Hardin v Shaor
2021 NY Slip Op 30132(U)
January 14, 2021
Supreme Court, Kings County
Docket Number: 516395/2018
Judge: Lillian Wan

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 17

----------X

DARRYL HARDIN,

Plaintiff,

– against –

ABDUL SHAOR,

Defendant.

----------X

Index No.: 516395/2018
Motion Date: 01/13/2021
Motion Seq.: 02

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 02) 25-35, 38-52, and 58 were read on this motion for summary judgment.

The defendant seeks an order granting summary judgment based on Insurance Law § 5102(d), claiming that the plaintiff's injuries fail to meet the "serious injury" threshold as required by the statute. The plaintiff has filed opposition to the motion. For the reasons set forth below, the defendant's motion is denied.

The plaintiff commenced this action to recover damages for personal injuries he alleges were sustained in a motor vehicle accident. Plaintiff claims that the vehicle he was driving was struck in the rear by the vehicle driven by the defendant, Abdul Shaor, on May 31, 2017, at or near the intersection of Utica Avenue and Eastern Parkway. Pursuant to the Verified Bill of Particulars, the plaintiff alleges that he suffered permanent and serious injuries to the lumbar spine, cervical spine, and right knee. Plaintiff states that as a result of injuries sustained in the accident, he underwent surgery for right L2-L5 hemilaminectomies, left L4-L5 hemilaminectomy, and bilateral nerve root compression of L3-L5, with the use of microscope and fluoroscopy. The preoperative lumbar spine diagnosis was L2-S1 stenosis, disc herniation, and nerve impingement. The plaintiff further asserts that his injuries were either caused or exacerbated by the accident and that he has been unable to resume his pre-accident way of life which included, *inter alia*, physical recreational activities and/or sports, and performing general household chores. The plaintiff further contends that he was "partially and totally" confined to bed and home beginning May 31, 2017 and intermittently thereafter for a period in excess of 90 days. The plaintiff also states that he was "partially and totally" confined to bed and home after his lower back surgery beginning November 13, 2017, and intermittently thereafter, for a period in excess of 90 days.

In support of the motion, the defendant submits the pleadings, the Verified Bill of Particulars, the plaintiff's deposition testimony, the affirmed narrative report of Dr. Dana Mannor, a board-certified orthopedic surgeon, and the affirmed reports of Dr. Audrey Eisenstadt, a board-certified radiologist. Dr. Mannor examined the plaintiff on June 12, 2019. Her report indicates that she reviewed the plaintiff's Verified Bill of Particulars and the police accident report.

With the use of a goniometer, Dr. Mannor performed a range of motion examination of the plaintiff's cervical spine, lumbar spine, and right knee. The objective findings of Dr. Mannor revealed decreased range of motion in the lumbar spine. Specifically, the range of motion in flexion was 50 degrees (60 degrees normal) and extension to 10 degrees (25 degrees normal). Dr. Mannor opined that the lumbar spine surgery performed on November 13, 2017 had healed by the time she had examined the plaintiff, but did not address the plaintiff's surgery any further. Dr. Mannor further opined that the orthopedic examination was objectively normal and indicated no findings which would result in orthopedic limitations in use of the examined body parts, and that the plaintiff is capable of functional use of the examined body parts for normal activities of daily living. Despite the abnormal range of motion findings, Dr. Mannor found that the plaintiff presented with a normal orthopedic examination on all objective testing and that his subjective complaints did not correlate with negative clinical test results. Furthermore, Dr. Mannor did not address whether the plaintiff was able to substantially perform all his normal and daily activities for 90 out of the 180 days immediately following the accident.

The reports of Dr. Eisenstadt, all dated August 28, 2019, indicate that she reviewed the CT scans and MRIs of the lumbar spine and cervical spine from June and July of 2017 and the CT scan of the right knee from June 2017. Upon review of the CT scan of the plaintiff's lumbar spine, Dr. Eisenstadt opined that the film showed loss of disc space height at the L3-4 and L4-5 intervertebral disc levels, facet joint hypertrophy at L3-4 through L5-S1 intervetebral disc levels, and bulging of the L2-3 through L4-5 disc levels. Likewise, upon review of the MRI of the lumbar spine, Dr. Eisenstadt found desiccation of the L2-3 intervertebral disc level, degeneration at the L3-4 and L4-5 intervetebral disc levels, bulging of the disc material at L2-3 through L4-5, facet joint hypertrophy at the L2-3 through L5-S1 levels, spinal stenosis at L2-3 and L3-4, and endplate degenerative signal change at L3-4. According to Dr. Eisenstadt, the lumbar spine studies reveal no evidence of any post-traumatic osseous, ligamentous or intervertebral disc changes, and she attributed any changes to pre-existing degeneration and arthritis. The radiological findings of the cervical spine included, among other things, degeneration of the C3-4 intervertebral disc level, desiccation of the C2-3 through C6-7 intervertebral disc levels, a small C2-3 disc herniation, and bulging and disc herniation at C3-4 intervertebral disc level. Dr. Eisenstadt states that the cervical spine studies also reveal degeneration rather than traumatic injury, and that there is no infection, no joint effusion, or soft tissue induration to indicate any inflammation, recent surgery, or current injury causally related to the subject accident. Dr. Eistenstadt's review of the CT scan of the right knee revealed, among other things, tricompartmental degenerative joint disease.

