Galindo v Kohli
2012 NY Slip Op 30991(U)
April 17, 2012
Supreme Court, Suffolk County
Docket Number: 09-18777
Judge: W. Gerard Asher
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SHORT FORM ORDER

COPY

INDEX No. 09-18777

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 3-30-11
ADJ. DATE 11-4-11
Mot. Seq.# 001 - MD

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MARIO R. GALINDO,

Plaintiff,

- against -

SADHANA KOHLI,

Defendant.

---X

CANNON & ACOSTA, LLP
Attorney for Plaintiff
1923 New York Avenue
Huntington Station, New York 11746

ZAKLUKIEWICZ, PUZO & MORRISSEY, LLP
Attorney for Defendant
2701 Sunrise Highway, P.O. Box 389
Islip Terrace, New York 11752

Upon the following papers numbered 1 to 22 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 10 ; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 11 - 20 ; Replying Affidavits and supporting papers 21 - 22 ; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant for an order pursuant to CPLR 3212 granting summary judgment in his favor dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is denied.

This is an action to recover damages for injuries allegedly sustained by plaintiff on April 30, 2008 when his vehicle was struck in the rear by defendant's vehicle. The accident occurred on Route 495 at or near its intersection with Route 25, in the Town of Oyster Bay, Nassau County, New York. In his bill of particulars, plaintiff alleges that as a result of the subject accident he sustained serious injuries including tear of the anterior horn of the medial meniscus of the left knee requiring surgery, post-traumatic trochlear chondral defect of the left knee requiring surgery, medial patellar facet chondral defect of the left knee requiring surgery, L3-4 disc herniation with annular tears and thecal sac deformities, L4-5 disc herniation with annular tears and thecal sac deformities, C6-7 disc herniation, L5-S1 disc bulge, and C3-4 disc bulge. In addition, plaintiff alleges that following the accident he was treated at North Shore University Hospital at Syosset and was confined to bed for two weeks and to home for approximately four weeks, and was totally disabled for approximately three months. Plaintiff is also seeking to recover damages for economic loss in excess of basic economic loss as defined in Insurance Law § 5102 (a).

Plaintiff further alleges in his bill of particulars that as a result of said accident he sustained injuries under the following categories of "serious injury" pursuant to Insurance Law § 5102 (d): 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 non-permanent injury or impairment that prevents the performance of substantially all of the material acts of plaintiff's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the accident.

Defendant now moves for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). In support of the motion, defendant submits the pleadings, plaintiff's bill of particulars, the affirmed report of defendant's examining orthopedic surgeon, the affirmed report of defendant's examining neurologist, the affirmed reports of defendant's examining radiologist, and plaintiff's certified deposition transcript.

Insurance Law § 5102 (d) defines "serious injury" 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" (*see* Insurance Law § 5102 [d]).

In order to recover under the "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance Inc.***, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, either objective evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration based on a recent examination of plaintiff must be provided or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (*see*, ***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2000]; ***Mejia v DeRose***, 35 AD3d 407, 825 NYS2d 722 [2d Dept 2006]).

On a motion for summary judgment, the defendant has the initial burden of making a prima facie showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) (*see* ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Akhtar v Santos***, 57 AD3d 593, 869 NYS2d 220 [2d Dept 2008]). The defendant may satisfy this burden by submitting the plaintiff's own deposition testimony and the affirmed medical report of the defendant's own examining physician (*see* ***Moore v Edison***, 25 AD3d 672, 811 NYS2d 724 [2d Dept 2006]; ***Farozes v Kamran***, 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; ***Boone v New York City Trans. Auth.***, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]).

