpation in the anterior joint line of the left shoulder, active range of motion on flexion and abduction was 0-160 degrees (normal is 0-180 degrees), passive range of motion is 0-170 degrees, Hawkins test was positive, and drop arm test was negative. There was also tenderness to palpation in the medial and lateral joint lines of the left knee, active range of motion on flexion was 0-125 degrees (normal is 0-130 degrees), and extension was full with pain, muscle strength was 4/5, and McMurray test was positive. She diagnosed plaintiff with left shoulder and left knee sprain/strain and recommended physical therapy. She advised him to be careful and mindful of his injuries and not to do any activities that would further exacerbate them.

On March 13, 2015, Dr. Mansukhani performed a follow-up examination on plaintiff's left shoulder and left knee. Plaintiff reported intermittent left shoulder pain and occasional stiffness in the morning or when lifting. He reported the left knee pain had improved and there was occasional pain when driving. He reported his last physical therapy session was on January 3, 2015, because

he was out of the country due to a death in the family. She reported that plaintiff had returned to work on November 14, 2014, and was independent in all activities of daily living.

Dr. Mansukhani found there was no tenderness to palpation of the left shoulder joint, active range of motion on flexion is 0 to 180 degrees (normal is 0 to 180 degrees), and Hawkins test is positive. She found there was no tenderness to palpation in the left knee joint, active range of motion on flexion is 0-130 degrees (normal is 0 to 130 degrees), McMurray test is negative, and extension is full. She also found manual muscle strength was 5/5 in all extremities.

She concluded plaintiff's left shoulder sprain/strain/possible rotator cuff impingement syndrome and left knee sprain/strain were clinically improved. She further concluded plaintiff had reached his maximal medical improvement from formal physical therapy and, as such, discontinued it. She advised plaintiff that if he had an exacerbation of his pain that he should continue with his home exercises and take over-the-counter medications.

Four days later, on March 17, 2015, Dr. Maury Harris, a board certified orthopedic surgeon, performed an orthopedic evaluation of plaintiff's left shoulder. Plaintiff complained of pain in the left shoulder. Dr. Harris's report indicated that plaintiff was involved in a motor vehicle accident on November 7, 2014, and sustained injuries to his neck, feet and shoulder. Plaintiff further reported that had been undergoing physical therapy three times per week, was no longer treating, his last date of treatment was March 13, 2015, and he wished to continue treating. He also reported using a neck and knee brace as assistive devices and missing six months from work due to the accident.

Dr. Harris' examination found there was no heat, swelling, effusion, erythema, or crepitus, range of motion demonstrated forward flexion to 160 degrees (170-180 degrees normal), extension to 40 degrees (40 degrees normal), abduction to 150 degrees (170-180 degrees normal), adduction

to 45 degrees (45 degrees normal), internal rotation to 45 degrees (80-90 degrees normal), external rotation to 60 degrees (80-90 degrees normal), and impingement was negative. He concluded that left shoulder sprain/strain was resolving and there was a mild partial causally related orthopedic disability. Dr. Harris did not examine plaintiff's left knee.

Dr. Harris noted plaintiff was working part time. He opined plaintiff was capable of working with restrictions to be placed on repetitive use of left arm and heavy lifting over 40 pounds. He further opined that based on his physical examination, plaintiff's condition warranted further treatment and had not reached maximum medical improvement in orthopedics and recommended further treatment including physical therapy for six weeks, twice a week, and an orthopedic follow-up visit within six weeks.

On December 31, 2018, Dr. Mansukhani conducted a musculoskeletal examination of plaintiff's left shoulder and left knee. She indicated that plaintiff was last seen and evaluated on March 13, 2015, at which time he was discharged. He reported intermittent pain to his left shoulder especially after using the left arm while driving or after repetitive use of the left arm. He also reported intermittent left knee pain and pain when going up and down the stairs. He had a motor vehicle accident on March 27, 2018 with injury to his right knee, neck and low back.

Her examination found decreased ranges of motion in the left knee and left shoulder compared to the right knee and right shoulder, but did not state the normal ranges of motion (*see McLaughlin v Rizzo*, 38 AD3d 856, 858 [2d Dept 2007] [comparison to normal required to establish whether decreased range is significant under the no-fault statute]). She diagnosed plaintiff with left shoulder sprain/strain and left knee pain, and concluded, "[a]t this point the patient has reached his maximal medical improvement. There is a 10% loss of use of the left knee and 10% loss of use of the left shoulder based on the New York State Worker's Compensation Board

Guideline 2018." Dr. Mansukhani noted plaintiff was working as a taxi driver and advised plaintiff to be careful and mindful of his injuries and not to do any activities that would further exacerbate them.

