

Palmer v Charles

2011 NY Slip Op 34248(U)

October 21, 2011

Supreme Court, Bronx County

Docket Number: 300279/09

Judge: Lizbeth Gonzalez

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART PP4

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Carlton Palmer,

Plaintiff,

DECISION and ORDER
Index No 300279/09

-against-

Lionel Charles,

Defendant.

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Recitation of the papers considered in reviewing the underlying motion for summary judgment as required by CPLR § 2219(a):

Notice of Motion and annexed Exhibits and Affidavits.....	1
Affirmation in Opposition and annexed Exhibits.....	2
Reply Affirmation.....	3

Plaintiff Palmer alleges that he sustained serious injuries as a result of the defendant's negligence. A collision occurred between the plaintiff's and defendant's respective vehicles on April 28, 2008.¹ Defendant Charles moves for summary judgment on the ground that the plaintiff sustained no serious injuries pursuant to Insurance Law § 5102(d).

DISCUSSION

Defendant Charles seeks summary judgment on threshold grounds. Summary judgment is a drastic remedy that a court should employ only in the absence of triable issues of fact. (*Andre v Pomeroy*, 35 NY 2d 361 [1974].) Insurance Law § 5102(d) delineates the serious injury threshold:

¹ The plaintiff is identified as the vehicle's owner and operator in his summons and complaint and in his counsel's Affirmation in Opposition. The verified bill of particulars, however, identifies him as a passenger and "not the owner or operator of any vehicle involved in the accident."

a personal injury which results in ... 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 90 days during the 180 days immediately following the occurrence of the injury or impairment.

Significant limitations of use of a body function or system are established by identifying objective tests employed to measure ranges of motion, providing the patient's ranges of motion and indicating normal ranges of motion. (*Nagbe v Minigreen Hacking*, 22 AD 3d 326 [1st Dept 2005].)

In interpreting the statutory definition of a 90/180 day claim, the words "substantially all" should be construed to mean that the injured person has been prevented from performing his usual and customary activities to a great extent. (*Thompson v Abbasi*, 15 AD 3d 95 [1st Dept 2005].) The plaintiff must provide objective proof of a medically determined injury which prevents his substantial performance of all of his usual and customary daily activities and his disengagement from such activities must be under a physician's directive. (*Berete v Ford Motor Credit Co., Company*, 814 NYS 2d 559, *affd* 815 NYS 2d 505 [1st Dept 2006].)

In support of his motion, defendant Charles submits the plaintiff's deposition testimony, spinal manipulation report and the affirmed findings of Dr. Ravi Tikoo, Dr. Robert J. Orlandi and Dr. Jessica Berkowitz.

Dr. Tikoo, the defendant's neurologist, reviewed the plaintiff's medical, psychological and acupuncture notes, cervical and lumbar spine and left knee MRI reports and the bill of particulars. During his 3/3/10 examination of the plaintiff, Dr. Tikoo learned from the plaintiff that he was a restrained driver of a vehicle when his vehicle was struck on its left side. He sustained injuries to

his head, back and left arm, shoulder and knee. The plaintiff said that he was a student at the time of the accident. Although he lost consciousness for 10 seconds, the plaintiff reported that he did not go to the emergency room following the accident. He subsequently commenced physical and chiropractic therapy. The plaintiff's current complaints consist of headaches, lower back pain and numbness and left knee pain and weakness. His pain worsens when he bends, lifts objects and walks and he takes ibuprofen for pain management. Dr. Tikoo's examination revealed no abnormalities. The plaintiff's straight leg raising test was normal and his Rhomberg test was negative. The plaintiff exhibited mild tenderness in his lumbar spine but no associated spasm. He shows no "significant clinical evidence of neuropathy, radiculopathy or disc hernation from the accident." Dr. Tikoo opined that there were no objective diagnostic findings to substantiate the plaintiff's subjective complaints. He has reached maximal medical improvement, requires no further treatment and may normally perform his activities.

Dr. Orlandi, the defendant's orthopedist, examined the plaintiff on 3/2/10. The plaintiff informed the doctor that his neck doesn't bother him much. He experiences increased lower lumbar symptoms during damp weather but experiences no pain or paresthesias into his arms or legs. His knee is better and no longer gives out. Dr. Orlandi performed range of motion tests on the plaintiff's cervical and lumbar spine, shoulders and left knee. The plaintiff's cervical spine range of motion exceeded normal range of motion parameters by ten degrees during extension and lateral rotation movements. His lumbar spine exceeded normal parameters by fifteen degrees during flexion movements. The plaintiff's range of motion in his shoulders was unrestricted. Dr. Orlandi examined the plaintiff's left knee that underwent arthroscopic surgery. His knee presents no atrophy or dystrophy, he has full range of motion, his ligaments and stability are intact and the "meniscal signs

for posterior horn tears of the menisci are negative.” Dr. Orlandi challenges the findings of the plaintiff’s orthopedist, Dr. Brownstein, and states that “Dr. Brownstein fully understands the importance of differentiating an intramenscal signal from a grade III or grade IV communicating tear and this left knee MRI scan, as interpreted, certainly would not have warranted a left arthroscopy.”

