

Watson v Merritt

2010 NY Slip Op 30991(U)

April 19, 2010

Supreme Court, New York County

Docket Number: 112458/2008

Judge: George J. Silver

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

PRESENT: GEORGE J. SILVER
Judge

PART 22

Index Number : 112458/2008

WATSON, CLARENCE

VS.

MERRITT, VERNEASE

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

n this motion to/for _____

FILED
APR 23 2010

PAPERS NUMBERED

notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

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2

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NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

In this action to recover for personal injuries allegedly sustained in a motor vehicle accident, Defendants Vernease and Christopher Merritt (collectively "Defendants") move pursuant to CPLR §3212 for an order granting summary judgment and dismissing the complaint of Plaintiff Clarence Watson ("Plaintiff") on the ground that Plaintiff did not sustain an injury that qualifies as "serious" as defined by New York Insurance Law §5102(d).

Plaintiff alleges in his Verified Bill of Particulars that, as a result of the accident, he sustained serious injuries under New York Insurance Law §5102(d) by incurring disc herniations at C6-C7 and L4-L5, disc bulges at C3-C4, C4-C5, C5-C6 and L5-S1, and associated impingement. Plaintiff contends that he was confined to bed for approximately 8 weeks after the accident and that he was confined to his home for approximately 12 weeks.

Under New York Insurance Law §5102(d), a "serious injury" is defined 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.

Dated: _____

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

"[A] defendant can establish that [a] plaintiff's injuries are not serious within the meaning of Insurance Law §5102 (d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (*Grossman v Wright*, 268 AD2d 79, 83-84 [1st Dept 2000]). If this initial burden is met, "the burden shifts to the plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law" (*id.* at 84). The Plaintiff is required to present nonconclusory expert evidence sufficient to support a finding not only that the alleged injury is serious within the meaning of §5102(d), but also that the injury was causally related to the accident (*Valentin v Pomilla*, 59 AD3d 184 [1st Dept 2009]).

In support of their motion, Defendants submit the affirmed expert reports of Dr. Mark Pitman, an orthopedic surgeon and Dr. Clifford Beinart, a radiologist. Dr. Pitman examined Plaintiff on May 13, 2009 and determined that Plaintiff suffered from cervical and lumbar sprains. Dr. Pitman also conducted range of motion testing using a goniometer for the cervical spine, shoulders and lumbar spine. He reported that Plaintiff's range of motion for the cervical spine was flexion of 45 degrees compared to 45 degrees normal, extension of 45 degrees compared to 45 degrees normal, right and left lateral flexion of 45 degrees compared to 45 degrees normal and right and left rotation of 60 degrees compared to 60 degrees normal. Both shoulders were tested for range of motion revealing right and left forward elevation of 180 degrees compared to 180 degrees normal, right and left abduction of 180 degrees compared to 180 degrees normal, right and left adduction of 45 degrees compared to 45 degrees normal, right and left internal rotation of 70 degrees compared to 70 degrees normal and right and left external rotation of 90 degrees compared to 90 degrees normal. Range of motion testing for the lumbar spine showed flexion of 90 degrees compared to 90 degrees normal, extension of 30 degrees compared to 30 degrees normal, right and left lateral flexion of 30 degrees compared to 30 degrees normal, right and left rotation of 30 degrees compared to 30 degrees normal. Straight leg testing was conducted both in sitting and supine positions. Though negative in the sitting position, straight leg raising was positive at 20 degrees right and 30 degrees left in the supine position.

Dr. Beinart conducted an independent review of Plaintiff's MRI films on December 17, 2008. He concludes that Plaintiff's cervical spine MRI showed diffuse degenerative and hypertrophic changes of longstanding duration, no post-traumatic changes and no findings causally related to the motor vehicle accident. Dr. Beinart reports that the lumbar spine MRI showed congenital/degenerative changes resulting in spinal stenosis at L3-L4 and L4-L5, no post-traumatic changes and no findings causally related to the motor vehicle accident.

