Morales v Oldcastle Glass, Inc.

2008 NY Slip Op 32261(U)

July 29, 2008

Supreme Court, New York County

Docket Number: 0116623/2005

Judge: Walter B. Tolub

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[* 1]
SCANNED ON 8/4/2008

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: WALTER B. TOLUB Justice

PART 15

Morales, C

INDEX NO. 116623/05

MOTION DATE

- v -

MOTION SEQ. NO. 01

Oldcastle Glass

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
AUG 01 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/29/08

WALTER B. TOLUB J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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CARLOS MORALES and OLGA MORALES,

Plaintiffs,

-against-

OLDCASTLE GLASS, INC., a/k/a OLDCASTLE NEW YORK, a/k/a FLORAL GLASS and CT CORPORATION SYSTEM,

Defendants.

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Index No. 116623/05
Mtn Seq. 001

FILED
AUG 01 2008
COUNTY CLERK'S OFFICE
NEW YORK

WALTER B. TOLUB, J.:

By this motion Defendant Oldcastle Glass, Inc., (Oldcastle) seeks summary judgment dismissing Plaintiffs' complaint in its entirety pursuant to CPLR §3212.

Facts

On November 10, 2004, Oldcastle was delivering panes of glass to McKenzie Group at its Manhattan office. Plaintiff Carlos Morales ("Plaintiff" or "Morales"), the Shop Foreman of McKenzie Group, for disputed reasons, was helping an Oldcastle employee unload the glass panes. During the unloading process the glass pane either slipped or was let go and fell onto Plaintiff's leg.

On the evening of the incident, Plaintiff was brought to the Peninsula Hospital Center where he complained of pain and swelling in his left leg which radiated above his left knee. The medical records from that day indicate that the Plaintiff

sustained soft tissue swelling and a hematoma[1] in his left calf. (LaFond Aff. Exs. G-K). Plaintiff left the hospital that same evening.

Then, on November, 16, 2004, Plaintiff went to North Shore University Hospital complaining of pain in his left calf. Plaintiff was hospitalized for five days to ascertain whether Plaintiff had compartment syndrome[2]. X-Rays and an MRI of Plaintiff's left leg and knee revealed no fractures.

Plaintiff was discharged from the hospital on November 20, 2004 after all his tests came back negative and stating to the doctors and nurses that he felt better, that his pain decreased and that he only had mild calf tenderness. In his discharge diagnosis, Dr. Kerker stated that the Plaintiff had trauma to the skin and a slightly swollen leg but that he did not have compartment syndrome. Plaintiff was discharged to his home on Keflex and instructed to see Dr. Shastri the following week.

On December 20, 2004, Dr. Fazzini, a neurologist, issued a report and a rehabilitation plan. The plan consisted of therapy 3-4 times per week for 4-6 weeks followed by a re-evaluation. The doctor also stated that Plaintiff could return to full work

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[1]The American Heritage Dictionary defines a hematoma as: a localized swelling filled with blood resulting from a break in a blood vessel.

[2]A condition where internal bleeding builds up excessive pressure on arteries, nerves bones and muscle mass causing permanent damage.

duty on December 27, 2004. Thereafter he returned to work.[3]

On December 28, 2004, the attending physician K.V. Krishanastry, MD, saw Plaintiff for a follow up visit and noted that the hematoma was resolving in his left leg, that there was no evidence of compartment syndrome, that he was ambulating normally and that he had no symptoms of pain or symptoms of infection.

Plaintiff underwent rehabilitative therapy at Five Towns Medical Care, PC from December 2004 through June 2005. There is no indication of treatment after this time.

Plaintiff commenced this action against Oldcastle on November 22, 2005 claiming serious injury and that defendant was negligent in handling and securing the glass panes. Plaintiff's wife, Olga Morales, seeks damages for loss of consortium as a result of her husband's injuries.

At some point at the end of 2005 or in early 2006, Plaintiff moved to Puerto Rico and began working for St. James Security as a security guard for over two years. While in Puerto Rico, Plaintiff went to an orthopedist, Dr. Ortiz. Dr. Ortiz met with Plaintiff twice, once on March 17, 2006 and once on February 25, 2008.

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[3]Although Plaintiff's attorney vaguely states in his affirmation that at some point Plaintiff was forced to leave his job because of his condition. However, the record is void of any indication as to what Plaintiff's responsibilities were at McKenzie Group or even when he left his employment.

In Dr. Ortiz's March 17, 2006 report he states:

> In my opinion, with a reasonable degree of medical certainty this injury is causally related to the accident of 11/10/04. The condition is permanent and equal to a schedule loss of 15% in the left leg. . .

Dr. Ortiz's report dated February 25, 2008 states:

> Patient needs to be examined on a regular basis for this condition. Periodic rehab sessions are indicated. In my opinion, with a reasonable degree of medical certainty this injury is causally related to the accident of 11/10/04. The condition is permanent and equal to a schedule loss of use of 15% in the left leg. . .