Dr. Berkowitz, the defendant’s radiologist, reviewed the plaintiff’s 5/9/08 cervical spine and left knee MRI films and his 5/29/08 lumbar spine MRI film. Dr. Berkowitz opined that the plaintiff’s lumbar spine MRI shows disc dessication and minimal disc bulge which are chronic and degenerative in origin. The MRI presents no evidence of an acute traumatic injury or a causal relationship between the MRI examination and the accident. The plaintiff’s cervical spine MRI shows straightening of the normal cervical lordosis which is a nonspecific finding and may be due to positioning. There are minimal disc bulges with “right uncovertebral hypertrophic changes” which are chronic and degenerative in origin. Tiny disc herniations exist which are common in the asymptomatic population. No evidence of an acute traumatic injury exists. Dr. Berkowitz also opines that the plaintiff’s left knee MRI film is unremarkable. The MRI reveals no evidence of acute traumatic injury such as “fracture, bone marrow edema, meniscal or ligamentous tear” and no causal relationship between the MRI examination and the accident is present. Dr. Berkowitz notes that her MRI findings of the plaintiff’s cervical spine and left knee are contrary to the original radiology report.

In his 12/15/09 deposition testimony, plaintiff Palmer states that he received education and unemployment benefits after he was laid off in February 2008, approximately two months prior to the accident. No medical evidence is provided to establish that the plaintiff was prevented from performing his usual and customary activities because of the injuries allegedly sustained in the

accident. (*Thompson v Abbasi*, 15 AD 3d 95, *supra*; (*Berete v Ford Motor Credit Co., Company*, 814 NYS 2d 559, *affd* 815 NYS 2d 505, *supra*.)

In opposition to the defendant's motion, plaintiff Palmer submits the police accident report, his deposition testimony and affidavit. He submits the unsworn reports of his chiropractor, Dr. Patricia Lindor, and his osteopathic doctor, Dr. M. Sobin, but proof of serious injury must be proffered in admissible form to defeat a motion for summary judgment. (*Grasso v Angerami*, 79 NY 2d 813 [1991].) Mr. Palmer tenders the affirmed findings of Drs. Jerry Lubliner and Jeffrey Cohen, his orthopedists; Dr. Alex Lyubarsky, his pain management physician; Dr. Steven Brownstein, his radiologist; and Dr. Sonia Armengol, his treating physician.

Dr. Armengol, plaintiff Palmer's treating physician, examined the plaintiff on 4/30/08. The plaintiff said he did not lose consciousness but experienced intermittent headaches, neck stiffness, radiating pain to his left shoulder and lower back and left shoulder and knee pain two days post-accident. Dr. Armengol performed range of motion tests on the plaintiff's cervical and lumbosacral spine. The doctor identifies the plaintiff's range of motion parameters but omits the required normal range of motion parameters. (*Nagbe v Minigreen Hacking*, 22 AD 3d 326, *supra*.) The plaintiff revealed full range of motion in his thoracic spine, wrist/hand, knee, ankle/foot and left shoulder and elbow. Based on her examination, Dr. Armengol opined that the accident caused the plaintiff to sustain "severe trauma to his spine" which causes "the vertebrae to be misaligned, ligaments and muscles to be over stretched, nerves to be irritated and various soft tissues to be inflamed." According to Dr. Armengol, additional diagnostic tests were needed to determine the full extent of the plaintiff's injuries. Dr. Armengol conducted follow-up evaluations on the plaintiff on 7/8/08,

7/14/08, 8/19/08 and 9/2/08 and used standard evaluation forms to report her findings. These forms contain less specific information than the doctor's 4/30/08 initial report.

Dr. Brownstein, the plaintiff's radiologist, performed an MRI study of his cervical spine and left knee on 5/9/08. The MRI revealed no evidence of "tonsillar herniation or other congenital anomalies." The spinal cord appeared intact; the vertebral bodies are of normal height with normal marrow signal; and no evidence of bulges or herniation or central, lateral or foraminal narrowing is present. The MRI showed "straightening of the normal cervical curve consistent with muscular spasm." Dr. Brownstein opined that the plaintiff's left knee MRI shows a "tear of the posterior horn of the medial meniscus with associated joint effusion."