Plaintiff's deposition testimony from April 27, 2010 reveals that he was stopped in traffic in the left lane of the Long Island Expressway when his van was struck in the rear by defendant's vehicle, that the impact was heavy, and that it caused his vehicle to strike the vehicle in front of it. At the time of the accident plaintiff was self-employed as a house painter. According to plaintiff, his body moved forward then backward and he hit his left knee, right foot, lower left side of his back and neck in the interior of his vehicle and he felt pain. He had never injured said regions of his body prior to the accident or received medical treatment for them. Plaintiff was treated at, given and prescribed pain medication, and then released from the hospital emergency room in Syosset. Two days later he went to a medical clinic. Plaintiff stated that he received physical therapy as well as acupuncture three times a week for seven or eight months and that the frequency then decreased to twice a week until his no-fault benefits ended. He also stated that the staff at the medical clinic checked his left knee and one physician recommended surgery. Plaintiff testified that he subsequently had ambulatory surgery on his left knee at the hospital in Syosset in September 2008 and used crutches for a month-and-a-half and used only one crutch for another month-and-a-half. He explained that he returned to work one week after the accident on a part-time basis and then one month or a month-and-a-half later he returned to work full-time. After surgery, plaintiff was out of work for one month or a month-and-a-half then returned part-time for a month then went back to working full-time. Plaintiff also testified that he currently had no appointments for medical treatment but that he still has pain in all the regions of the body that he injured in the accident. Plaintiff further testified that there are no activities that he cannot do at all but that he is restricted at work in his use of a ladder, being on his knees and bending too much, and he cannot lift or bend or run too long when exercising.

The affirmed report dated June 4, 2010 of defendant's examining orthopedic surgeon, Robert Israel, M.D. (Dr. Israel), indicates that he examined plaintiff on said date, reviewed plaintiff's MRI's of his right foot, lumbar spine, left knee and cervical spine as well as other medical records, and performed range of motion testing of plaintiff's cervical spine, lumbar spine and left knee using a goniometer. He noted that plaintiff's current complaints were continued pain in his neck, described as being better, and continued pain in his lower back, left knee and right foot, described as being the same as at the time of the accident. With respect to plaintiff's cervical spine, Dr. Israel provided range of motion testing findings of flexion to 45 degrees (45 degrees normal), extension to 60 degrees (60 degrees normal), right rotation to 80 degrees (80 degrees normal), left rotation to 80 degrees (80 degrees normal), right lateral flexion to 45 degrees (45 degrees normal), and left lateral flexion to 45 degrees (45 degrees normal). He noted that there was no tenderness or spasm to palpation, intact sensation to pinprick and light touch, and that cervical compression testing and Spurling test results were negative. Regarding plaintiff's lumbar spine, Dr. Israel indicated that there were no spasms or tenderness on palpation and that plaintiff's gait and toe and heel walking were normal. In addition, he indicated that straight leg raising was negative bilaterally to 75 degrees (75 degrees normal), and provided range of motion testing results of the lumbar spine of forward flexion to 60 degrees (60 degrees normal), extension to 30 degrees (30 degrees normal), right lateral flexion to 45 degrees (45 degrees normal) and left lateral flexion to 45 degrees (45 degrees normal). Dr. Israel noted that the patella and Achilles' deep tendon reflexes were symmetrical. Concerning the left knee, Dr. Israel noted that there were three portal sites, well healed and non-tender, that plaintiff's gait was normal, and that there was no tenderness or effusion present. He also noted that there was no patella-femoral crepitus and that the McMurray test and the patella-femoral compression test were negative. Dr. Israel found that range of motion of the knee was normal from 0 to 130 degrees of flexion (0 to 130 degrees normal). In concluding his report, Dr. Israel diagnosed resolved sprain of the cervical spine, resolved sprain of the lumbar spine, and "SP"

arthroscopy of the left knee not related to the accident. He stated that based on his orthopedic examination, plaintiff had no disability as a result of the subject accident, and that if the history of the accident was correct, there was a cause and effect relationship between the diagnosis and said accident.

