Martin v Portexit Corp.
2010 NY Slip Op 33874(U)
July 1, 2010
Sup Ct, Bronx County
Docket Number: 303854/07
Judge: Jr., Kenneth L. Thompson
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

[* 1] FILED Jul 13 2010 Bronx County Clerk

L.W.

CASEDISP

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IA 20

ANTHONY MARTIN,

Plaintiff,

-against-

PORTEXIT CORP., IAN DUKE HAMILTON, and KENNETH A. MOORE,

Defendants.

Index No. 303854/07

DECISION/ORDER

Present:

HON. KENNETH L. THOMPSON, Jr.

The following papers numbered 1 to ___ read on this motion, ___

No On Calendar of	PAPERS NUMBERED
Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed	
Answering Affidavit and Exhibits	
Replying Affidavit and Exhibits	
Affidavit	
Pleadings -- Exhibit	
Stipulation -- Referee's Report --Minutes	
Filed papers	

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Defendants', PORTEXIT CORP. and IAN DUKE HAMILTON, motion for an Order pursuant to CPLR § 3212 granting summary judgment for Plaintiff's failure to meet the serious injury threshold requirement mandated by Insurance Law § 5102(d) and Plaintiff ANTHONY MARTIN's cross-motion for an Order pursuant to CPLR § 3212 granting summary judgment as to liability against Defendants PORTEXIT CORP. and IAN DUKE HAMILTON are consolidated for decision herein.

Defendants' motion for an Order pursuant to CPLR § 3212 granting summary judgment and dismissing the Complaint on the grounds that the Plaintiff did not sustain a "serious injury" as defined by Insurance Law § 5102(d) is also granted.

Plaintiff's motion for an Order granting summary judgment as to liability is denied as moot.

RECEIVED
BRONX COUNTY CLERK'S OFFICE
JUL - 8 2010
PAID NO FEE

FILED Jul 13 2010 Bronx County Clerk

Background

It is undisputed that Plaintiff was a passenger in a motor vehicle operated by Defendant IAN DUKE HAMILTON and registered to Defendant PORTEXIT CORP. There is also no dispute that on November 25, 2005, said motor vehicle came into contact with a motor vehicle operated by Defendant KENNETH A. MOORE at the intersection of Nereid Avenue and White Plains Road in Bronx, New York. All parties to this action further acknowledge that Defendant MOORE is no longer a party to this action.

As a result of the intersection collision, Plaintiff commenced this negligence action by service of a Summons and Complaint on or about December 21, 2007, to recover damages for personal injuries sustained therein. Plaintiff avers that as a result of Defendants' alleged negligence in the causing the subject accident, he has sustained serious injuries to the right shoulder, right knee, neck, and spine within the meaning of Insurance Law §5102(d)

Serious Injury Analysis

> '[S]erious 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; 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.

N.Y. Ins. Law § 5102(d).

The purpose of the statute is "to weed out frivolous claims and limit recovery to significant injuries." Dufel v. Green, 84 N.Y.2d 795, 798. As such, the Court has determined that the phrases "permanent loss of use," "permanent consequential limitation," and "significant limitation of use" must be interpreted in terms of "total loss." Oberly v. Bangs Ambulance Inc., 96 N.Y.2d 295, 299. Furthermore, the word "significant" as it relates to "limitation of use of a body function or system," refers to more than "a minor, mild or slight limitation of use." Licari v. Elliot, 57 N.Y.2d 230, 236.

Also, the phrase "substantially all" as it relates to the 90/180 requirement, should be "construed to mean that the person has been curtailed from performing his or her usual activities to a great extent rather than some slight curtailment." Id. Although no-fault insurance is meant to allow plaintiffs to recover for non-economic injuries in appropriate cases, the Legislature also "intended that the [C]ourt first determine whether or not a prima facie case of serious injury has been established which would permit plaintiff to maintain a common-law cause of action in tort." Id. at 237.

Defendants proffer the medical reports of Dr. Edward Weiland, Dr. Robert Israel, and Dr. David Fisher in support of their application. Dr. Weiland's September 9, 2009 neurological evaluation notes that the ranges of motion for Plaintiff's spine, shoulder and right knee were all within normal limits. The doctor concludes that, based on these findings, there was no evidence of permanent neurological injuries as a result of the November 25, 2005 accident, and no reason why Plaintiff would not be able to perform activities of daily living and return to gainful employment without any restriction from a neurological perspective.

FILED Jul 13 2010 Bronx County Clerk

Dr. Israel's October 14, 2009 orthopedic evaluation revealed the ranges of motion for Plaintiff's right knee, shoulder, and spine to all be within normal limits. This doctor concluded that Plaintiff was capable of performing work and daily living activities and that there was no evidence of permanent or residual orthopedic injury to MARTIN.

Dr. Fisher's June 12, 2009 review of Plaintiff's various MRIs found no evidence of a meniscus tear or other ligament injury to Plaintiff's right knee and no evidence of trauma, bulge, herniation, or other injury to the cervical or lumbar spine, causally related to the accident of November 25, 2005. The doctor concluded that there were degenerative changes in Plaintiff's L5-S1, "manifested by disc dehydration and disc space narrowing."

