

Santiago v New York City Transit Authority
2007 NY Slip Op 34183(U)
December 4, 2007
Supreme Court, New York County
Docket Number: 0104854/2005
Judge: Donna Marie Mills
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SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : DONNA M. MILLS
Justice

PART 21

SANTIAGO, LUIS

Plaintiff,

-against-

NEW YORK CITY TRANSIT AUTHORITY, et al.,
Defendants.

INDEX No. 104854/05

MOTION DATE _____

MOTION SEQ. No. 001

MOTION CAL No. _____

The following papers, numbered 1 to 3 were read on this motion for _____.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits....

1

Answering Affidavits- Exhibits _____

2

Replying Affidavits _____

3

CROSS-MOTION: YES NO

FILED
DEC 19 2007
NEW YORK
COUNTY CLERKS OFFICE

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated: 12-4-07

D. Mills
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, I.A.S. PART 21

-----X
LUIS SANTIAGO,

Plaintiff,

-against-

Index No. 104854/05

NEW YORK CITY TRANSIT AUTHORITY and
MANHATTAN AND BRONX SURFACE TRANSIT
OPERATING AUTHORITY,

Defendants.
-----X

MILLS, J.:

Defendants New York City Transit Authority and Manhattan and Bronx Transit Operating Authority, move pursuant to CPLR 3211 (a) (7) and 3212, for summary judgement dismissing the complaint on the ground that plaintiff Luis Santiago has not sustained a serious injury as defined by New York's No-Fault Law (Insurance Law § 5102 [d]) after being injured by a bus while riding his bicycle. Plaintiff contends that summary judgment must be denied as there are issues of fact raised by certified medical records and the report of his examining physician as to the seriousness of his injuries.

FACTUAL ALLEGATIONS

Plaintiff and Elba Bonilla were riding bicycles on July 4, 2004, in the vicinity of Central Park South and Seventh Avenue. While approaching the intersection of Central Park South and Seventh Avenue, plaintiff observed a bus in the intersection. Fearing that the bus would hit Ms. Bonilla, plaintiff pushed her out of the way and applied his brakes. At this point, the bus was directly next to plaintiff. The front tire of plaintiff's bicycle came into contact with the bus,

causing plaintiff to fall from the bicycle. The side of the bus scraped against the right side of plaintiff's body from his arm to his knee. The bus continued after the contact with plaintiff and did not stop.

Plaintiff testified that following the accident he felt pain in his right arm from the shoulder down to the arm as well as his in his right knee. Plaintiff was treated by EMT workers at the scene of the accident as he was bleeding from his right shoulder and right knee. After being taken to St. Vincent's Hospital, plaintiff received bandages for his shoulder, arm, and knee. While no x-rays were performed, plaintiff was given painkillers.

Shortly thereafter, plaintiff came under the care of Elliot Cohen, M.D., at Parkchester Medical Services located in Bronx, New York.¹ While treating at Parkchester Medical Services, plaintiff was referred to Williamsbridge Radiology for an MRI of his head and leg. The MRI taken on August 20, 2004, indicated that plaintiff had an impingement, an abnormal signal in the rotator cuff likely due to partial rotator cuff tear or to inflammatory changes, and an old fracture on the inferior aspect of the glenoid process that can be associated with a bankhart lesion. As a result of the MRI, plaintiff was referred to physical therapy for eight months.²

Plaintiff filed a verified complaint on April 8, 2005 alleging that defendants caused plaintiff to suffer a serious injury as set forth under section 5102 (d) of New York State's Insurance Law. In plaintiff's verified bill of particulars, plaintiff alleges that as a result of the

¹ According to plaintiff's deposition, plaintiff visited Dr. Bazu of Parkchester Medical Services on July 5, 2007. (Plaintiff's EBT, at 31). However, the medical records submitted by plaintiff include two visits with Dr. Bazu which took place on July 7, 2004 and September 1, 2004.

² Defendants contend that the physical therapy records indicate that plaintiff's last date of physical therapy treatment was on February 18, 2005.

accident, his injuries included trauma and abrasions to his right shoulder arm, hand and knee; contusions to his right shoulder, arm and leg; impingement upon the supraspinatus muscle; abnormal signal in the rotator cuff likely due to partial rotator cuff tear; and pain and tenderness on the right shoulder, arm, elbow, hip, and knee. Plaintiff states that due to his injuries, he can not bowl, fish or play baseball as he is right hand dominant and cannot raise his arm above his shoulder.