Defendant argues that regardless of the cause of the injury, Plaintiff did not sustain a serious injury as defined by Article 51 of the Insurance law and that therefore the complaint should be dismissed. Plaintiff argues that there are issues of fact precluding summary judgment.

Discussion

To prevail on its motion for summary judgment, Defendant has the initial burden of establishing that it is entitled to summary judgment. Once the moving party has satisfied it s burden, it shifts to the Plaintiff to establish by admissible evidence the existence of a factual issue requiring a trial of the action (GTF Marketing, Inc. v. Colonial Aluminum Sales, Inc., 66 NY2d 965 [1985]). Here, the issue presented is strictly whether Plaintiff sustained a "serious injury" as defined by Article 51 of the

Insurance Law.

Applicability

Recovery of no-fault benefits under Article 51 of the Insurance Law, also known as the "No Fault Law", requires that the plaintiff's injuries arise out of the "use or operation" of a motor vehicle, and that plaintiff sustain a "serious injury" as defined in the statute. The vehicle must also be the proximate cause of plaintiff's injury (Walton v. Lumbermens Mut. Cas. Co., 88 NY2d 211 [1996]). Here, plaintiff claims he was injured while assisting with the unloading of a delivery truck. The loading and unloading of a vehicle constitutes the "use or operation" of a motor vehicle under Article 51 of the Insurance Law (Argentina v. Emery World Wide Delivery Corp., 93 NY2d 554 [1999]). That being said, the No Fault statute applies to this case.

Purpose of No-Fault Law

The No Fault Law was adopted by the Legislature to assure the prompt and full compensation for economic loss and to provide for non-economic loss in case of serious injury (Oberly v. Bangs Ambulance, Inc., 96 NY2d 295 [2001] *citing* Montgomery v. Daniels, 38 NY2d 41[1975]). Article 51 of the Insurance Law defines serious injury as:

> "Serious injury" means 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 nonpermanent 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.

Insurance Law §5102(d).

The term "serious injury" is narrowly defined. The No Fault law was adopted by the Legislature to correct recognized problems under the common law tort system of compensating automobile accident claimants (Licari v. Elliot, 57 NY2d 230 [1982]). Tacit in the enactment is that any injury not falling within the statutory definition of serious injury, is minor and a trial by jury is not permitted under the no-fault system (Id.). This court is required to answer the threshold question of whether the Plaintiff has established a prima facie case that he sustained a serious injury within the meaning of the statute.

Although the statute sets forth eight specific categories of serious injury, from what can be gleaned from the parties papers, we are only concerned with whether the Plaintiff suffered a serious injury with regard to: (1)permanent consequential limitation of use of a body organ or member; (2)significant limitation of use of a body organ or member; and (3) a medical determined injury or impairment of a non-permanent nature which

prevents the injured person from performing the usual and customary daily activities for no less than ninety days during the one hundred and eighty days immediately following the occurrence of the injury or impairment.

Permanent Consequential Limitation of a Body Organ or Member and Significant Limitation of Use of a Body Organ or Member

The No Fault Law was designed to keep minor personal injury cases out of court (Licari v. Elliot, 57 NY2d 230 [1982]). The words in the statute are construed in a manner consistent with the Legislative intent. The word "significant" as used in the statute pertaining to the limitation of use of a body member or function is construed to mean something more than a minor limitation of use (Id.). A minor, mild or slight limitation of use is classified as insignificant within the meaning of the statute (Id.).

A review of Plaintiff's *objective* medical records indicates that less than two months after the incident, the treating physician determined that the plaintiff showed no evidence of compartment syndrome, was ambulating normally and had no symptoms of infection or pain. Plaintiff's only symptom was swelling.

Plaintiff relied upon the reports of Dr. Ortiz to support his claim of serious injury. However, Dr. Ortiz first saw the Plaintiff on March 17, 2006 and then again on February 25, 2008, almost two years after the incident and after this action was

commenced by the Plaintiff.

Dr. Ortiz performed physical examinations on Plaintiff and found that, in relevant part: (1) his gait was normal; (2) his alignment was symmetrical; (3) when he stood on his toes he experienced "slight" discomfort in his left calf; (4) he could do a full squat with only a "tight" sensation in his left calf; (5) range of motion in both knees was normal; (6) ligaments are stable; (7) McMurray and Apley tests were negative on both sides; (8) no swelling in the knee joints; (9) patellar alignment and tracking were normal; (10) left calf was swollen; and (11) range of motion of the left ankle was normal and pain free. Dr. Ortiz concluded that the diagnosis was a contusion of the left calf with hematoma formation.

The examination revealed that the left knee and ankle were normal with no loss of range of motion and not restrictions were placed upon Plaintiff.

The objective medical evidence from the date of the accident through February 2008, demonstrate that Plaintiff sustained a hematoma. Plaintiff's claim that he feels pain and discomfort when he stands on his heels and toes and that he feels a tight sensation when he squats, does not overcome the classification of the injury as minor.

