

Tamayo v Truman

2012 NY Slip Op 33455(U)

February 17, 2012

Supreme Court, Bronx County

Docket Number: 020567/2009

Judge: Jr., Alexander W. Hunter

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papers raise a triable issue of fact Trantel v. Rothenberg, 286 A.D.2d 325 (2nd Dept. 2001); Papdonikolakis v. First Fidelity Leasing Group, Inc., 283 A.D.2d 470 (2nd Dept. 2001)

In support of the motion for summary judgment, defendants submit the affirmed report of Ravi Tikoo, M D, a neurologist who examined plaintiff on March 2, 2011 Dr Tikoo conducted a physical examination of the plaintiff which included a straight leg raising testing In his report he noted that, "There was mild tenderness of the cervical and lumbar spine" but "No associated spasm was noted " Dr Tikoo concluded that plaintiff did not have "significant clinical evidence of neuropathy, radiculopathy, or disc herniation from the accident " (Defendants' Exhibit D) He diagnosed plaintiff with a history of cervical strain, thoracic strain and lumbosacral strain He further opined that plaintiff was not disabled from a neurological standpoint and that no permanent injury was sustained (Defendants' Exhibit D)

Defendants further submit the affirmed report of Robert J Orlandi, M D., an orthopedic surgeon who examined the plaintiff on March 1, 2011 Dr Orlandi conducted range of motion tests on plaintiff's cervical spine and shoulders and lumbar spine and found all to be within normal limits He observed no neck or back spasm and found that plaintiff did not have a "musculoskeletal disability" nor "permanent residuals" from what he concluded to be a "minor accident " (Defendants' Exhibit E)

Defendants also submit the affirmation of Jessica F Berkowitz, M D., a radiologist, who reviewed the MRI taken of plaintiff's cervical spine on November 8, 2008 Dr Berkowitz noted that no bulges or herniations were present and there was no evidence of "acute traumatic injury to the cervical spine such as vertebral fracture, asymmetry of the disc spaces, spinal cord contusion or epidural hematoma " (Defendants' Exhibit F) Dr Berkowitz concluded that there was no causal relationship between plaintiff's accident and the findings on the MRI (Defendants' Exhibit F)

Dr Berkowitz also reviewed the MRI taken of plaintiff's lumbar spine on November 8, 2008 In her affirmation dated March 2, 2011, she asserts that no disc bulges or herniations were present and "normal lumbar lordosis is maintained " (Defendants' Exhibit F) She further states that, "There is no evidence of acute traumatic injury to the lumbar spine such as vertebral fracture, asymmetry of the disc spaces, ligamentous rupture or epidural hematoma " Dr Berkowitz further notes, "This report is in disagreement with the original radiology report." (Defendants' Exhibit F) She opines that there is no causal relationship between plaintiff's accident and the findings in the MRI

Defendants contend that based on the reports of said doctors, plaintiff did not suffer a permanent injury or a significant limitation of a body function or system as defined by Insurance Law §5102(d) They aver that the medical evidence shows that any causally related injury allegedly sustained by plaintiff was mild, at best, and is now resolved

Moreover, defendants contend that plaintiff did not sustain an injury or impairment of a non-permanent nature under the 90/180 category of serious injury since plaintiff's Bill of Particulars alleges that plaintiff was confined to his home and was incapacitated from his employment for only two (2) weeks following the accident Moreover, plaintiff is not asserting a claim for loss of earnings in the instant action Accordingly, the motion for summary judgment should be granted

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Plaintiff opposes the motion and argues that defendants have not met their burden of showing that plaintiff did not sustain a serious injury. First, plaintiff refers to defendants' failure to acknowledge two (2) independent medical examiners' (IME) reports which show positive findings. Plaintiff refers to the unsworn report of Ron Amidor, D.C., a chiropractor who examined the plaintiff on December 23, 2008. Dr. Amidor conducted range of motion tests on plaintiff and concluded that plaintiff suffered a "mild chiropractic disability" that was causally related to the subject accident (Plaintiffs' Exhibit 1). Dr. Amidor further recommended that plaintiff continue chiropractic treatments two (2) times per week for six (6) weeks (Plaintiffs' Exhibit 1).

Plaintiff further argues that defendants ignored the report of a second IME, William J. Walsh Jr., M.D., an orthopedic surgeon who examined plaintiff on December 23, 2008. Range of motion testing revealed some limitations in plaintiff's cervical spine. Dr. Walsh opined that plaintiff suffered a cervical spine sprain/strain that was resolving and thoracic spine sprain/strain that was resolved. He concluded that plaintiff suffered a "mild disability" and stated that there was a "probable causal relationship" between the accident and plaintiff's "symptomatology" (Plaintiffs' Exhibit 2). Dr. Walsh recommended that plaintiff continue physical therapy two (2) times per week for an additional six (6) weeks, "with one orthopedic follow up within six weeks and should then be re-evaluated" (Plaintiffs' Exhibit 2).

Plaintiff contends that since defendants failed to address the foregoing reports, they have not met their burden of showing that plaintiff did not sustain a serious injury.

This court notes that the report of Dr. Amidor is not in admissible form and, therefore, said report is disregarded. Dr. Amidor is a chiropractor and it is well established that an affirmation from a chiropractor is not competent evidence if it is not subscribed to before a notary or other authorized individual. Shinn v. Catanzaro, 1 A.D.3d 195 (1st Dept. 2003). Additionally, Dr. Walsh, in his report merely stated that there was a "probable" causal relationship between plaintiff's symptoms and the subject car accident. Thus, this court finds that defendants have met their initial burden of establishing that plaintiff did not suffer a serious injury causally related to the action and the burden shifts to plaintiff to submit proof in admissible form to create an issue of fact. Franchini v. Palmieri, 1 N.Y.3d 536 (2003).

Plaintiff submits the affidavit and report of Mitchell Zeren, a chiropractor who was treating plaintiff after the accident. In his report, dated October 21, 2008, Dr. Zeren noted that plaintiff was having trouble with his daily routines. Range of motion testing revealed that plaintiff had significant limitations in range of motion in his cervical and lumbar spine. Moreover, Dr. Zeren noted "severe paraspinal muscle spasm of the cervical and upper thoracic spine" (Plaintiffs' Exhibit 3). Dr. Zeren stated that, "there appears to be a causal relationship between Mr. Tamayo's injuries and the accident of October 17, 2008" (Plaintiffs' exhibit 3).

Additionally, plaintiff submits the affirmed report of Yolande Bernard, M.D., who performed a physiatrist evaluation of plaintiff on October 30, 2008. Dr. Bernard performed range of motion testing on plaintiff's cervical spine and lumbosacral spine and found significant limitations. Dr. Bernard causally related the injuries to the subject accident and recommended physical therapy three (3) to four (4) times per week as well as continued chiropractic care. (Plaintiffs' Exhibit 4). In follow up examinations performed by Dr. Bernard on December 2, 2008 and January 15, 2009, plaintiff was noted to have continued pain and loss of range of motion.

