

Liburd v Mondal

2020 NY Slip Op 34191(U)

December 3, 2020

Supreme Court, Kings County

Docket Number: 506242/2018

Judge: Lara J. Genovesi

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At an IAS Term, Part 34 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 3rd day of December 2020.

PRESENT:

HON. LARA J. GENOVESI,
J.S.C.

-----X

MARVIN LIBURD

Index No.: 506242/2018

Plaintiff,

DECISION & ORDER

-against-

MOHAMMED MONDAL

Defendants.

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Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

| | |
|---|-------------------------|
| | <u>NYSCEF Doc. No.:</u> |
| Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed _____ | _____ 27-36 |
| Opposing Affidavits (Affirmations) _____ | _____ 40-49 |
| Reply Affidavits (Affirmations) _____ | _____ 56 |

Defendant Mohammad Mondal moves (sequence number 2) for summary judgment on the grounds that plaintiff did not sustain a serious injury within the meaning of Insurance Law 5102(d). Plaintiff commenced this action for personal injuries as the result of a motor vehicle accident on May 11, 2016. In the bill of particulars, plaintiff alleged the following injuries: left shoulder tear with surgery, left knee sprain, cervical spine bulges/herniations and lumbar spine bulges/herniations (*see* NYSCEF Doc. # 32 at

¶ 10). Plaintiff further alleges that the injuries sustained meet the following categories of Insurance Law 5102: (1) permanent loss of body function/system, (2) permanent consequential limitation, (3) a significant limitation, and (4) a non-permanent medically determined injury which prevented him from his usual and customary activities for 90 out of the first 180 days following the accident (*see id.* at (¶ 20)).

Defendant met his burden and establish that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d). Defendant contends that plaintiff did not sustain a serious injury as a result of the accident. Defendant met his burden and established that plaintiff did not sustain a permanent loss, permanent consequential limitation or significant limitation. Defendant provided the sworn medical report of Dr. Willie E. Thompson, M.D., who examined plaintiff on April 26, 2019 (*see* NYSCEF Doc. # 33). Dr. Thompson measured his range of motion with a goniometer and found normal range of motion in plaintiff's cervical spine, lumbar spine, left shoulder and left knee. The doctor opined that plaintiff's orthopedic examination is normal and his cervical and lumbar sprains are resolved, his left knee strain is resolved, and his left shoulder is healed after surgery.

Defendant further established that plaintiff did not sustain a non-permanent medically determined injury which prevented him from his usual and customary activities for 90 out of the first 180 days following the accident. At his deposition, plaintiff testified that since the accident, he "can't lift as much as [he] did before" and has difficulty dressing and getting out of bed (NYSCEF Doc. # 36 at 81). There are no activities that he can no longer do because of the injuries suffered in this accident (*see id.*

At 82). The deposition transcript alone is insufficient as it fails to identify plaintiff's usual and customary daily activities during the relevant time frame or compare plaintiff's pre and post accident activities during that time frame (*see Hall v. Stargot*, 187 A.D.3d 996 [2 Dept., 2020]).

However, defendant provided the sworn medical report of Dr. Eric L. Cantos, who reviewed plaintiff's MRI, taken on June 11, 2016, one month after the accident. The doctor opined that plaintiff had a "longstanding and aging related degenerative condition" in his's cervical spine, lumbar spine, left knee and left shoulder (*see* NYSCEF Doc. # 34). Defendant further provided the sworn medical report of Dr. Bernard P. Chang, who reviewed plaintiff's emergency room records from the date of the accident and opined that the records are inconsistent with the injuries alleged in the bill of particulars and no acute traumatic findings are causally related to the subject accident (*see* NYSCEF Doc. # 35). Although the doctors don't specifically relate their findings to this category of Insurance Law § 5102(d) (*see Tinsley v. Bah*, 50 A.D.3d 1019, 857 N.Y.S.2d 180 [2 Dept., 2008]), they review plaintiff's medical records from within the relevant time period and opine that he did not sustain the injuries alleged. The relevant body systems had evidence of age-related degeneration one month after the accident. Accordingly, defendant met his burden on this category of Insurance Law § 5102(d) (*see Barry v. Arias*, 94 A.D.3d 499, 942 N.Y.S.2d 57 [1 Dept., 2012]).

As defendant meet his burden and demonstrated lack of causation, the burden shifts to plaintiff to raise triable issue of fact regarding causation or to explain any gap in treatment (*see Reyes v. Kashem*, 187 A.D.3d 1080, 131 N.Y.S.3d 175 [2 Dept., 2020]).

Here, plaintiff failed to raise a triable issue of fact. Plaintiff provided the sworn report of Dr. Mark Bursztyn, M.D., FAAOS, who treated plaintiff's left shoulder since 2016, and most recently examined plaintiff's left shoulder in January 2020. Dr. Bursztyn opined that there is a clear causal relationship between the May 11, 2016 motor vehicle accident and the left shoulder tear suffered by plaintiff and that the injury is permanent. At examination in July 2016, plaintiff had range of motion loss in his left shoulder up to 27.78%. At the most recent examination, plaintiff had up to 8.33% loss in left shoulder range of motion and a Positive O'Briens test (see NYSCEF Doc. # 44). However, Dr. Bursztyn failed to address the gap in treatment from February 7, 2018 to January 24, 2020. "[E]ven where there is objective medical proof, when additional contributory factors interrupt the chain of causation between the accident and claimed injury—such as a gap in treatment, ...—summary dismissal of the complaint may be appropriate" (*Pommells v. Perez*, 4 N.Y.3d 566, 830 N.E.2d 278 [2005]).

Accordingly, defendants' motion for summary judgment (sequence number 2) pursuant to Insurance Law § 5102(d) is granted.

ENTER:



Hon. Lara J. Genovesi
J.S.C.