Lewis v Kalker
2020 NY Slip Op 34708(U)
October 1, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 603335/19
Judge: Carmen Victoria St. George
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SUPREME COURT – STATE OF NEW YORK
TRIAL TERM, PART 56 SUFFOLK COUNTY

PRESENT:

Hon. Carmen Victoria St. George
Justice of the Supreme Court

JAYDEN J. LEWIS,

Plaintiff,

-against-

ELLIOT D. KALKER,

Defendant.

Index No.
603335/19

Motion Seq:
001 Mot D
Decision/Order

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Defendant seeks summary judgment dismissal of the complaint against him on the ground that the plaintiff has not sustained a serious injury within the meaning of Insurance Law § 5102 (d). Plaintiff opposes the requested relief.

Pursuant to his Bill of Particulars, plaintiff alleges that he suffered injuries to his cervical spine, lumbar spine and left shoulder, specifically bulging and herniated discs in his spine, radiculopathy, muscle spasms, reversal of the normal cervical and lumbar lordosis, and limited range of motion in those areas, combined with neck, back and left shoulder pain. Plaintiff claims injuries under the following categories of the Insurance Law: 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 use of a body function or system; and 4); a medically determined injury or impairment of a non-permanent nature which prevented plaintiff from performing substantially all of the material acts which constituted plaintiff's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment (90/180 claim).

As a proponent of the summary judgment motion, the defendant herein has the initial burden of establishing that plaintiff did not sustain a causally related serious injury under the categories of injury claimed in the Bill of Particulars (*see* ***Toure v Avis Rent a Car Sys.***, 98 NY2d 345, 352 [2002]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact (***Cauthers v. Brite Ideas, LLC,*** 41 AD3d 755 [2d Dept 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the plaintiff (***Makaj v. Metropolitan Transportation Authority***, 18 AD3d 625 [2d Dept 2005]).

The proponent of a summary judgment motion must tender sufficient evidence to demonstrate the absence any material issue of fact (***Winegrad v. New York University Medical Center***, 64 MY2d 851, 853 [1985]). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (***Id.***) "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (***Alvarez v. Prospect Hospital***, 68 NY2d 320, 324 [1986]).

A defendant can satisfy the initial burden by relying on the sworn statements of defendant's examining physician and plaintiff's sworn testimony, or by the affirmed reports of plaintiff's own examining physicians (***Pagano v Kingsbury***, 182 AD2d 268, 270 [2d Dept 1992]). A defendant can demonstrate that plaintiff's own medical evidence does not indicate that plaintiff suffered a serious injury and that the alleged injuries were not, in any event, causally related to the accident (***Franchini v Palmieri***, 1 NY3d 536, 537 [2003]). Defendant's medical expert must specify the objective tests upon which the stated medical opinions are based and, when rendering an opinion with respect to plaintiff's range of motion, must compare any findings to those ranges of motion considered normal for the particular body part (***Browdame v. Candura***, 25 AD3d 747, 748 [2d Dept 2006]).

The Court notes that, a tear in tendons, as well as a tear in a ligament or bulging disc is not evidence of a serious injury under the no-fault law in the absence of objective evidence of the extent of the alleged physical limitations resulting from the injury and its duration (***Little v. Locoh***, 71 AD3d 837 [2d Dept 2010]; ***Furrs v. Griffith***, 43 AD3d 389 [2d Dept 2007]; ***Mejia v. DeRose***, 35 AD3d 407 [2d Dept 2006]). Thus, regardless of an interpretation of an MRI study, plaintiff must still exhibit physical limitations to sustain a claim of serious injury within the meaning of the Insurance Law. Furthermore, to qualify as a serious injury within the meaning of the statute, "permanent loss of use" must be total (***Oberly v. Bangs Ambulance Inc.***, 96 NY2d 295, 299, [2001]).

In support of his motion, the defendant submits, *inter alia*, the pleadings, plaintiff's deposition transcript, the affirmed reports of his examining expert physicians (Drs. Healy and Berkowitz), MRI reports concerning plaintiff's cervical and lumbar spine areas, plaintiff's physical therapy and treatment records, and a narrative report of Stuart Hershon, M.D.

Dr. Hershon's report is submitted with defendant's moving papers, but defendant does not rely upon that report to establish his *prima facie* entitlement to summary judgment.

Defendant submits, "that through the Affirmations of Dr. William A. Healy, III and Dr. Jessica F. Berkowitz, defendant has met his *prima facie* burden showing that plaintiff did not sustain a serious injury. . ." (Affirmation, ¶ 103), and "that through the affirmed report of Dr. William A. Healy, III, defendant has met his *prima facie* burden. . ." (Memorandum of Law, p. 16). Accordingly, submission of Dr. Hershon's report is a matter of concern to this Court since that report is not relied upon by defendant and because it was prepared in connection with plaintiff's no-fault claim but was not the product of the discovery process in this litigation. In contrast, the reports of Drs. Healy and Berkowitz (the independent orthopedic examination and the independent radiological review, respectively) are the product of the litigation discovery process.