In support of their motion for summary judgment, defendants rely on the affirmed medical report of Jacquelin Emmanuel, M.D., an orthopedic surgeon, who examined the plaintiff on October 25, 2004. According to Dr. Emmanuel's report, she reviewed the physical examination report dated July 7, 2004 and the progress and treatment notes from Parkchester Medical Services dated July 21, 2004 and September 1, 2004.³ At the examination, plaintiff complained of occasional right hand pain and right leg pain, continued lower back, right shoulder and right arm pain with numbness and tingling to the right shoulder.

Dr. Emmanuel states that plaintiff had full range of motion of the cervical spine and right and left rotation. Upon neurologic examination, Dr. Emmanuel states that there are no motor or sensory deficits, normal muscle strength in each range with no radiating pain, normal biceps and triceps reflexes, firm grasping power in both hands, no finger locking or snapping and no atrophy. Dr. Emmanuel also found a normal range of motion of the lumbar spine and the left shoulder, no swelling or tenderness found in his right hand and a normal range of motion and no joint line tenderness or effusion of his right knee. Straight leg raising was negative to 75 degrees

³ Plaintiff contends that although Dr. Emmanuel's report states that plaintiff had an MRI of the right shoulder, the report fails to state whether she reviewed the MRI.

in both the seated and supine positions.

Dr. Emmanuel concludes that plaintiff has recovered from sprains of the cervical spine, the lumbar spine, the right shoulder and the right hand, and the contusion of the right knee has been resolved. Dr. Emmanuel states that in her opinion, plaintiff has no disability and his prognosis is good.

In opposition to the motion for summary judgment, plaintiff relies on the affirmed medical report of Barry Sloan, D.O., who examined the plaintiff on February 6, 2007. Dr. Sloan states that at his visit, plaintiff complained of persistent headaches and neck pain with radiation to the right shoulder and right upper extremity.

Dr. Sloan states that an examination of the cervical region revealed bilateral paravertebral muscle spasm and that a cervical forminal compression test was positive on the right with radiation of pain down the right upper extremity. Dr. Sloan states there was diminished sensation in the right C5-6 and C7 dermatomal distributions and diminished reflexes in the right biceps, right brachioradialis and right triceps. There was weakness of the right deltoid in abduction, right brachioradialis and right deltoid in abduction, right brachioradialis and right flexor carpi ulnaris muscles.

Dr. Sloan states that there was a limited range of motion of the cervical spine region, right shoulder tenderness to light palpation over the acromial clavicular, lateral and posterior joint lines while examination of the lumbar region reveals paravertebral muscle spasm on the right greater than the left. Straight leg raising was positive on the right at the 40 degrees with radiation of pain, numbness and tingling down the right lower extremity. The Braggard's sign was

positive on the right.⁴ There was also weakness of the right ankle dorsiflexors and plantarflexors against resistance and diminished sensation along the L5 and S1 dermatomes on the right.

Dr. Sloan concludes that plaintiff sustained significant limitations of his cervical spine and permanent limitation to his right shoulder as a result of the accident. Dr. Sloan states that plaintiff has functional limitation of motion, in the neck, back and right shoulder which have significantly diminished his range of motion and which he believes to be permanent.

DISCUSSION

Section 5102(d) of the New York State's Insurance Law defines the term "serious injury" as:

a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

Defendants argue that upon viewing the facts most favorable to the plaintiff, it is clear that plaintiff's injuries are not serious as defined by section 5102(d) of the Insurance Law as plaintiff does not have a significant limitation of use of a body function or system. In addition, defendants contend that plaintiff has not alleged any specific amount of time that he was confined to either hospital or home as a result of his alleged injuries and no lost earnings are claimed as plaintiff was unemployed at the time of the accident.

⁴ The Braggard's test is utilized by the medical community which if causes pain is indicative of sciatic nerve involvement.

Defendants have met their burden of establishing that plaintiff did not sustain a serious injury by submitting the report of their independent examining physician, Dr. Emmanuel, who concluded plaintiff has recovered from sprains of the cervical spine, the lumbar spine, the right shoulder, the right hand, and the contusion of the right knee. Dr. Emmanuel concludes that, in her opinion, plaintiff has no disability as a result of the July 4, 2004 accident.

