

Hernandez v CBF Trucking

2012 NY Slip Op 31159(U)

April 27, 2012

Sup Ct, Suffolk County

Docket Number: 09-14136

Judge: Peter H. Mayer

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 11-15-11
ADJ. DATE 1-3-12
Mot. Seq. # 002 - MD

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WILBER R. DIAZ HERNANDEZ,	:	GRUNDFAST & HIGHAM
	:	Attorney for Plaintiff
Plaintiff,	:	207 Hallock Road, Suite 207
	:	Stony Brook, New York 11790
-against-	:	
	:	LITCHFIELD CAVO, LLP
CBF TRUCKING and ALAIN JEAN PIERRE,	:	Attorney for Defendants
	:	420 Lexington Avenue, Suite 2104
Defendants.	:	New York, New York 10170
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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendants, dated October 14, 2011, and supporting papers 1-19 (including Memorandum of Law dated ____); (2) Notice of Cross Motion by the , dated , supporting papers; (3) Affirmation in Opposition by the plaintiff, dated December 23, 2011, and supporting papers 20 - 24; (4) Reply Affirmation by the defendants, dated January 6, 2012, and supporting papers 25 - 26; (5) Other ____ (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that this motion by defendants for an order pursuant to CPLR 3212 granting summary judgment in their 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 July 5, 2008 when his vehicle was struck by a vehicle owned by defendant CBF Trucking and operated by defendant Alain Jean Pierre. The accident occurred on southbound Crooked Hill Road at or near its intersection with G Road in Brentwood, Suffolk County, New York. Plaintiff alleges in his bill of particulars that as a result of said accident he sustained serious injuries including torn lateral meniscus of the right knee, a tear of the posterior horn of the medial meniscus of the right knee, right knee internal derangement, bulges at L1-L2, L2-L3, L3-L4, and L4-5, broad based central bulge at L5-S1 impinging upon the anterior thecal sac, right L5-S1 radiculopathy, bilateral C6 and C8 radiculitis, persistent and constant headaches, and double or blurred vision. In addition, plaintiff alleges that following the accident he was confined to bed for approximately 10 days and to home for approximately twelve weeks. At the time of the accident, plaintiff was employed

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as kitchen help at McDonald's in Northport, New York. Plaintiff also alleges that he sustained economic loss in excess of basic economic loss as defined in Insurance Law § 5102 (a).

In his bill of particulars, plaintiff claims 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.

Defendants now move for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) as a result of the subject accident. In support of the motion, defendants submit, among other things, the pleadings, plaintiff's bill of particulars, plaintiff's signed examination under oath transcript, plaintiff's signed examination before trial transcript, plaintiff's medical records including plaintiff's report dated September 3, 2008 concerning his MRI of the lumbar spine and plaintiff's report dated August 6, 2008 regarding his MRI of the right knee, and the affirmed reports of defendants' examining orthopedic surgeon and examining neurologist.

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 Eyer*, 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

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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, 487 NYS2d 316 [1985]; *Boone v New York City Trans. Auth.*, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]).

Plaintiff's examination under oath testimony from October 29, 2008 reveals that at the time of the subject accident he was 30 years old, that he had not been involved in any prior accident, and that he was employed at McDonald's working at the counter and in the kitchen. He testified that as a result of the accident he lost approximately three-and-a-half months from work but that he was currently working as a mechanic and had started the job one month prior, in September 2008. Plaintiff stated that after the accident, he lost consciousness, that he had pain in his chest, back, right knee, and neck as well as a headache, and that he was taken by ambulance to Southside Hospital where x-rays were taken, he was given pain medication and he was released. In addition, plaintiff testified that two or three days after the accident he sought medical treatment at a medical clinic, and he began treatment with a physician who referred him for physical therapy, chiropractic treatment, acupuncture, and nerve testing. According to plaintiff, he received physical therapy treatment four or five times a week and was still receiving treatment. He stated that he was referred for surgery by the physician at the medical clinic and that he had right knee surgery performed by Dr. Durant at Syosset Hospital on September 9, 2008. Plaintiff explained that he continued to have pain in his back and knee and that he was continuing his treatments at the medical clinic.

During his deposition on June 23, 2010, plaintiff testified that he was currently employed as a mechanic, that his medical treatment had ended approximately seven months after the accident, and that he saw the physician who performed his knee operation, Dr. Durant, approximately three times prior to the surgery and once after the surgery. In addition, plaintiff testified that he did not currently have any medical appointments scheduled for the injuries that he allegedly sustained in the accident. According to plaintiff, there are no activities that he cannot do at all as a result of the accident but he is limited in performing his work. He explained that he cannot strain or stand in one position for long or squat for long periods of time otherwise he feels pain in his knee or lower back.

Plaintiff's medical records include a note dated July 15, 2008 from his physician, Irage Yehudian, M.D. (Yehudian), at Padova Physical Rehabilitation in Brentwood, New York indicating that plaintiff was injured in a motor vehicle accident on July 5, 2008, that he sustained injuries and was unable to work from July 5, 2008 to July 13, 2008, and that plaintiff can return to work with no restriction on July 14, 2008. However, in a report of the same date, Dr. Yehudian found positive results for the Foraminal Compression, Kemp's, and Milgrim's tests and diagnosed, among other things, cervical radiculitis or neuritis. A report based on an initial chiropractic examination of plaintiff on July 7, 2008 by Adam Neil Hopkins, D.C. at Peak Chiropractic, P.C. in Brentwood, New York provides the results of plaintiff's active range of motion of the lumbar spine visually estimated in degrees indicating flexion 90/90, extension 30/30, left rotation 30/30, right rotation 30/30, left lateral flexion 30/30, and right lateral flexion 30/30 and positive test results for plaintiff's lumbar spine with respect to Yeoman's test, and Kemp's test, both indicating pain.

