Falcon v Rhaisa Auto Corp.
2011 NY Slip Op 34141(U)
December 20, 2011
Sup Ct, Bronx County
Docket Number: 0302930/2009
Judge: Howard H. Sherman
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NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 4

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

Case Disposed	☐
Settle Order	☐
Schedule Appearance	☐

---X

FALCON,LEO

-against-

RHAISA AUTO CORP.

---X

Index №. **0302930/2009**

Hon. ~~DIANE A. LEBEDEFF~~ Hon. Howard H. Sherman, Justice.

The following papers numbered 1 to 2 Read on this motion, **SUMMARY JUDGMENT DEFENDANT**
Noticed on **May 04 2011** and duly submitted as No. ___ on the Motion Calendar of 9/6/11

	PAPERS NUMBERED	
Notice of Motion - ~~Order to Show Cause~~ - Exhibits A-K and Affidavits Annexed	1	
Answering Affidavit and Exhibits A - I	2	
Replying Affidavit and Exhibits		
___ ___ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING DECISION FILED HEREWITH

Motion is Respectfully Referred to:
Justice: ___
Dated: ___

Dated: 12-20, 11

Hon. ___
~~DIANE A. LEBEDEFF~~, J.S.C.
H. Sherman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX
---x
Leo Falcon

Plaintiff

Index No. 302930/09

-against-

Decision and Order

Rhaisa Auto Corp.
Castillo Livery Corp.
Ramon L. Cruz

Defendants,

Present:
Hon. Howard H. Sherman
J.S.C.
---x

FACTS AND PROCEDURAL HISTORY

Plaintiff seeks damages for personal injuries allegedly sustained when on February 6, 2009 , while walking in the intersection of West 225th Street and Broadway, in New York County, he was struck by a motor vehicle owned and operated by the defendants.

This action was commenced in April 2009, and issue was joined with the service of defendants' answer in August 2009.

The Note of Issue was filed on December 7, 2010.

Motion

Defendants now move for an award of summary judgment dismissing the complaint on the grounds that plaintiff fails to meet the serious injury threshold defined by Insurance Law 5102(d).

In support of the motion, defendants submit copies of: the pleadings (Exhibits B, C); the verified bill of particulars, as well as the supplemental verified bill of particulars

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(Exhibits D, E); the affirmed reports of the independent medical examiners (Exhibits G-I); the transcript of plaintiff's 06/25/10 examination before trial(Exhibit J), and a copy of the police report {MV-104} of the accident (Exhibit K).

Verified Bills of Particulars

Plaintiff alleges that as a result of the motor vehicle accident he sustained the following permanent injuries: **Left knee** - partial thickness tear of the anterior cruciate ligament; intrameniscal tear of the posterior horn of the lateral meniscus ; **Right knee** - intrameniscal tear of the posterior horn of the medial meniscus; disc herniation **L5-S1** ; disc bulges at **C3-4** and C4-5 ; **adjustment disorder with anxious mood** (Verified Bill of Particulars ¶ ¶7 -8). Plaintiff alleges that he missed no time form his employment, and no claim for lost wages is interposed (Id. ¶¶ 10, 21). It is also alleged that the injuries constitute a serious injury as defined as a dismemberment ; a significant disfigurement ; a fracture; a permanent loss of a use of a body organ, member, function , or system[1]; a permanent consequential limitation of use of a body organ or member, a significant limitation of use of a body function or system, as well as a medically determined injury/impairment of a non-permanent nature which prevented plaintiff from performing

[1] It would be better practice for plaintiff to confine the allegations of serious injury to those categories applicable, there being no contention that he was dismembered or significantly disfigured in the accident. Moreover, there is no showing here, that the injuries sustained constituted a "total" loss of the use of the areas affected (see, Oberly v. Bangs Ambulance , 96 N.Y.2d 295. 296 [2001]). The consideration here is limited to the latter three categories applicable here.

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substantially all of the material acts which constitute his usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of his injury/impairment (¶ 21).

Supplemental Verified Bill of Partuculars - 11/29/10

Plaintiff further alleges that he "requires surgery to both knees ."