However, Dr. Ortiz states that "the condition is permanent and equal to a schedule loss of use of 15% of the left leg".

Dr. Ortiz's evaluations of Plaintiff's loss of leg use are of limited evidentiary value since, noticeably absent from his report, is an identification of any diagnostic test performed indication of what that finding was based on.

There are no objective medical findings and diagnostic tests that support Dr. Ortiz's conclusion that Plaintiff suffered a "permanent" injury with "significant limitations". The mere repetition of the word "permanent" in an affidavit of a treating physician is insufficient to establish serious injury and summary judgment should be granted when the plaintiff's evidence is limited to conclusory assertions tailored to meet statutory requirements (Lopez v. Senatore, 65 NY2d 1017 [1985]).

Plaintiff also argues that the "permanent loss" predicate does not require that there be a total loss of the use of a body organ or member, but rather that the permanency can be referred to as a constant pain. However, the Court of Appeals held that when Plaintiff's proofs indicate a soft tissue injury, as is the case in the instant action, pain may not form the basis of a serious injury under such circumstances (Scheer v. Koubek, 70 NY2d 678 [1987]). The subjective quality of Plaintiff's pain does not fall within the objective verbal definition of serious injury as contemplated by the No Fault Insurance Law (Id., *citing* Licardi v. Elliot, 57 NY2d [1982] *see also* Flisch v. Walters, 42 AD3d 682 [3d Dept 2007]). It follows that Plaintiff's pain does

not raise a triable issue of fact for the jury.

Additionally, there is no indication that Plaintiff received treatment other than the treatment in Five Towns Medical Care, PC. That treatment lasted for six months and ended in June 2005. Plaintiff sought no further medical treatment until he visited Dr. Ortiz in March of 2006, after this case was commenced. While a gap in treatment or 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 278 [2005]). Here, Plaintiff claims in a conclusory fashion that his treatment was continuous. There is nothing in the record showing that to be the case. Plaintiff has provided no explanation as to why he failed to pursue such treatment.

Proof of a hematoma and soft tissue injury without additional objective medical evidence establishing that the accident resulted in significant physical limitations, is not alone sufficient to establish a "serious injury" under the No Fault Law (Pommells v. Perez, 4 NY3d 566 [2005]). As a matter of law, Plaintiff is unable to establish a permanent consequential limitation of a body organ or member nor a significant limitation of use of a body organ or member and therefore is unable to establish a serious injury under Article 51.

Serious Injury under to 90/180 Category

The last category of the statute states that a serious injury may be "a medically determined injury or impairment of a nonpermanent 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." The words "substantially all" is construed to mean that the person has been curtailed from performing his usual activities to a great extent, rather than some slight curtailment (Licari v. Elliott, 57 NY2d 230 [1982]). As to the statutory 90/180 day period of disability requirement, it is considered a necessary condition to the application of the statute (Id.). Where the statute is specific, as it is here, that the period of disability be for not less than ninety days during the immediate one hundred and eighty days immediately following the injury or impairment, the Legislature has made it clear that the disability falling within the threshold period must be proved along with other statutory requirements in order to establish a prima facie case of serious injury (Id.).

Turning to the case before this court, Plaintiff claims that his injuries were serious within the meaning of the statute in that he was prevented, for at least ninety days, from performing

substantially all of the material acts which constituted his daily activities. However, it is undisputed that Plaintiff was permitted to begin full time work, without any limitations or restrictions, 47 days after the incident. Additionally, after Plaintiff was permitted to return to work, there was never any medical directive to refrain from working.

Plaintiff relies on his affidavit and on the affidavit of Dr. Ortiz. However, Dr. Ortiz did not examine the Plaintiff until well after the one hundred and eighty day period expired. Proof rendered in connection with the 90/180 category after the one hundred and eighty day period is insufficient as a matter of law (Conners v. Center City, inc., 2002 NY Slip Op. 01665 [2nd Dept 2002]).

Furthermore, Plaintiff did not submit an affidavit from the treating physician Dr. Krishanastry, or Plaintiff's neurologist Dr. Fazzini, indicating that he could not perform substantially all of his usual and customary activities for ninety days in the immediate one hundred and eighty days following the incident. In his affidavit Plaintiff states that his lifestyle changed and that he experienced paid which he alleviated using over the counter medication. Plaintiff's statements are conclusory and insufficient and fail to create a triable issue of fact. It follows that Plaintiff is unable to establish serious injury as a matter of law under this section of the statute.

The court has considered Plaintiff's other arguments and fins them unavailing. It follows that the Complaint against Oldcastle is dismissed in its entirety.

Accordingly, it is

ORDERED that Defendant's motion for summary judgment is granted and the Complaint is dismissed; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

Counsel for the remaining parties are to appear for a conference on September 5, 2008 at 11:00 am at 60 Centre Street, room 335.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 7/29/08

HON. WALTER B. TOLUB, J.S.C.

FILED
AUG 01 2008
COUNTY CLERK'S OFFICE
NEW YORK