In view of the statutory and regulatory design of New York's no-fault automobile insurance laws, especially 11 NYCRR 65-3.2 where the principle that a person involved in an automobile accident who makes a claim for no-fault benefits is not to be treated as an adversary by an insurer is promulgated, the use of a no-fault examination in an adversarial proceeding is not condoned (*see* ***State Farm Mutual Automobile Insurance Company v. 21st Century Pharmacy, Inc.***, 2020 US Dist LEXIS 24646 at 16-23 [EDNY 2020]; ***Rowe v. Wahnow***, 26 Misc3d 8, 10-13 [App Term 1st Dept 2009]). Closely aligned with this issue is the holding of the Court of Appeals in ***Dermatossian v. New York City Transit Authority*** (67 NY2d 219, 224 [1986]). In that case, the Court held that proof of no-fault benefits paid to an individual should not have been admitted into evidence in the underlying litigation because there are "compelling reasons of policy supporting our holding that the proof that benefits were paid should have been excluded. A rule permitting the use of such evidence against insureds would work against the primary purpose underlying the No-Fault Law—to assure claimants of expeditious compensation for their injuries through prompt payment of first-party benefits without regard to fault and without expense to them" (Id. at 224-225).

The purpose of the examination of plaintiff made by Dr. Hershon in this case was to assess plaintiff's continued eligibility for first-party benefits as a vital part of the overall no-fault insurance scheme, not part of the adversarial process represented by this action; accordingly, the Court will not consider Dr. Hershon's report, especially since defendant makes clear that he does not rely on Dr. Hershon's report in support of his *prima facie* burden.

Defendant has submitted the affirmed report of his examining orthopedic surgeon, Dr. Healy, who examined plaintiff on November 27, 2019. Dr. Healy's report states that "[a]ll range of motion was performed under direct visual inspection;" therefore, it does not appear that Dr. Healy employed an objective means of measurement for the range of motion values set forth in his report. Also, Dr. Healy has not stated the source of the normal range of motion values to which he compared plaintiff's measurements. There is no indication that Dr. Healy administered any other type of objective tests to the plaintiff aside from range-of-motion testing. Lacking an objective means of measurement and a source for the normal values, Dr. Healy's conclusions are rendered speculative, and his report fails to objectively demonstrate that the plaintiff did not suffer a permanent consequential or significant limitation of use of the alleged affected areas of his body.

Dr. Berkowitz's expert radiological review of the MRI studies performed on plaintiff's lumbar and cervical spine areas is at odds with the MRI reports in some significant respects. The lumbar spine MRI report from the study performed on February 1, 2019, approximately three months after the subject accident, states that there is a "straightening of the normal lumbar lordosis," "consistent with an element of muscle spasm," and that "[t]here is a broad-based disc herniation" in the L4-L5 area. In contrast, Dr. Berkowitz states that, "[t]he normal lumbar lordosis is maintained. No disc bulges or herniations are present," and "[u]nremarkable MRI of the lumbar spine." Although Dr. Berkowitz states that there is no causal relationship between the subject accident and the findings on the MRI examination, and that there is no evidence of acute traumatic injury to plaintiff's lumbar spine, she does not explain or account for the clear contrast between her assessment and the findings as stated in the MRI report concerning the broad-based disc herniation at L4-L5 and the straightening of the normal lumbar lordosis, or how such findings might impact her impressions/opinions.

As to the MRI of plaintiff's cervical spine, the report dated February 1, 2019 states that "[t]here is reversal of the normal cervical lordosis," "consistent with an element of muscle spasm;" that "[t]here is posterior bulging of the intervertebral discs" at C4-C5, and that, "[t]here is posterior bulging of the intervertebral discs" at C5-C6. Dr. Berkowitz writes that there is straightening "with slight reversal of the normal cervical lordosis," that there is an "extremely small central disc herniation" at C4-C5, but she further states that there are "[n]o other disc bulges or herniations [ ] visualized," which is in contrast to the MRI report of the bulging intervertebral discs at C5-C6. In discussing the "slight reversal" of the normal lordosis and the "extremely small" central disc herniation at C4-C5, Dr. Berkowitz writes that "[t]he etiology of this disc herniation cannot be definitely determined on the basis of MRI review alone," so her further statement that there is no evidence acute traumatic injury to the cervical spine is thereby undermined and thus rendered speculative.

Based upon the foregoing, the defendant has failed to establish his *prima facie* entitlement to summary judgment as to the permanent consequential and significant limitation of use categories of injury alleged in plaintiff's Bill of Particulars. Accordingly, the Court need not consider the plaintiff's opposition papers with regard to these categories of injury.

Plaintiff's deposition testimony and the records of his treating physician/physical therapist, however, establish defendant's *prima facie* entitlement to summary judgment as a matter of law as to plaintiff's 90/180 and permanent loss of use claims (***Oberly***, ***supra***; ***Kuperberg v. Montalbano***, 72 AD3d 903 [2d Dept 2010]; ***Sanchez v. Williamsburg Volunteer of Hatzolah, Inc.***, 48 AD3d 664 [2d Dept 2008]).

There is no proof either in his own deposition testimony, or in his treatment records, that the plaintiff has sustained a permanent loss of use of any of his body parts as contemplated by the Insurance Law and clarified in ***Oberly***, ***supra***.