In an affirmation dated March 19, 2019, Dr. Mansukhani indicated she reviewed the August 23, 2018 report of Dr. Elfenbein. She noted Dr. Elfenbein performed objective range of motion testing using a goniometer, expressly relying on the AMA Guide to Physical Impairment, 5th Edition for the normal ranges on his range of motion measurements. She contended, however, the AMA Guide to Physical Impairment 5th Edition was superseded by the AMA Guide to the Evaluation of Permanent Impairment, Sixth Edition in 2009, and that the normal ranges of motion in the Sixth Edition are larger than in the 5th.

She argued, the 6th edition "sets range of motion guidelines for the shoulder at Forward Flexion and Abduction of 180 degrees, Abduction of 50 degrees (thus Dr. Elfenbein actually measures a 20 degree, 40% limitation), Extension of 50 degrees (thus Dr. Elfenbein actually measures a 10 degree 20% limitation), internal rotation of 90 degrees (thus Dr. Elfenbein actually measures a 10 degree, 11% limitation) and external rotation of 90 degrees (thus Dr. Elfenbein actually measures a 10 degree, 11% limitation)." She further argued, "Dr. Elfenbein also measured left knee range of motion using the outdated standard, finding flexion at 150 degrees (150 degrees normal), and extension at 0 degrees (0 degrees normal). This again applied an outdated normal range, which is generally accepted in the medical community presently as being 0-130 degrees."

She concluded plaintiff had significant limitations of several planes of left knee and left shoulder motion continuing from the date of accident. She further concluded that these limitations were permanent and significant in their effect on plaintiff's ability to perform any activities requiring any significant movement of his arm above his head, such as reaching for an object on a

high shelf or combing his hair, or significant bending or flexing of his left knee, such as tying his shoes or picking something up off the floor.

This affirmation, however, failed to raise a triable issue of fact. It failed to address plaintiff's gap in treatment. Plaintiff reported to Dr. Mansukhani on March 13, 2015, that he ceased treatment in January 2015, although he indicated to Dr. Harris, on March 17, 2015, his desire to resume treatment. There is no evidence that he did so. Further, plaintiff did not allege a 90/180 claim and there is no evidence in the record to support it.

Moreover, Dr. Mansukhani's attack on Dr. Elfenbein's methodology is inconsistent with the authority it cites. The 6th edition of the American Medical Association Guidelines to the Evaluation of Permanent Impairment states, "[c]urrent evidence does not support range of motion as a reliable indicator of specific pathology or permanent functional status; therefore motion is no longer used as a basis for defining impairment" (6th ed., 557-601). Accordingly, Dr. Mansukhani's rebuttal failed to take into account Dr. Elfenbein's findings that there was no other clinical evidence to support that plaintiff was suffering significant limitations from the injuries he suffered on November 7, 2014, (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 351 [2002]), plaintiff's complaints of intermittent pain are insufficient to establish serious injury within the meaning of Insurance Law § 5102 (d) (*Baldasty v Cooper*, 238 AD3d 367 [2d Dept 1997]), and plaintiff has not demonstrated that the alleged decreased ranges of motion were more than "minor, mild or slight" so as to be considered significant within the meaning of the Insurance Law (*see McLaughlin*, 38 AD3d at 858).

Further, Dr. Mansukhani concluded on March 13, 2015, that plaintiff's injuries had clinically improved, reached maximal medical improvement such that physical therapy was discontinued, and plaintiff was found to be independent in all activities of daily living. On March

19, 2019, she concluded that plaintiff was significantly and permanently disabled. These conflicting conclusions were not explained or reconciled.

Accordingly, plaintiff has failed to raise a triable issue of fact and defendants' motions (MS 2, 3) seeking summary judgment on the grounds plaintiff did not sustain a serious injury pursuant to Insurance Law § 5102 (d) are granted.

HON. REGINALD A. BODDIE J.S.C.

ENTER:

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Honorable Reginald A. Boddie
Justice, Supreme Court

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