Defendant's examining neurologist, Matthew M. Chacko, M.D. (Dr. Chacko), indicated in his affirmed report dated June 22, 2010 that he examined plaintiff on that date, and that plaintiff's complaints consisted of pain in his neck, back, left knee and bottom of the right foot. Dr. Chacko provided active range of motion testing results using a goniometer for plaintiff's cervical spine and lumbar spine. With respect to plaintiff's cervical spine, Dr. Chacko provided the following results, flexion 50 degrees (50 degrees normal), extension 60 degrees (60 degrees normal), lateral rotations 80 degrees (80 degrees normal), and lateral flexions 45 degrees (45 degrees normal). Regarding plaintiff's lumbar spine, he provided the following results, flexion 45 degrees (60 degrees normal), lateral flexions 25 degrees (25 degrees normal), and extension 25 degrees (25 degrees normal). Straight leg raising was up to 90 degrees bilaterally, 90 degrees being normal. Dr. Chacko noted that plaintiff reported tenderness on palpation of the left cervical region but that no muscle spasm was felt on palpation of the cervical, thoracic or lumbar areas. In addition, Dr. Chacko provided the results of his neurological examination including that the motor examination showed normal tone and strength in upper and lower extremities in proximal and distal muscle groups with no atrophy or fasciculations noted, deep tendon reflexes were 2+ and symmetrical, plantar responses were downgoing, which was normal, and the sensory examination was normal to touch and pinprick sensation bilaterally. His impression was a history of cervical and lumbar sprains resolved from a neurological standpoint. He indicated that no focal neurological deficits were noted and that there was no muscle weakness, reflex asymmetry or focal sensory changes. Dr. Chacko also indicated that plaintiff exhibited mild limitation of lumbar range of motion and that "it should be noted that these are voluntary movements fully under the control of the person being examined and hence not a truly objective finding." He stated that there are no findings consistent with radiculopathy or myelopathy in plaintiff's cervical or lumbar areas. In conclusion, Dr. Chacko opined that there was no objective clinical evidence of any neurological sequelae attributable to the subject accident, that plaintiff was not disabled and was capable of performing the normal activities of daily living, and that if the history provided was accurate, plaintiff's original symptoms were related to the subject accident.

Defendant's examining radiologist, David A. Fisher, M.D. (Dr. Fisher), indicated in his affirmed reports dated July 16, 2009 that he reviewed plaintiff's MRI of the right foot from June 7, 2008, MRI of the left knee from July 10, 2008, MRI of the lumbar spine from July 21, 2008, and MRI of the cervical spine from July 26, 2008. In all of his reports he concluded that there was no radiographic evidence of recent traumatic or causally related injury. With respect to the left knee MRI, he also noted that aside from mild articular cartilage thinning and intrasubstance degeneration within the posterior horn of the medial meniscus, it was an unremarkable study. Regarding the lumbar spine MRI he indicated that there were no disc herniations and that the disc bulges noted were compatible with the amount of degenerative change present. For the cervical spine MRI, Dr. Fisher indicated that there were mild diffuse degenerative changes with minimal disc bulge at C 6-7.

Here, defendant failed to meet his prima facie burden of showing that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (*see* ***McFadden v Barry***, 63 AD3d 1120, 883 NYS2d 83 [2d Dept 2009]). Defendant's examining orthopedic

surgeon and examining neurologist both failed to address whether there were any limitations in range of motion in the rotation of plaintiff's lumbar spine (*see id.*). In addition, although defendant's examining neurologist found a 15 degree range of motion limitation when measuring plaintiff's lumbar spine flexion and implied that plaintiff was voluntarily restricting his movement during testing, he failed to explain or substantiate, with objective medical evidence, the basis for his conclusion that the limitation was voluntary (*see **Astudillo v MV Transp., Inc.***, 84 AD3d 1289, 923 NYS2d 722 [2d Dept 2011]). Such a finding raises credibility issues that cannot be resolved on a motion for summary judgment (*see **Washington v Delossantos***, 44 AD3d 748, 843 NYS2d 186 [2d Dept 2007]). Furthermore, defendant's examining physicians' normal measurements differed (*see **Sanon v Moskowitz***, 44 AD3d 926, 843 NYS2d 510 [2d Dept 2007]).

Inasmuch as defendant failed to meet his prima facie burden on the motion, it is unnecessary to consider whether plaintiff's opposition papers were sufficient to raise a triable issue of fact (*see **Yong Deok Lee v Singh***, 56 AD3d 662, 867 NYS2d 339 [2d Dept 2008]).

Accordingly, the instant motion is denied.

Dated: March 30, 2012

W. Gerard Asher
J.S.C.

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**