As defendants have met their burden, the burden shifts to the plaintiff to come forward with evidence to prove that he sustained a serious injury within the meaning of the Insurance Law. *Gaddy v Eycler*, 79 NY2d 955, 957 (1992); *Shinn v Catanzaro*, 1 AD3d 195, 197 (1st Dept 2003). Viewing the evidence in the light most favorable to the plaintiff, there is a triable issue of fact as to whether plaintiff has permanent motion limitations.

The Court of Appeals has held that whether a limitation of use or function is significant or consequential “involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part.” *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 353 (2002), quoting *Dufel v Green*, 84 NY2d 795, 798 (1995). “In order to prove the extent or degree of physical limitation, an expert may designate a numeric percentage of a plaintiff’s loss of range of motion or may make a qualitative assessment of plaintiff’s condition, provided that the latter evaluation has an objective basis and compare the plaintiff’s limitations to the normal use of the affected body system or function.” *Shinn v Ctanzaro*, 1 AD3d at 198. In addition, the Court of Appeals has held that a significant limitation must be something more than a “minor, mild or slight limitation of use.” *Gaddy v Eycler*, 79 NY2d at 957, quoting *Licari v Elliott*, 57 NY2d 230, 236 (1982).

Here, Dr. Sloan’s conclusions regarding plaintiff’s range of motion differ greatly from the

conclusions of Dr. Emmanuel. While Dr. Emmanuel states that plaintiff does not have range of motion limitations, Dr. Sloan opines that based upon his tests and physical examination of plaintiff, plaintiff has permanent functional range of motion limitations in the neck, back and right shoulder. For example, Dr. Sloan states that the cervical spine revealed flexion to 35 degrees when the normal range of motion was 60 degrees, anterior flexion of the right shoulder was 130 degrees when the normal range of motion was 170 degrees, and flexion of the lumbar spine was 35 degrees when the normal range was 60 degrees. As Dr. Sloan's affirmation contains medical evidence to raise a triable issue as to whether plaintiff sustained a serious injury, inasmuch as he conducted range of motion tests and leg raising tests and determined that there were limitations on plaintiff's range of motion, summary judgment must be denied. *Ramos v Dekhtyar*, 301 AD2d 428, 429 (1st Dept 2003).

Defendants contend that as plaintiff did not have any further treatment for injuries sustained in the accident after February 18, 2005 and as there was a lack of follow up appointments at the hospital, the nature of plaintiff's injuries are limited. Plaintiff argues that Dr. Cohen advised him that he had reached the maximum benefit from physical therapy and that his neck and back condition were permanent and that his shoulder may recover with surgery. However, plaintiff fails to submit any medical reports from Dr. Cohen to substantiate this alleged final prognosis regarding plaintiff's condition. The only prognosis reports submitted by plaintiff are the July 7, 2004 and September 1, 2004 reports of Dr. Bazu and the undated prognosis report of Dr. Cohen, wherein he advises plaintiff to start physical therapy.

Although a cessation of treatment is not dispositive, a plaintiff who terminates therapeutic measures following the accident, while claiming "serious injury," must offer some reasonable

explanation for having done so. *Pommells v Perez*, 4 NY3d 566, 574 (2005); *DeLeon v Ross*, ___ AD3d ___, 844 NYS2d 36, 38 (1st Dept 2007). While plaintiff does not provide Dr. Cohen's prognosis sheets, plaintiff does submit the affirmation of Dr. Sloan. Dr. Sloan states that he reviewed the hospital records from St. Vincent's Hospital as well as the certified medical records of Parkchester Medical Services including plaintiff's physical therapy records. Dr. Sloan states that plaintiff "received an adequate course of conservative treatment for eight (8) months and had reached maximum medical improvement when discharged by Dr. Cohen." (Sloan affirm., ¶ 2). Dr. Sloan also states that when he saw plaintiff on February 6, 2007, although plaintiff was "still showing signs and symptoms of his injuries and further treatment, while proving costly, would not significantly improve his condition." (*Id.*, ¶ 3).

Therefore, as a question of fact exists as to the nature and seriousness of plaintiff's injuries and as plaintiff offers an explanation for his cessation of treatment by the affirmation of Dr. Sloan, summary judgment must be denied.

CONCLUSION AND ORDER

Accordingly, it is hereby

ORDERED that defendants New York City Transit Authority and Manhattan and Bronx Transit Operating Authority motion for summary judgment is denied.

Dated: December 4, 2007

Enter: *Donna Mills*

J.S.C.

DONNA M. MILLS, J.S.C.

FILED
 DEC 19 2007
 NEW YORK
 COUNTY CLERKS OFFICE