Defendants' expert reports satisfy their burden of establishing *prima facie* that Plaintiff did not suffer a serious injury (*Yagi v Corbin*, 44 AD3d 440 [1st Dept 2007]; *Becerril v Sol Cab Corp*, 50 AD 3d 261, 854 NYS2d 695 [1st Dept 2008]). Plaintiff must now bear the burden of overcoming Defendants' submissions by demonstrating that a serious injury was sustained through the presentation of nonconclusory expert evidence causally linking the serious injury, as

defined by New York Insurance Law §5102(d), to the accident in question. (*Grossman v Wright*, 268 AD2d 79, 84 [1st Dept 2000]; *Valentin v Pomilla*, 59 AD3d 184 [1st Dept 2009]).

In opposition, Plaintiff submits the affirmed expert reports of Dr. Gideon Hedrych, a trauma specialist and Dr. David Milbauer, a radiologist. Dr. Hedrych first examined Plaintiff on November 2, 2007 and most recently on December 11, 2009. At this most recent date, Dr. Hedrych determined that cervicodorsal range of motion reveals flexion of 20 to 25 degrees compared to 45 degrees normal, extension of 10 degrees compared to 45 degrees normal, right lateral flexion of 10 to 15 degrees compared to 45 degrees normal, left lateral flexion of 15 degrees compared to 45 degrees normal, right rotation of 25 to 30 degrees compared to 80 degrees normal and left rotation of 30 to 35 degrees compared to 80 degrees normal. Examination of the dorsolumbar spine reveals range of motion of flexion of 40 degrees compared to 80 degrees normal, extension of 0 to 5 degrees compared to 20 degrees normal, right lateral flexion of 5 to 10 degrees compared to 20 degrees normal, left lateral flexion of 5 degrees compared to 20 degrees normal, right rotation of 10 to 15 degrees compared to 30 degrees normal and left rotation of 10 degrees compared to 30 degrees normal. Dr. Hedrych also performed straight leg testing (positive), Lhermitte's sign (positive), flip test on left (positive) and Lasegue's sign test which revealed 25 degrees on the left compared to 90 degrees normal. Dr. Hedrych concludes that Plaintiff suffers from injuries including cervical spine derangement with disc protrusion/herniation at C6-C7 and bulging discs at C3-C4, C4-C5 and C5-C6 compromising right C3-C4 and left C4-C5 neural foramina. He also diagnosed cervical radiopathy and probable cervical myelopathy, dorsal spine sprain/strain, lumbosacral spine derangement with herniated discs at L4-L5, L3-L4 and bulging disc at L5-S1. Dr. Hedrych concludes that Plaintiff's injuries are causally related to the accident.

Dr. Milbauer reviewed Plaintiff's lumbar MRI on December 12, 2007 and concludes that there are disc herniations and hypertrophic changes at L4-L5, a small protrusion/herniation at L3-L4 with mild impingement, and mild disc bulging with hypertrophic changes at L5-S1. Review of Plaintiff's cervical spine MRI reveals posterior disc bulges with osteophytes at C3-C4, C4-C5, C5-C6, deforming the thecal sac associated with hypertrophic changes and a small disc protrusion/herniation at C6-C7.

Defendants also argue that a gap in treatment interrupts the chain of causation between the accident and Plaintiff's claimed injuries. In opposition, Plaintiff contends that he was forced to discontinue therapeutic treatment because his No-Fault benefits were terminated. While 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 (*DeLeon v Ross*, 44 AD3d 545 [1st Dept 2007]; *Pommells v Perez*, 4 NY3d 566, 574 [2005]). Plaintiff has offered a reasonable explanation and as such, Defendants' gap in treatment argument fails (*see Wadford v Gruz*, 35 AD3d 258 [1st Dept 2009]).