The affirmed report dated April 28, 2011 of defendants' examining orthopedic surgeon, William A. Healy, III, M.D. (Dr. Healy), indicates that he examined plaintiff on said date, that he recorded plaintiff's

complaints of daily knee and low back pain, and that he reviewed plaintiff's bill of particulars as well as an operative report of Dr. Durant dated September 9, 2008 and plaintiff's records from Southside Hospital's emergency room. In addition, he notes that there were no radiographs for review but that radiographs were taken of plaintiff on said date including an AP and lateral of plaintiff's right knee showing no significant osseous findings and an AP and lateral of plaintiff's lumbar spine showing normal lumbar lordosis, disc space height was maintained, and no significant osseous findings were appreciated. In addition, Dr. Healy indicates that he performed a physical examination of plaintiff and provides his observations that plaintiff ambulated without evidence of an antalgic gait, was able to heel and toe walk without difficulty, and was able to crouch and rise without difficulty. He reports range of motion in degrees of plaintiff's lumbar spine, cervical spine, and right knee as compared to normal with all the results being normal. Dr. Healy also notes that plaintiff has no cervical or lumbar paraspinal spasm, negative straight leg raise, and no motor sensory, reflex or vascular deficits distally for the lumbar spine and cervical spine. With respect to plaintiff's right knee, he finds no effusion, no instability in the AP plane or varus or valgus stress, and negative results for Lachman test, McMurray test, Apley grind, and negative medial joint line tenderness. Dr. Healy also reports no tenderness over the medial or lateral facet of the patella, no patellofemoral crepitations, no lateral tilting of the patella, and no crepitation in the medial or lateral femoral condyle. In conclusion, Dr. Healy states that if the history as taken is correct, plaintiff may have sustained a cervical and thoracic and lumbar strain as a result of the accident, which has fully and maximally resolved, and that no further intervention is warranted. Regarding the right knee, he states that plaintiff may have sustained a contusion that should have and has fully and maximally recovered and that no further intervention is warranted.

Defendants' examining neurologist, Howard B. Reiser, M.D. (Dr. Reiser), indicates in his affirmed report dated January 15, 2011 that he performed a neurological examination of plaintiff on that date, that plaintiff provided his history and complaints, and that he reviewed plaintiff's medical records. Dr. Reiser notes that plaintiff's head is normocephalic and atraumatic, his neck is supple and non-tender, his thoracic paraspinal regions are non-tender, and that plaintiff reported mild discomfort when right lumbar paraspinal regions were palpated. In addition, he reports that straight leg raising signs are negative bilaterally, that there is no cognitive or communication deficit noted, and that there is no deficit upon cranial nerve examination. He also reports that there is normal tone, bulk and power upon motor examination, that his sensory examination was normal to common and cortical modalities throughout, and that his cerebellar examination revealed no dysmetria or intention tremor. In concluding his report, Dr. Reiser states that plaintiff presented with ongoing subjective symptoms including pain in his right knee and lower back. In addition, he states that there is no ongoing symptom to suggest neurological involvement and that the neurological examination reveals no objective deficit. Dr. Reiser adds that there is no ongoing symptom or objective finding to suggest ongoing radiculitis or radiculopathy in either the cervical or lumbosacral region. He notes that he found no correlation between the reports of imaging studies and the electrodiagnostic findings that were submitted. Dr. Reiser also notes that although plaintiff stated that he was unconscious at the scene, plaintiff's emergency room records indicate that he denied loss of consciousness, plaintiff's CT scan of his head revealed no evidence of intracranial injury, and there was nothing in Dr. Reiser's examination to suggest an objective disorder involving the central, peripheral or autonomic nervous system. Dr. Reiser further states that based on the history, his neurological examination, and review of the submitted records, he did not find evidence of any objective, ongoing neurological disorder causally related to the subject accident.

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Here, defendants' submissions were insufficient to establish a prima facie showing that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) as a result of the subject accident (*see Barrett v Jeannot*, 18 AD3d 679, 795 NYS2d 727 [2d Dept 2005]). Defendants' examining orthopedic surgeon failed to set forth the objective test or tests performed supporting his claim that there was no limitation of range of motion in plaintiff's lumbar spine, cervical spine, or right knee (*see Exilus v Nicholas*, 26 AD3d 457, 809 NYS2d 458 [2d Dept 2006]). He failed to indicate what instrument he used to make his specific, numerical range of motion measurements (*see Perl v Meher*, 18 NY3d 208, 936 NYS2d 655 [2011]; *George v Suarez*, 71 AD3d 727, 895 NYS2d 724 [2d Dept 2010]; *DeLeon v J & J Towing, Inc.*, 32 AD3d 986, 822 NYS2d 120 [2d Dept 2006] [plaintiff's range of motion objectively measured using an arthroidal protractor]; *Desulme v Stanya*, 12 AD3d 557, 785 NYS2d 477 [2d Dept 2004] [plaintiff's range of motion objectively measured using a goniometer]). Defendants' examining neurologist offered no range of motion testing results to remedy the deficiency (*see Barrett v Jeannot, supra*). In addition, the note from plaintiff's physical therapy physician that plaintiff could return to work nine days after the accident, and his chiropractor's finding of full range of motion of plaintiff's lumbar spine one day after the accident, are insufficient to establish that plaintiff failed to satisfy the serious injury threshold.

Inasmuch as defendants failed to meet their prima facie burden, 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 for summary judgment is denied.

Dated: _____

4/27/12



PETER H. MAYER, J.S.C.