

Williams v Wilfred

2012 NY Slip Op 32519(U)

September 26, 2012

Supreme Court, Queens County

Docket Number: 5693/2011

Judge: Robert J. McDonald

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

- - - - - x

QUENTIN WILLIAMS, Index No.: 5693/2011
Plaintiff, Motion Date: 08/30/12
- against - Motion No.: 48
Motion Seq.: 3
GERTRUDE P. WILFRED and HENRY WILFRED,

Defendants.

- - - - - x

The following papers numbered 1 to 14 were read on this motion by defendants, GERTRUDE P. WILFRED and HENRY WILFRED, for an order pursuant to CPLR 3212, granting defendants summary judgment and dismissing the plaintiff's complaint on the ground that the plaintiff did not sustain a serious injury within the meaning of Insurance Law §§ 5102 and 5104:

Papers
Numbered

Notice of Motion-Affidavits-Exhibits- Memo.....1 - 6
Affirmation in Opposition-Affidavits-Exhibits.....7 - 11
Reply Affirmation.....12 - 14

This is a personal injury action in which the plaintiff, Quentin Williams, seeks to recover damages for injuries he sustained as a result of a motor vehicle accident that occurred on December 12, 2010, at or near the intersection of Utica Avenue and Pacific Street, Kings County, New York. Plaintiff alleges that he was traveling southbound on Utica Avenue when the defendants's vehicle, which was traveling northbound on Utica Avenue, struck his vehicle in the intersection as defendants' vehicle was attempting to make a left turn onto westbound Pacific Street. Plaintiff allegedly sustained physical injuries as a result of the accident.

In his verified Bill of Particulars, the plaintiff states that as a result of the accident he sustained, inter alia, disc herniations at C5-C6, C6-C7, L3-L4 and L5-S1, as well as a tear of the posterior horn of the medial meniscus of the right knee.

The plaintiff contends that he sustained a serious injury as defined in Insurance Law § 5102(d) in that he sustained a permanent loss of use of a body organ, member function or system; a permanent consequential limitation or use of a body organ or member; a significant limitation of use of a body function or system; and a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute his 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.

Defendant now moves for an order pursuant to CPLR 3212(b), granting summary judgment dismissing the plaintiff's complaint on the ground that plaintiff did not suffer a serious injury as defined by Insurance Law § 5102.

In support of the motion, defendants submit an affirmation from counsel, Michael P. Jones, Esq; a copy of the pleadings; plaintiff's verified bill of particulars; the affirmed medical report of board certified orthopedic surgeon, Dr. Jacquelin Emmanuel; board certified radiologist, Dr. Melissa Sapan Cohn and a copy of the transcript of the plaintiff's examination before trial.

Dr. Emmanuel, an orthopedic surgeon retained by the defendant to perform an independent orthopedic examination, evaluated the plaintiff on March 1, 2012. At the time of the examination plaintiff was 39 years old. Plaintiff told Dr. Emmanuel that as a result of the accident of December 12, 2010 he injured his neck, lower back and right knee. After performing objective and comparative range of motion tests, the doctor reported that the plaintiff had no limitations of range of motion of the cervical spine, lumbosacral spine or right knee. Her diagnosis of plaintiff's injuries was, resolved sprain/strain of the cervical and lumbar spine and resolved sprain/contusion of the right knee. She states that there are no degenerative, congenital or age related factors relevant to the performed and recorded range of motion measurements. She also states that the plaintiff is capable of performing activities of daily living as well as occupational duties without any limitation or restriction.

Dr. Cohn, reviewed the MRIs of the plaintiff's lumbosacral spine, cervical spine and right knee and stated in her affirmed reports that she found only mild disc bulging at L5-S1 which was attributable to degeneration. She states that she found a disc bulge at C5-6 and a disc herniation at C6-7. She states that the disc spaces of the C2-3, C3-4, C4-5, L1-2, L2-3, L3-4 and L4-5 vertebrae were within normal limits. She also states that the bulge and herniation at C5-6 and C6-7 is caused by degenerative disc disease and is unrelated to trauma. With respect to the MRI of the right knee, Dr. Cohn states that she found a linear tear of the posterior horn of the medial meniscus. She attributes the tear to a chronic condition and states that it was of unknown duration and there were no associated findings which would indicate that the tear represents an acute traumatic related injury.

In his examination before trial, taken on January 20, 2012, plaintiff, testified that he is presently employed as a security guard for Elite Security and is assigned to various locations for the purpose of observing and deterring shoplifters. He states that at the time of the accident he was not working. He stated that he left the accident scene in a cab. He stated that the next day he woke up with pain to his knees and jaw. He went to his physician, Dr. Raynor, and to Interfaith Medical Center where he was treated for pain to the left side of his jaw, his knees, back and neck. He was released from Interfaith the same day with a knee brace and a cane which he used for a few months. Two weeks later he went for treatment at Ace Medical having been referred there by his attorney and continued treatments for 3 - 4 months. Subsequently, he went three times per week for another 4 or 5 months and now goes once a week. He is treated there by chiropractor, Dr. Roland Rose. He stated that he went for MRIs of his neck and back and was told that he had three herniated discs in his neck and three herniated discs in his back. He stated that he also received three epidural injections from Dr. Cean in New Jersey.

Defendant's counsel contends that the medical reports of Drs. Emmanuel and Cohn as well as the transcript of the plaintiff's examination before trial are sufficient to establish, prima facie, that the plaintiff has not sustained a permanent consequential limitation or use of a body organ or member; a significant limitation of use of a body function or system; or a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute his 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.