To qualify under the "permanent loss of use of a body organ, member, function or system," the loss must not only be permanent, but must be a total loss of use (*Gaddy v Eyler*, 79

NY2d 955, 582 NYS2d 990 [1992]; *Oberly v Bangs Ambulance, Inc.*, 96 NY2d 295, 727 NYS2d 378 [2001]. Plaintiff has not demonstrated that he sustained a permanent and total loss of use of his neck or cervical spine. Therefore, Defendants' summary judgment motion as to Plaintiff's permanent loss claim under New York Insurance Law §5102(d) is granted.

Under the permanent consequential limitation and significant limitation categories of Insurance Law § 5102[d], Plaintiff must submit medical proof containing "objective, quantitative evidence with respect to diminished range of motion or a qualitative assessment comparing plaintiff's present limitations to the normal function, purpose and use of the affected body organ, member, function or system" (*Gorden v Tibulcio*, 50 A.D.3d 460 [1st Dept 2008] quoting *John v Engel*, 2 AD3d 1027, 1029 [3d Dept 2003]). Because Drs. Hedrych and Milbauer personally reviewed the MRI films, the positive results stated in their reports are properly reviewable on this summary judgment motion (see *Thompson v Abbasi*, 15 AD3d 95 [1st Dept 2005]; *Dioguardi v Weiner*, 288 AD2d 253 [2d Dept 2001]). Specifically, Dr. Hedrych's report demonstrates a limitation of range of motion supported by objective medical findings that are based upon a recent examination of Plaintiff. This evidence raises a triable issue of fact as to whether Plaintiff suffered serious injury within the permanent consequential limitation and/or significant limitation categories of Insurance Law §5102(d).

With respect to Plaintiff's claim under the 90/180 category of Insurance Law §5102(d), Plaintiff's injuries must restrict him from performing "substantially all" of his daily activities to a great extent rather than some slight curtailment (*Szabo v XYZ, Two Way Radio Taxi Ass'n, Inc.*, 700 NYS2d 179 [1st Dept 1999]; *Thompson v Abbasi*, 788 NYS2d 48 [1st Dept 2005]; *Hernandez v Rodriguez*, 63 A.D.3d 520 [1st Dept 2009]). Plaintiff's Verified Bill of Particulars states that he was confined to bed for approximately eight weeks following the accident. Additionally, Plaintiff's deposition testimony indicates that he stayed in bed for approximately four to five months following the accident and that he could not participate in activities such as bike riding and fishing. However, his deposition testimony does not, in the absence of a physician's affidavit substantiating that his alleged impairment was attributable to a "medically determined" injury, suffice to raise a triable issue as to whether Plaintiff was prevented from performing "substantially all of the material acts which constitute his usual and customary activities for not less than [90] days during the [180] days immediately following the occurrence" (*Santiago v Bhuiyan*, 2010 N.Y. Slip Op. 1890 [1st Dept 2010]) *Sigona v New York City Transit Authority*, 255 AD2d 231, 680 NYS2d 228 [1st Dept 1998]).

Accordingly, it is hereby

ORDERED that Defendants' motion for summary judgment is granted as to Plaintiff's claim under the permanent loss category of Insurance Law §5102(d); and it is further

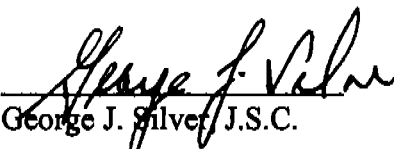
ORDERED that Defendants' motion for summary judgment is denied as to Plaintiff's claim under permanent consequential limitation and significant limitation categories of

Insurance Law §5102(d); and it is further

ORDERED that Defendants' motion for summary judgment is granted as to Plaintiff's claim under the 90/180 category of Insurance Law §5102(d); and it is further

ORDERED that Defendants are to serve a copy of this order, with Notice of Entry, within 30 days.

This constitutes the decision and order of the court.


George J. Silver, J.S.C.
GEORGE J. SILVER

Dated: April 19, 2010
New York County

FILED

APR 23 2010

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