

Sutliff v Qadar
2012 NY Slip Op 30857(U)
March 30, 2012
Sup Ct, NY County
Docket Number: 107610/10
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: JAFFE BARBARA JAFFE
J.S.C.
Justice

PART 5

Index Number : 107610/2010
SUTLIFF, KYLE
vs.
QADAR, GHULAM
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT CAL # 148

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). 1, 2, 3
Answering Affidavits — Exhibits _____ No(s). 4, 5
Replying Affidavits _____ No(s). 6

Upon the foregoing papers, it is ordered that this motion is

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

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

FILED

APR 04 2012

Dated: 3/30/12
MAR 30 2012

NEW YORK
COUNTY CLERK'S OFFICE
BARBARA JAFFE, J.S.C.

1. CHECK ONE: ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

-----X
KYLE SUTLIFF,

Plaintiff,

-against-

GHULAM QADAR, THE CITY OF NEW YORK, and
POLICE OFFICER JOHN MALONE,

Defendants.
-----X

BARBARA JAFFE, JSC:

Index No. 107610/10

Motion Subm.: 1/10/12

Motion Seq. No.: 002

DECISION & ORDER

FILED

APR 04 2012

NEW YORK
COUNTY CLERK'S OFFICE

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By notice of motion dated September 7, 2011, defendant Qadar moves pursuant to CPLR 3212 for an order summarily dismissing the complaint against him on the ground that plaintiff did not suffer a serious injury. By notice of cross motion dated December 1, 2011, defendants City and Malone move for summary judgment on the same ground. Plaintiff opposes both motions.

I. BACKGROUND

On December 2, 2009, plaintiff was allegedly injured when, while a passenger in a vehicle being driven by defendant Malone, the vehicle was hit by another vehicle owned and operated by defendant Qadar. (Affirmation of Cynthia Hung, Esq., dated Sept. 7, 2011 [Hung Aff.], Exh. A).

An unsworn MRI report, dated December 22, 2009, the purpose of which was to rule out

a rotator cuff tear in plaintiff's left shoulder, reflects that a partial tear of plaintiff's rotator cuff previously seen on a 2008 MRI examination was "largely unchanged," but that there was abnormal configuration and fluid surrounding plaintiff's labrum and thus a labral tear could not be excluded, which was a new finding. (Affirmation of Frank Braunstein, Esq., dated Nov. 7, 2011 [Braunstein Aff.], Exh. C).

By report dated January 6, 2010, Dr. Joseph Gregorace, an osteopath, diagnosed plaintiff with right shoulder cuff tendonitis and left shoulder derangement with suspected labrum and rotator cuff pathology, based on various tests including range of motion tests of plaintiff's left and right shoulders reflecting that he was within normal ranges. He opined that if the history given by plaintiff was correct, "then there is a causal relationship." He diagnosed plaintiff as disabled and recommended that he not return to work until he was re-evaluated. (*Id.*, Exh. A).

In follow-up evaluations performed by Gregorace on February 24, 2010, April 7, 2010, after plaintiff underwent surgery on his left shoulder, and May 14, 2010, plaintiff's ranges of motion in his left and right shoulders remained limited. (*Id.*, Exh. B).

By report dated June 9, 2010, Gregorace opined that plaintiff's disability was partial and permanent and that his shoulder injuries were caused by the accident. He did not address plaintiff's previous shoulder injury. (*Id.*).

In an evaluation dated June 30, 2010, Gregorace states that various tests on plaintiff's left shoulder were negative, and that two out of the three tested ranges of motion were within the normal range. (*Id.*).

In his verified bill of particulars dated July 19, 2010, plaintiff alleges that he sustained the following injuries: partial cuff tear, impingement syndrome, bursitis, requiring arthroscopic

subacromial decompression, bursectomy, acromioplasty and debridement of the shoulders, partial tear of the supraspinatus tendon in the left shoulder requiring surgery, bursitis/synovitis in the right shoulder, bilateral internal derangement of both shoulders with loss of use, right shoulder rotator cuff tendonitis with impingement syndrome for which surgery is recommended, severe sprain/strain of the cervical spine with loss of range of motion, and severe sprain/strain of the lumbar spine with loss of range of motion. On February 2, 2010, plaintiff underwent surgery, specifically, "arthroscopic subacromial decompression bursectomy, acromioplasty, and debridement partial cuff tear" in his left shoulder. He also asserts that he was confined to his bed for approximately two months and his home for approximately four months and intermittently thereafter, and incapacitated from employment for approximately four months and that, upon his return, he was placed on limited duty for another two months. (Hung Aff., Exh. C).

By sworn reports dated September 16, 2010, Dr. A. Robert Tantleff states that plaintiff's MRI examinations for his right and left shoulders are normal and unremarkable. (*Id.*, Exh. E).

On March 14, 2011, plaintiff testified at an examination before trial, as pertinent here, that after the accident he was confined to his home for two weeks, that he was unable to work for four and a half months and when he returned, he was placed on light duty for one and one-half to two months thereafter, and that his usual and customary daily activities were limited after the accident and remain so. He stopped receiving medical care for his injuries in April 2010. Plaintiff also testified that he had previously injured his left shoulder in 2008, resulting in a torn rotator cuff. (*Id.*, Exh. F).