Independent Medical Evaluations

On August 26, 2010 , plaintiff was examined by Alvin M. Bregman, M.D.. for purposes of an independent **orthopedic** evaluation. [2] Prior to the examination, Dr. Bregman reviewed plaintiff's bill of particulars, as well as contemporaneous narrative reports , and diagnostic studies for the period : 02/12/09 - 08/04/09.

Plaintiff presented with complaints of pain in his neck, back and knees, as well as headaches, and difficulty standing up and sitting for prolonged periods.

Upon examination, Dr. Bregman found no paravertebral muscle spasm on palpation of the **cervical** spine and range of motion was tested as normal in all six planes as quantified and compared to normal readings. Muscle testing revealed findings of 5/5 in the biceps, and triceps , and grasping power was found to be firm in both hands.

The examination of the **lumbar** spine revealed neither tenderness nor spasm , and the lordotic curve was found to be normal. The ranges of motion were normal in all four planes as quantified and compared to normal readings. Straight leg raising test was

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[2] Exhibit H.

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negative to 75 degrees in the seated and the supine positions.

The examination of the **shoulders** revealed no tenderness upon palpation of the AC joint or over the greater tuberosity, nor swelling , nor erythema, nor induration . Active abduction, adduction , flexion , internal and external rotation , as well as posterior extension were all found to be normal as quantified and compared to normal, bilaterally. There was no impingement sign found in either shoulder, and the Drop Arm and apprehension tests were also negative, bilaterally.

Both **knees** were found to be stable on valgus and varus stress, and there was no evidence of tenderness or effusion . The Lachman's, McMurray and anterior drawer tests were negative, bilaterally, and the ranges of motion of each knee was found to be 0-130 degrees (normal 0-130 degrees).

Dr. Bregman concluded that any strains of the cervical, thoracic and lumbar spine had resolved, as had sprains of the shoulders and the knees. He also found no objective evidence of a need for plaintiff to limit either his work status or the activities of his daily living.

On October 7, 2010, plaintiff for purposes of an independent **neurological** evaluation. [3] Prior to the examination, Dr. R.C. Krishna reviewed plaintiff's bill of particulars, as well as contemporaneous narrative reports and diagnostic studies for the period : 02/12/09 - 08/04/09.

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[3] Exhibit G.

Plaintiff presented with complaints that his symptoms have not changed since the accident, and that they consisted of pain in his head, neck, back , wrists , and knees. He advised that his arms and legs were weak with numbness and that he had difficulty walking, bending, lifting, and moving his legs.

Upon examination, Dr. Krishna found plaintiff's calculations, reversals, spelling , right/left orientation , ability to follow commands, identification of body parts and face and hand tests to be within normal limits.

Upon examination of the cranial nerve, Dr. Krishna found plaintiff's pupils to be reactive to light, and accommodated directly . The facial sensation and muscular expression were normal . The corneal reflex, gag reflex, and the remainder of the brainstem reflexes were normal and symmetrical , bilaterally.

Upon examination of the **cervical** and **thoracolumbar** spine, as measured with an inclinometer, the ranges of motion were found to be normal in all planes as quantified and compared to normal readings. Dr. Krishna found plaintiff's station, gait, volume, tone and strength and range of motion of the muscles were also within normal limits.

Dr. Krishna concluded that plaintiff's examination was normal , and that there was no neurological deficits , or indication of a disability, or any contraindication from continuing his daily or work activities.

Dr. A. Robert Tantleff conducted a **radiological** review of the MRI studies of plaintiff's cervical and lumbar spine and both knees , performed in March 2009.

Dr. Tantleff found that the study of the **cervical** spine , the report of which incorporated a finding of disc bulges at C 3-4 , revealed "no evidence of disc bulge, protrusion or herniation ." Dr. Tantleff also found that the films revealed no evidence of recent trauma, or of spasm or contusion, or of edema, or of swelling or enlargement of the prevertebral soft tissue space, or evidence of muscle spasm of the deep muscles adjacent to the cervical spine. He also found that there was no abnormal signal changes present within the canal indicative of disc herniation or mass, or any intrinsic abnormality of the cervical spinal cord. However, Dr. Tantleff did find that the films revealed chronic degenerative discogenic disc disease and cervical spondylosis unrelated to the incident of 02/06/09, and consistent with plaintiff's age . [4] The presence of the degenerative changes were also found to be consistent with the findings described in noted peer reviewed journal articles.