There is also no medical evidence that plaintiff was prevented from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or

impairment. There are no recommendations in the submitted records from medical personnel restricting plaintiff's daily activities, but only the following vague statements: 1) "Physical activities such as lifting, carrying, bending, pulling, prolonged periods of standing on feet or sitting, climbing stairs etc., are restricted." This statement, in context, appears to be based upon plaintiff's own reporting rather than representing a specific recommendation by Dr. Harhash that plaintiff refrain from a particular activity(ies). 2) "Patient was educated and given instruction for activity modifications to alleviate his pain and increase his function to his maximum safe potentials." The activities are not specified. In the "Instructions" section of the physical therapy reports, no restrictions on plaintiff's activities are listed.

Moreover, plaintiff's own Bill of Particulars alleges that he missed only one day of work and one day of school and was confined to home and bed for only two days immediately following the subject accident (*see* ***Gaddy v. Eyler***, 79 NY2d 955, 958 [1992] [plaintiff missed only two working days and returned to her duties at work, maintaining most of her daily routine]).

Plaintiff also testified that he did not lose consciousness, was not bleeding, and did not feel pain at the accident scene. He responded in the negative when asked by the responding police officer if he wanted an ambulance, and he did not seek treatment in a hospital emergency room afterward. When he felt pain in his neck, back and shoulder at about 2:00 or 3:00 a.m. on the morning following the accident, he did not take any medication, but called a doctor later in the morning. He found Dr. Harhash by conducting an online search, and he saw Dr. Harhash two days after the accident. Plaintiff testified that he attended some physical therapy sessions, although he did not attend as many sessions as recommended by Dr. Harhash and/or the physical therapist. Plaintiff also refused to have injections to his neck, and he took the muscle relaxer prescribed by Dr. Harhash only once. Plaintiff continued to work part-time and attend college after the accident.

Although plaintiff testified that he still experiences pain in his neck, shoulders and lower back, and he can no longer wrestle with his 14-year-old brother and 10-year-old sister, or pick up his 60-pound dog, there are no other activities that he can no longer do as a result of the subject accident. He testified that he experiences difficulty/pain in putting on his shoes and clothes, but he is able to dress and groom himself. He also stated that he has difficulty sleeping because of his back pain and is limited in helping his mother do chores around the house, like cleaning the tub and bringing in groceries. When asked if there were other household chores that he could not do or finds more difficult to do, plaintiff answered, "[t]here's more, but I can't—it does not come to mind right now." Despite these stated difficulties, plaintiff was able to vacation in Puerto Rico with his girlfriend from May 30, 2019 to June 2, 2019.

Thus, plaintiff's own deposition testimony is insufficient to demonstrate that he was prevented from performing substantially all of his customary daily activities for not less than 90 days during the 180 days immediately following the subject accident (***Omar v. Goodman***, 295 AD2d 413 [2d Dept 2002]; ***Lauretta v. County of Suffolk***, 273 AD2d 204 [2d Dept 2000]).

In opposition, plaintiff has failed to raise a triable issue of fact as to the two categories of injury for which defendant has demonstrated his *prima facie* entitlement to summary judgment as a matter of law: 1) permanent loss of use and 2) 90/180 claim.

Plaintiff submits the MRI reports concerning his cervical and lumbar spine areas, which do not assist in raising a triable issue of fact as to these two categories of injury. Plaintiff also submits a narrative report from Dr. Harhash dated May 29, 2020. There is nothing in Dr. Harhash's report that remotely supports plaintiff's permanent loss of use and/or 90/180 claims. In this new narrative, Dr. Harhash makes the identical vague statement: "Physical activities such as lifting, carrying, bending, pulling, prolonged periods of standing on feet or sitting, climbing stairs etc., are restricted." As noted herein, this statement appears to be based upon plaintiff's own reporting rather than representing a specific recommendation by Dr. Harhash that plaintiff refrain from a particular activity(ies). Subjective complaints of pain do not qualify as serious injury within the meaning of Insurance Law §5102(d) (*see* ***Toure, supra; Scheer v Koubek***, 70 NY2d 678, 679 [1987]; ***Munoz v Hollingsworth***, 18 AD3d 278, 279 [1st Dept 2005]). Furthermore, a plaintiff cannot defeat a motion for summary judgment, and successfully rebut a *prima facie* showing that he did not sustain a serious injury, merely by relying on documented subjective complaints of pain (***Uddin v Cooper***, 32 AD3d 270, 271 [1st Dept 2006] *lv to appeal denied* 8 NY3d 808 [2001]).

Accordingly, plaintiff has failed to raise a triable issue of fact as to these two categories of injury.

Defendant's summary judgment motion is denied as to the permanent consequential and significant limitation of use categories of injury, but the motion is granted as to plaintiff's permanent loss of use and 90/180 claims.

The foregoing constitutes the Decision and Order of this Court.

Dated: October 1, 2020
Riverhead, NY

CARMEN VICTORIA ST. GEORGE, J.S.C.

FINAL DISPOSITION [ ] NON-FINAL DISPOSITION [X]