Summary Judgment Standard

> To obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor and he must do so by tender of evidentiary proof in admissible form... One opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require trial of material questions of fact on which he rests his claims...

Zuckerman v. City of NY, 49 N.Y.2d 557, 562 (citations omitted).

Where Defendant establishes a prima facie case that Plaintiff's injuries were not serious within the meaning of Insurance Law § 5102(d), the burden is then shifted to the Plaintiff to overcome defendant's motion by demonstrating that she sustained a serious injury. Gaddy v. Eyler, 79 N.Y.2d 955. In order to survive summary dismissal of the Complaint, the Court must find that the Plaintiff has satisfied his evidentiary burden to

FILED Jul 13 2010 Bronx County Clerk

submit "objective medical proof of a serious injury" causally related to the accident. Pomells v. Perez, 4 N.Y.2d 566, 574.

In opposition to Defendants' motion, Plaintiff proffers the affidavit of Dr. Henry Hall, and the affirmations of Dr. Robert Scott Schepp and Dr. Jacob Nir. Dr. Hall's February 4, 2010 Affidavit indicates that as a result of the motor vehicle accident of November 25, 2005, Plaintiff suffered a: 35-degree flexion limitation, 25-degree extension limitation, 40-degree left rotation limitation, 45-degree right rotation limitation, 20-degree left lateral flexion limitation, and a 20-degree right lateral flexion limitation of his cervical spine. Dr. Hall also found a: 50-degree flexion limitation, 10-degree extension limitation, 15-degree left rotation limitation, 10-degree right rotation limitation, 10-degree left lateral flexion limitation, and 15-degree right lateral flexion limitation of Plaintiff's lumbar spine. Dr. Hall went on to conclude that the limitations in Plaintiff's lumbar and cervical spine were causally related to the accident that occurred on November 25, 2005.

Dr. Hall admits, however, that he only treated Plaintiff for four months, from November 25, 2005 until April 2006—finding that Plaintiff "had reached the maximum benefits from active physiotherapy." (Dr. Haff. Aff. at ¶ 13.) The Court finds this interesting considering that the doctor includes a June 28, 2007 Report, wherein the doctor suggested that Plaintiff undergo traction and chiropractic manipulation. And that Plaintiff should be seen daily for 3 weeks and be re-examined, which according to the doctor did not occur until January 28, 2010. (Id. at ¶ 14.)

FILED Jul 13 2010 Bronx County Clerk

Dr. Jacob Nir's March 5, 2010 Affirmation states that Plaintiff sustained a 35% decrease in lumbar spine flexion, extension, and lateral bending, as well as a 35% decrease in flexion, extension, and lateral rotation in his cervical spine area. Dr. Nir concluded that Plaintiff's lumbar and cervical spine limitations were a direct result of the accident that occurred on November 25, 2005. The doctor also indicates that he first saw Plaintiff on February 3, 2006, and made identical findings regarding Plaintiff's various ranges of motion. The doctor's February 3, 2006 Report also indicates that Plaintiff's suggested treatment for his alleged ailments was ultrasound therapy, massage, traction, manipulation, exercises and anti-inflammatory medication.

no causation

Dr. Robert Scott Schepp's February 24, 2010 Affirmation mentions the review of Plaintiff's various MRIs, which revealed a partial meniscus tear of Plaintiff's right knee, in addition to bulges of the L-4 and L-5 disc, and C-4, C-5, and C-6 discs of his lumbar and cervical spine, respectively. Dr. Schepp failed, however, to casually relate any of these findings to the November 25, 2005 accident. See Daisernia v. Thomas, 12 A.D.3d 998 (dismissing plaintiff's complaint because she "fail[ed] to causally connect her . . . injury to the accident"); Foley v. Karvelis, 276 A.D.2d 666, 667 (dismissing plaintiff's complaint because "[h]er doctor failed to causally connect that injury to the subject accident"); Ray v. Ficchi, 178 A.D.2d 988, 989 (dismissing plaintiff's complaint because "the affidavit of plaintiff's chiropractor failed to connect causally plaintiff's alleged injury to the motor vehicle accident").

FILED Jul 13 2010 Bronx County Clerk

bulge alone not "serious"

Although "[a] bulging or herniated disc may very well be a serious injury within the meaning of the statute, and a CT scan or MRI constitutes objective medical evidence to support subjective complaints of such a painful condition . . . a plaintiff must still offer some objective evidence of the extent or degree of his alleged physical limitations and their duration, resulting from the disc injury." Arjona v. Calcano, 7 A.D.3d 279; see also Pommells v. Perez, 4 N.Y.3d 566, 574 (holding that "proof of a herniated disc, without additional objective medical evidence establishing that the accident resulted in significant physical limitations, is not alone sufficient to establish a serious injury"); Howell v. Reupke, 16 A.D.3d 377 (holding that "[t]he mere existence of a bulging or herniated disc is not conclusive evidence of a serious injury in the absence of any objective evidence of a related disability or restriction").

gap-in-treatment

As to those limitations that were found by Plaintiff's doctors, there are other factors that weigh against equating those findings with a "serious" injury. "[E]ven where there is objective medical proof, when additional contributory factors interrupt the chain of causation between the accident and claimed injury--such as a gap in treatment, . . . or a preexisting condition--summary dismissal of the complaint may be appropriate." Pommells, 4 N.Y.3d at 572.