Dr. Tantleff found that the **lumbar** spine , the report of which found disc herniation at L5-S1 with central and foraminal narrowing, revealed "a bulge/pseudobulge complex identified at L5-S1 as a result of the malalignment secondary to the degenerative retrolisthesis [ ] [5]" and " associated degenerative annular fissure." He also found that there was "no evidence of evidence of recent trauma or annular edema of any outermost annuli

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[4] Plaintiff was born on 03/30/73.

[5] Dr. Tantleff explained that "[d]egenerative retrolisthesis "is both an indication and consequence of degenerative discogenic spine and disc disease."

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noted to suggest a recent herniation or recent acute exacerbatory change [ ] ", or "evidence of posterior endplate fractures of the opposing discovertebral endplates to suggest whiplash/trauma." The presence of the degenerative changes was found to be consistent with longstanding chronic discogenic disease and plaintiff's age and the findings described in peer reviewed journal articles.

The studies of the **right knee** , the report of which included a finding of an intrameniscal tear of the posterior horn of the medical meniscus, were found to reveal "no evidence of meniscal tear or ligamentous abnormality." Dr. Tantleff concluded that the films revealed the osseous structure to be without fracture or signal abnormality, and the medial and lateral collateral ligaments to be intact, with the menisci demonstrating no evidence of either tear or signal change. There was a minimal amount of normal physiologic fluid found without evidence of swelling or joint effusion. He concluded that the "unremarkable" examination revealed no evidence of any recent trauma.

The studies of the **left knee** , the report of which included a finding of a partial thickness tear of the anterior cruciate ligament , and a small intrameniscal tear of the posterior horn of the lateral meniscus, were found by Dr. Tantleff to reveal no evidence of meniscal tear or ligamentous abnormality . He concluded that the films revealed the osseous structures to be without fracture or signal abnormality, and the medial and lateral collateral ligaments to be intact, with the menisci demonstrating no evidence of either tear

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or signal change. There was a minimal amount of normal physiologic fluid found without evidence of soft tissue swelling or joint effusion. He concluded that the "unremarkable" examination revealed no evidence of any recent trauma.

Deposition Testimony

Plaintiff testified that he was struck by the left front bumper of a Lincoln Town car sustaining impact to the right side of his body that knocked him down and forward a few feet [FALCON EBT: 14-20]. He was taken by ambulance from the accident scene to St. Barnabas Hospital Emergency Room [EBT: 22-25]. His chief complaints concerned his knees, back, and neck, and x-rays were performed on the right knee and the torso [Id. 26]. Pain medication was prescribed, and he was discharged after a few hours [Id.].

Two days later, he commenced a course of twice-weekly treatments at a medical facility in Manhattan [Id. 27-28] that included physical therapy, electric stimulation and chiropractic adjustment [Id. 28]. Plaintiff testified that the treatment helped his condition a "great deal", and that he continued to undergo the treatment[6] [Id. 30:8;28].

As a result of the accident, plaintiff missed two or three days of work as a "driver" [Id. 37]. Upon his return to work, he worked a "lighter schedule" for a few months[7], and then left to find a new job, which he did [Id. 38-39].

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[6] The deposition took place on June 25, 2011, sixteen months post-accident.

[7] Approximately ten hours less a week.

Finally, plaintiff testified that he continued to experience daily pain in his knees, neck, and back [Id. 38-39], and he was unable to play soccer or to carry heavy objects , or to move furniture, as he had prior to the accident [Id. 35-36].

Discussion and Conclusions

Upon review of the moving papers, including the negative clinical findings upon objective testing at recent examinations, as well as the findings of the lack of trauma-related pathology evidenced in the contemporaneous diagnostic films of the affected areas , and plaintiff's testimony concerning his return to work within days of the accident , it is the finding of this court that defendants have shouldered their initial burden to prove as a matter of law that plaintiff did not sustain a serious injury as a permanent consequential limitation of use of a body organ or member; a significant limitation of use of a body function or system, or a medically determined injury/impairment of a non-permanent nature which prevented him from performing substantially all of the material acts which constitute his usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of his injury/impairment .

In light of this prima facie showing, it is incumbent upon plaintiff to come forward with probative medical evidence to raise an issue of fact that he sustained a serious injury as a result of the 02/06/09 motor vehicle accident.