Dr. Cohen, the plaintiff's orthopedist, examined him on 7/30/08 and reviewed his 5/9/08 left knee MRI report which shows a "tear of the posterior horn of medial meniscus with joint effusion." Dr. Cohen examined the plaintiff's knees and opined that his left knee showed "traumatic synovitis" with a "tear of the medial meniscus and joint effusion." On 8/12/08, Dr. Cohen performed an arthroscopy on Mr. Palmer's left knee and reported his final diagnosis: "Large tear posterior horn lateral meniscus, peripheral fraying medial meniscus, synovitis, joint effusion and defect of the lateral femoral condyte." The doctor subsequently examined the plaintiff on 8/20/08, 10/15/08, 12/17/08. Dr. Cohen's last report states that the plaintiff ambulates with a cane. His range of motion is 0-125 degrees and his strength is 5/5.

Plaintiff Palmer underwent three operative procedures or Manipulation Under Anesthesia ("MUA") on his back on 7/11/08, 7/12/08 and 7/19/08. The last operative report of Dr. Alex Lyubarsky, the plaintiff's pain management physician, states that the plaintiff responded positively to the two previous treatments; his range of motion increased; and spasms and swelling had

diminished. During the last MUA, the report states that the plaintiff's spine was "taken to full range; the elastic barrier of resistance was reached and a low velocity thrust was performed; and cavitation was achieved on both sides" of the plaintiff's back. Mr. Palmer was discharged in good condition, advised to take medication and told to apply cold packs as needed. The current condition of the plaintiff's back cannot be determined in the absence of a recent examination report.

Dr. Lubliner, plaintiff Palmer's other orthopedist, examined the plaintiff on 9/7/10, almost 2½ years post-accident. No explanation for the gap in treatment is provided which is fatal to the plaintiff's claim of serious injury. (*Pommells v Perez*, 4 NY3d 566 [2005]; *Santos v Landroni*, 11 Misc3d 127(A) [1st Dept 2006].) In addition, Dr. Lubliner cannot qualify the plaintiff's alleged injury as a permanent injury based on one physical examination (*Berete v Ford Motor Credit Company*, 814 NYS 2d 559, *affd* 815 NYS 2d 505 [1st Dept 2006]) nor can he establish serious injury since he has no personal knowledge of the plaintiff's medical condition at the time of the accident. (*Uddin v Cooper*, 32 AD 3d 270 [1st Dept 2006].)

CONCLUSION

Defendant Charles, the movant for summary judgment on threshold grounds, bears the burden to establish, by the submission of evidentiary proof in admissible form, that the plaintiff sustained no serious injuries as a result of the automobile accident. The burden thereafter shifts to the plaintiff to demonstrate the existence of a triable issue of fact. (*Perez v Rodriguez*, 25 AD 3d 506 [1st Dept 2006].) The defendant met his burden. After a careful review of the evidence, the Court finds that plaintiff Palmer failed to meet his shifting burden regarding all of his alleged injuries with the exception of his left knee.

The plaintiff proffers the contemporaneous examination findings and reports of Drs. Lyubarsky, Brownstein and Armengol. No recent examination findings of these doctors, however, are provided although they are necessary to establish that the plaintiff is alleging an injury with an extended duration element as defined in Insurance Law § 5102(d). Defendant Charles' motion for summary judgment is granted with respect to the plaintiff's alleged head, arms, shoulders and back injuries.

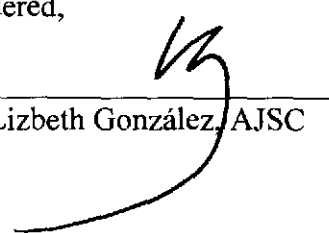
The plaintiff's left knee injury presents an issue for trial. Dr. Cohen, the plaintiff's orthopedist, performed an arthroscopic surgery on his knee for a meniscal tear. A torn meniscus requiring surgery raises an issue of fact. (*Noriega v Sauerhaft*, 5 AD3d 121 [1st Dept 2004].) The issue of whether the plaintiff's knee injury is permanent or significant is a question for the jury (*Noble v Ackerman*, 252 AD 2d 392 (1998)) since Dr. Cohen and Dr. Orlandi, the defendant's orthopedist, provide conflicting medical evidence. The jury must assess the conflicting evidence, determine the credibility of the witnesses and decide the weight to be accorded expert testimony. (*Windisch v Weiman*, 161 AD2d 433 [1st Dept 1990].)

Defendant Charles' motion for summary judgment as it pertains to the plaintiff's left knee is denied.

This is the Decision and Order of the Court.

Dated: October 21, 2011

So ordered,



Hon. Lizbeth González, AJSC