Plaintiff's claims of permanency and disability are undercut by the unexplained three-plus year gap-in-treatment between Dr. Hall's April 2006 and January 28, 2010 examinations, and the four-plus year gap-in-treatment between Dr. Nir's February 2006

FILED Jul 13 2010 Bronx County Clerk

and March 25, 2010 examinations. Although both doctors allude to suggesting a course of treatment for Plaintiff's, he has proffered no evidence to establish that he actually attended therapy, or sought and received any other treatment for his alleged injuries during the period between his various examinations. See Arjona, 7 A.D.3d at 280; see also Ayala v. Bassett, 57 A.D.3d 387, 389 (stating that "the unexplained gap in treatment . . . for each plaintiff undermined their respective claims of serious injury based on allegations of permanent injury"); Pitter v. Ceesay, 2009 NY Slip Op 51488U, **1 (stating that "[t]he failure of plaintiff . . . or her physicians to address or explain the gap in treatment is fatal to said plaintiff's serious injury claims under the 'significant limitation' and 'permanent consequential limitation' categories of Insurance Law § 5102(d)").

degenerative findings

Additionally, Dr. Hall's Affidavit fails to address the degenerative findings of Defendant's doctor. Indeed, "[P]laintiff's expert failed to satisfactorily rebut this conclusion, neglecting even to mention, let alone explain, why he ruled out degenerative changes, thus rendering his opinion speculative." Lopez v American United Transp., Inc., 66 A.D.3d 407; see also Pommells v. Perez, 4 N.Y.3d 566, 574; Montgomery v. Pena, 19 A.D.3d 288, 290.

90/180

Plaintiff testified during his July 17, 2009 EBT that he returned to his job as a construction worker at Basalies Construction three weeks after the accident. And that he resumed visiting his friends several times a week within three months of the

accident. This testimony that Plaintiff was able to return to work three weeks after the accident, precludes a finding that he was unable to perform his usual and customary activities for at least 90 of the 180 days following the accident. Hamilton v. Rouse, 46 A.D.3d 514 (holding 90/180 day requirement of serious injury allegation not met where Plaintiff testified he missed only one month of work, returned to work on a part-time basis, and after that resumed working on a full time basis); Rodriguez v. Vigra, 24 A.D.3d 650 (holding Plaintiff failed to establish prima facie case of serious injury under the 90/180-day category of serious injury where it was undisputed Plaintiff returned to work less than 90 days after the accident); Szabo v. Two Way Radio Taxi Assoc. Inc., 267 A.D.2d 134 (holding Plaintiff failed to meet "substantially all" standard and statutory 90/180-day period of disability requirement where Plaintiff was absent from work on full time basis for two full weeks after the accident and was thereafter able to work half days); Grotzer v. Levy 133 A.D.2d 134 (holding it was clear Plaintiff's injury did not prevent her from performing substantially all of the material acts constituting Plaintiff's usual and customary daily activities in accord with the 90/180-day requirement where Plaintiff returned to work within one month of the accident).

Furthermore, Plaintiff has failed to establish that he was prevented from performing his usual and customary activities for at least 90 of the 180 days following the accident. See Glover v. Capres Contr. Corp., 61 A.D.3d 549, 550 (holding that "[p]laintiff's self-serving deposition testimony regarding her inability to work for a period of time is insufficient to establish that she was prevented from performing her usual and customary activities for at least 90 of the 180 days following the accident"). His

FILED Jul 13 2010 Bronx County Clerk

subjective complaints of pain do not countenance a different result. See, e.g., Christian v. Waite, 61 A.D.3d 581, 582; Guadalupe v. Blondie Limo, Inc., 43 A.D.3d 669, 670; Park v. Champagne, 34 A.D3.d 274, 276; see also Arjona, supra at 280 (finding that "permanent problems in standing, sitting, bending and lifting" where "a minor, mild or slight limitation of use . . . insufficient to constitute a serious injury within the definition of the no-fault statute"); see also Alloway v. Rodriguez, 61 A.D.3d 591, 592 (holding that "plaintiff's subjective claims of pain and a limitation on sports and exercise activities do not prove a restriction on her usual and customary daily activities for at least 90 days of the 180 days following the accident"); Becerril v. Sol Cab Corp., 50 A.D.3d 261, 262; Nelson v. Distant, 308 A.D.2d 338, 339-40.

The foregoing shall constitute the decision and order of this Court.

Dated: JUL 0 1 2010

J.S.C.