Opposition Papers

Plaintiff comes forward with the following admissible[8] medical submissions in opposition to the motion : 1) the affirmation of Stanley Liebowitz, M.D. , who initially examined plaintiff on 02/12/09 , and the report of that orthopedic examination (Exhibit C); the reports of the MRI studies as affirmed by the examining radiologist (Exhibit D), and the reports of Dr. Liebowitz's follow-up examinations of 04/06/09, 02/01/10, 08/02/10, and 12/20/10 (Exhibits E-H).

Discussion and Conclusions

The probative value of Dr. Liebowitz's findings of causality with respect to the spinal injuries he diagnosed and treated, is fatally diminished due to his failure to address the persuasive evidence of pre-existing degenerative disc disease. This failure is made even more problematic as the degenerative disease is not only a crucial finding in the report of the defendants' expert, but, with respect to the lumbar spine, the finding of a hospital lumbar x-ray was stated as "[d]egenerative disc disease at L4-5 and L5-S1" and listed by Dr. Liebowitz as being among those diagnostic reports[9] among which he relied when making his assessment of plaintiff's injuries . Plaintiff's treating physician failed to come forward with any clinical findings to raise an issue of fact to rebut the asserted lack of

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[8] The emergency treatment records are not neither certified nor affirmed (Exhibits A,B).

[9] See , Report of 12/20/10, Exhibit H.

causation with respect to the spinal injuries alleged (see, Ortiz v. Ash Leasing , Inc. , 63 A.D.3d 556 [1st Dept. 2009], Lemos v. Giacomo Mgmt. Inc., 82 A.D.3d 602 [1st Dept. 2011])

However, with respect to the injuries alleged to plaintiff's knees, there is no evidence of any pre-existing pathology. What is presented in this record is a clear conflict in the findings of the respective radiological experts, with defendants' expert concluding that the studies were "unremarkable", and the examining radiologist finding that the study of the right knee revealed an intrameniscal tear of the posterior horn of the medial meniscus, and that of the left knee, a partial thickness tear of the anterior cruciate ligament, as well as a small intrameniscal tear of the posterior horn of the lateral meniscus. [10] This conflict in the experts' evaluation of the knee injuries extends as well to the findings of any residual deficits upon recent examination. In light of these conflicts in the findings upon objective testing of the respective experts, it is submitted that the issue of whether the plaintiff sustained either a "significant limitation" or "permanent consequential" serious bilateral knee injury as a result of the motor vehicle accident is more properly reserved for resolution by the trier of fact.

It is the further finding of this court that plaintiff fails to raise a material issue of fact with respect to a serious injury in the remaining 90/180 category asserted. The record here fails to support any finding that there is an unresolved issue of fact that plaintiff was unable

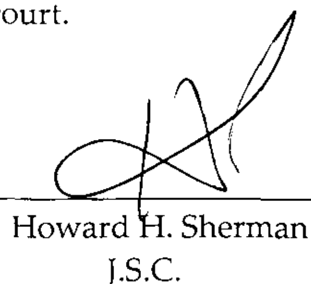
[10] Plaintiff's treating physician diagnosed these tears as being "post-traumatic."

to perform substantially all of his daily activities during the period immediately after the accident (see, Graves v. L&N Car Service, 87 A.D.3d 878 [1st Dept. 2011]). It is settled that any claim of a reduced work schedule is insufficient to raise a triable issue of fact on this claim (see, Perez v. Corr, 84 AD3d 646, 647 [1st Dept. 2011}; Borja v. Delarosa, 2011 N.Y. App.Div. LEXIS 8499 [1st Dept. 12/1/11]).

Moreover, Dr. Liebowitz's conclusory "functional level evaluation" incorporating statutory language, and stated as the penultimate paragraph of each report is insufficient, without more, to raise an issue of fact that even were a qualifying post-accident curtailment demonstrated, it was medically determined to be necessary.

For the reasons above stated the motion is granted to the extent of dismissing plaintiff's claims of serious injury in all categories alleged, with the exception of "significant limitation" and "permanent consequential."

This constitutes the decision and order of this court.



Dated: December 20, 2011
Bronx, New York

Howard H. Sherman
J.S.C.