On May 13, 2011, Dr. Gregory Montalbano, an orthopedic surgeon, examined plaintiff and found that he had normal ranges of motion in his cervical and lumbar spines and both

5] shoulders. Montalbano also examined plaintiff's medical records, including the December 2009 MRI reports, although he did not have the MRI images to review, and observed that the MRI report of plaintiff's left shoulder reflected a partly torn tendon which appeared unchanged when compared with an MRI performed on May 16, 2008. Montalbano determined that although plaintiff sustained a left shoulder injury during the accident, there was no substantial and/or permanent injury to the left shoulder or any permanent injury to plaintiff's right shoulder or cervical or lumbar spine. He also opined that the surgery performed on plaintiff's left shoulder relates to his pre-existing shoulder injury and not the accident. (*Id.*, Exh. D).

II. CONTENTIONS

Qadar and City argue that the medical evidence submitted by Qadar establishes, *prima facie*, that plaintiff did not suffer a serious injury. (Hung Aff.; Affirmation of Stacy L. Cohen, ACC, dated Dec. 1, 2011).

Plaintiff contends that as Montalbano did not address his 90/180 day claim, defendants' motions must be denied, that defendants did not demonstrate that he did not sustain a significant limitation of use of his left shoulder, and that in any event, he established that he has a significant or permanent limitation of use of his left shoulder and was unable to perform his daily activities for not less than 90 out of the 180 days following the accident. Although plaintiff refers to a September 2011 report by Gregorace, it is not annexed to his papers. (Braunstein Aff.).

In reply, Qadar observes that Montalbano's examination reveals that plaintiff had normal ranges of motion in his shoulders and that plaintiff testified that he was confined to his home for only two weeks after the accident. He also argues that as the December 2009 MRI report was unsworn, Gregorace improperly relied on it, and that plaintiff submitted no evidence based on a

[* 6]
recent physical examination. He observes that Gregorace failed to address the evidence that plaintiff's rotator cuff tear pre-dated the accident. (Reply Affirmation, dated Dec. 15, 2011).

III. ANALYSIS

Pursuant to section 5102(d) of the Insurance Law, a serious injury is defined as:

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 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.

Here, defendants established, *prima facie*, through Montalbano's affirmed medical report and plaintiff's deposition testimony, that plaintiff did not sustain a serious injury as defined by Insurance Law § 5102. (See *Pisani v First Class Car and Limousine Serv. Corp.*, 82 AD3d 596 [1st Dept 2011] [defendant met burden through report of orthopedic surgeon who determined that plaintiff had normal range of motion in cervical and lumbar spine, and plaintiff's deposition testimony that he missed only three days of work after accident]; *Whitaker v Soumano*, 81 AD3d 411 [1st Dept 2011] [defendant submitted reports based on independent medical examinations showing that plaintiff's range of motion was normal]).

While Gregorace found that plaintiff had limited ranges of motion in his left and right shoulders, by June 30, 2010 he determined that plaintiff had normal ranges of motion in two of the three areas tested and all of the other tests were negative. Moreover, plaintiff submits no evidence based on a more recent examination, and thus has not rebutted Montalbano's finding that he had normal ranges of motion in both shoulders. (See *Lam v Dong*, 84 AD3d 515 [1st Dept 2011] [plaintiff failed to submit recent examination results to rebut defendant's expert's finding

of full ranges of motion more than year after last examination by plaintiff's doctor]; *Townes v Harlem Group, Inc.*, 82 AD3d 583 [1st Dept 2011] [plaintiff did not submit proof of recent examination showing loss of range of motion]; *Ali v Mirshah*, 41 AD3d 748 [2d Dept 2007] [since plaintiff alleged permanent serious injury and significant limitation of use, he was required to submit objective medical evidence based on recent examination]).

Also, Gregorace's opinion that the accident caused plaintiff's injuries is conclusory, and he has failed to address plaintiff's previous left shoulder injury or establish that that injury was different from the new claimed injury. (See *McArthur v Act Limo, Inc.*, 2012 WL 952854, 2012 NY Slip Op 02174 [1st Dept] [plaintiff's doctor ignored effect of prior accidents and submitted no evidence that claimed injuries differed from prior injuries]; *Lam*, 84 AD3d at 515 [plaintiff's physician set forth no objective basis or reason other than history given by plaintiff for concluding that injuries caused by accident]). While the 2009 MRI report reflects that a labral tear "could not be excluded," plaintiff submits no medical evidence showing that he actually sustained one.

Although it is undisputed that plaintiff missed four months of work, absent proof that his injuries were caused by the accident or any objective medical evidence showing that his daily activities were substantially curtailed, his 90/180 day claim fails. (See *Arroyo v Morris*, 85 AD3d 679 [1st Dept 2011] [plaintiff's 90/180 day claim insufficient although he missed nine months of work]; *Mitchell v Calle*, 90 AD3d 584 [1st Dept 2011] [claimed restrictions in usual and customary activities unsupported by objective medical evidence]; *Blake v Portexit Corp.*, 69 AD3d 426 [1st Dept 2010] [fact that plaintiff missed more than 90 days of work not determinative; plaintiff's statement as to curtailment of daily activities unsupported by medical

evidence)). For the same reason, it is irrelevant to plaintiff's 90/180 day claim that defendant's expert did not address this issue. (*Jimenez v Polanco*, 88 AD3d 604 [1st Dept 2011]).

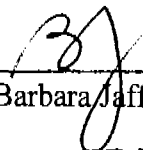
IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motions for summary judgment are granted, and the complaint is dismissed.

ENTER:

FILED


Barbara Jaffe, JSC

APR 04 2012

DATED: March 30, 2012
New York, New York

BARBARA JAFFE
J.S.C.

NEW YORK
COUNTY CLERK'S OFFICE

MAR 30 2012