In opposition, plaintiff's attorney, Ann Jen, Esq., submits her own affirmation, as well as the affidavit of chiropractor, Dr. Roland Rose and affirmation of radiologist Dr. William Weiner, as well as the affidavit of the plaintiff dated August 20, 2012.

Dr. Rose states that he initially examined the plaintiff on December 21 2010 with respect to the plaintiff's accident of December 12, 2010. At that time he presented with headaches, severe left jaw pain, neck pain, low pack pain and right knee pain. Dr Rose's physical examination on that date revealed significant limitations of range of motion of the cervical spine, lumbar spine, and right knee. He states that he referred the plaintiff for MRI testing which revealed disc herniations at C5-6, C6-7 and a disc bulge at C3-4. The lumbar spine MRI revealed disc herniations at L3-L4, L4-L5 and L5-S1. The right knee MRI indicated a tear of the posterior horn of the medial meniscus. Dr Rose states that the plaintiff was subsequently placed on a course of physical therapy during which the plaintiff treated from December 21 2010 through June 29, 2012. Plaintiff could no longer continue treatments as his no fault benefits were terminated and any further treatments would have been palliative in nature. Plaintiff was most recently examined by Dr. Rose on June 29, 2012 at which time he continued to have limitations of range of motion of the cervical spine and thoracic-lumbar spine. Dr Rose concludes that the accident of December 12, 2010 was the direct cause of the plaintiff's injuries and that he is partially permanently disabled with regard to the functioning of his cervical and lumbar spine and right knee.

Dr. Weiner a radiologist submits an affirmed report stating that he performed an MRI of the plaintiff's cervical spine, lumbar spine and right knee and found disc protrusion at C3-4 and disc herniations at C5-6, C6-7, L3-4, l4-5 and L5-S1, as well as a tear of the medial meniscus of the right knee. Dr. Weiner states that in his opinion, the disc pathologies and MRI findings are trauma induced and not the result of pre-existing conditions.

In his affidavit, Mr. Williams states that the heavy impact to his vehicle caused his windshield to shatter and the airbags to deploy. His legs hit the steering wheel and dashboard and he blacked out for a minute. He states that he went to Interfaith Hospital the next day and also began treatments with Dr. Rose at Ace Medical for pain in his

knees, neck and back. He states that he stopped his treatments when his no-fault benefits ran out and he could not continue to pay his medical expenses on his own.

On a motion for summary judgment, where the issue is whether the plaintiff has sustained a serious injury under the no-fault law, it is defendant's initial obligation to demonstrate that the plaintiff has not sustained a "serious injury" by submitting affidavits or affirmations of its medical experts who have examined the litigant and have found no objective medical findings which support the plaintiff's claim (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]). Where defendants' motion for summary judgment properly raises an issue as to whether a serious injury has been sustained, it is incumbent upon the plaintiff to produce evidentiary proof in admissible form in support of his or her allegations. The burden, in other words, shifts to the plaintiff to come forward with sufficient evidence to demonstrate the existence of an issue of fact as to whether he or she suffered a serious injury (see Gaddy v. Eyler, 79 NY2d 955 [1992]; Zuckerman v. City of New York, 49 NY2d 557[1980]; Grossman v. Wright, 268 AD2d 79 [2d Dept 2000]).

Here, the proof submitted by the defendants, including the affirmed medical report of Drs. Emmanuel and Cohn were sufficient to meet defendants' prima facie burden by demonstrating that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]).

However, this Court finds that the plaintiff raised triable issues of fact by submitting the affirmed medical reports of Drs. Rose and Weiner attesting to the fact that after a qualitative examination the plaintiff had substantiated injuries contemporaneous to the accident and had significant limitations in range of motion at a recent examination, and concluding that the plaintiff's limitations were significant and permanent and resulted from trauma causally related to the accident. As such, the plaintiff raised a triable issue of fact as to whether he sustained a serious injury under the permanent consequential and/or the significant limitation of use categories of Insurance Law § 5102(d) as a result of the subject accident (see Khavosov v Castillo, 81 AD3d 903[2d Dept. 2011]; Mahmood v Vicks, 81 ADd 606 [2d Dept. 2011]; Compass v GAE Transp., Inc., 79 AD3d 1091[2d Dept. 2010]; Evans v Pitt, 77 AD3d 611 [2d Dept. 2010]; Tai Ho Kang v Young Sun Cho, 74 AD3d 1328 743 [2d

Dept. 2010])).

In addition, Dr. Rose adequately explained the gap in the plaintiff's treatment by stating that his no fault benefits were terminated and in addition, the plaintiff reached the point of maximum medical improvement and any further treatments would be palliative (see Abdelaziz v Fazel, 78 AD3d 1086 [2d Dept. 2010]; Tai Ho Kang v Young Sun Cho, 74 AD3d 1328 [2d Dept. 2010]; Gaviria v Alvarado, 65 AD3d 567 [2d Dept. 2009]; Bonilla v Tortori, 62 AD3d 637 [2d Dept. 2009])).

Accordingly, for the reasons set forth above, it is hereby,

ORDERED, that the defendants' motion for an order granting summary judgment dismissing the plaintiff's complaint is denied.

Dated: September 26, 2012
Long Island City, N.Y.

ROBERT J. MCDONALD, J.S.C.