The defendant also submits the deposition testimony of the plaintiff and concludes that his testimony did not establish that he could not perform substantially all of the material acts that constitute his usual and customary activities for 90 of the 180 days immediately following the accident under Insurance Law § 5102(d). The defendant also argues that the plaintiff was only confined to his bed for two weeks and that he was unemployed at the time of the accident.

A motion for summary judgment is granted in favor of the moving party where there are no material issues of fact, and as a result, the moving party is entitled to judgment as a matter of law. *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986). As the proponent of the summary judgment motion, the defendants have the initial burden of establishing that the plaintiff did not

sustain a serious injury under the categories of injury claimed in his Bill of Particulars. *See Toure v Avis Rent A Car Sys.*, 98 NY2d 345 (2002). Once the defendant has made a *prima facie* showing that the plaintiff did not sustain a serious injury, the burden shifts to the plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating that a triable issue of fact exists that the plaintiff sustained a serious injury. *See Gaddy v Eyler*, 79 NY2d 955 (1992).

The defendant's motion must be denied since he failed to meet his *prima facie* burden of showing that the plaintiff did not sustain a serious injury under the 90/180-day category of Insurance Law § 5102(d) as a result of the subject accident. *See Toure*; *see also Gaddy*. The papers submitted by the defendant failed to adequately address plaintiff's claim, as set forth in the Bill of Particulars, that he sustained a serious injury under this category of serious injury. *See Che Hong Kim v Kossoff*, 90 AD3d 969 (2d Dept 2011). Furthermore, the medical report of Dr. Mannor was based upon an examination conducted two years after the accident and did not address plaintiff's medical condition during the 90/180-day period. *See Greenidge v Righton Limo, Inc.*, 43 AD3d 1109 (2d Dept 2006) (defendant's examining neurologist did not examine plaintiff until almost two years after the accident and did not relate his medical findings to the 90/180 category of serious injury). Moreover, neither plaintiff's deposition transcript nor his Bill of Particulars rule out the possibility that he suffered a serious injury under the 90/180-day category. *See Nicholson v Bader*, 105 AD3d 719 (2d Dept 2013); *Refuse v Magloire*, 83 AD3d 685 (2d Dept 2011). Although the plaintiff testified that he was only confined to bed for two weeks following the surgery on November 13, 2017, he also stated that he did not leave his home until eight to ten months after the accident. Plaintiff further testified that during this period, he had to have his friend or brother take his child to and from elementary school, and that his friend had to go food shopping for him.

Additionally, the defendant's submissions do not eliminate issues of fact on any other category of serious injury under the statute. Significantly, when questioned about present complaints, the plaintiff testified that he has pain on a daily basis in his lower back, neck and right knee. He indicated that on a scale of one to ten, the lower back pain is a ten and the neck and right knee pain is a seven. The plaintiff further testified that his current pain interferes with daily activities such as cooking, washing clothing, shopping, taking his children out, and playing sports such as basketball, softball, bowling, and running. The plaintiff stated that, prior to the accident, he used to go to parks, petting zoos, and museums with his children. The plaintiff further acknowledged that he had a prior motor vehicle accident in 2007, which resulted in surgery to the right knee, as well as a 2013 accident that resulted in surgery to the left hip. However, the plaintiff also testified that during the year before the subject accident, he was not experiencing any complaints from the 2007 or 2013 accidents.

Considering the report of Dr. Mannor, defendant's own orthopedist, which finds decreased range of motion in the plaintiff's lumbar spine, together with the plaintiff's testimony, the Court cannot conclude that the defendant is entitled to judgment as a matter of law on the significant limitation of use, permanent consequential limitation of use, or 90/180 categories under the Insurance Law. *See Holtz v Y. Derek Taxi*, 12 AD3d 486 (2d Dept 2004) (defendants failed to make a *prima facie* showing that plaintiff did not sustain a serious injury within

Insurance Law § 5102(d) where one of the defendant's examining physicians reported finding limitations of range of motion of plaintiff's cervical spine).

Since the defendant failed to meet his *prima facie* burden of showing that the plaintiff did not suffer a serious injury, it is unnecessary to consider the plaintiff's opposing papers in this regard. *See Winegrad v New York Univ Med. Ctr.,* 64 NY2d 851 (1985); *Fils-Aime v Colombo*, 152 AD3d 493 (2d Dept 2017); *Scinto v Hoyte*, 57 AD3d 646 (2d Dept 2008).

The remaining contentions are without merit.

Accordingly, it is hereby

ORDERED, that the defendant's motion for summary judgment (Motion 02) is DENIED.

This constitutes the decision and order of the Court.

DATED: January 14, 2021

Lillian Wan

HON. LILLIAN WAN, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020.