Monticello v Shah
2013 NY Slip Op 31730(U)
July 26, 2013
Supreme Court, New York County
Docket Number: 106977/2010
Judge: Arlene P. Bluth
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SCANNED ON 7/31/2013

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH
Justice

PART 22

Index Number : 106977/2010
MONTICELLO, ANTHONY
vs
SHAH, NILABEN N.
Sequence Number : 002
SUMMARY JUDGMENT

INDEX NO. ____________

MOTION DATE ____________

MOTION SEQ. NO. ____________

The following papers, numbered 1 to 3 **, were read on this motion to/for** motion for summary judgment serious injury

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____________ **No(s).** 1

Answering Affidavits — Exhibits ____________ **No(s).** 2

Replying Affidavits ____________ **No(s).** 3

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER

FILED
JUL 31 2013
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 7/26/13

____________, **J.S.C.**
HON. ARLENE P. BLUTH

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: IAS PART 22
-- X
ANTHONY MONTICELLO,

Plaintiff,

- against-

NILABEN N. SHAH and JOHN DOE (NAME BEING FICTICIOUS),

Defendants.
-- X

DECISION AND ORDER

Index No. 106977/10
Motion Seq 02

HON. ARLENE P. BLUTH, JSC

FILED
JUL 31 2013
COUNTY CLERK'S OFFICE
NEW YORK

Defendant's motion for summary judgment dismissing this action on the ground that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5012 (d) is granted in part, and denied in part.

In this action, plaintiff alleges that on June 13, 2008 he sustained personal injuries when, as a pedestrian in a crosswalk, he was knocked down by a vehicle owned by the defendant.

To prevail on a motion for summary judgment the defendant has the initial burden to present competent evidence showing that the plaintiff has not suffered a "serious injury" (*see Rodriguez v Goldstein*, 182 AD2d 396 [1st Dept 1992]). Such evidence includes "affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (*Shinn v Catanzaro*, 1 AD3d 195, 197 [1st Dept 2003], quoting *Grossman v Wright*, 268 AD2d 79, 84 [2d Dept 2000]). In order to establish prima facie entitlement to summary judgment under the 90/180 category of the statute, a "defendant must provide medical evidence of the absence of injury precluding 90 days of normal activity during the first 180 days following the accident" (*Elias v Mahlah*, 58 AD3d 434 [1st Dept

2009]). However, a defendant can establish prima facie entitlement to summary judgment on this category without medical evidence by citing other evidence, such as the plaintiff's own deposition testimony or records demonstrating that plaintiff was not prevented from performing all of the substantial activities constituting customary daily activities for the prescribed period (*id.*).

Once the defendant meets his initial burden, the plaintiff must then demonstrate a triable issue of fact as to whether he sustained a serious injury (*see Shinn*, 1 AD3d at 197). A plaintiff's expert may provide a qualitative assessment that has an objective basis and compares plaintiff's limitations with normal function in the context of the limb or body system's use and purpose, or a qualitative assessment that assigns a numeric percentage to plaintiff's loss of range of motion (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350-351 [2002]).

In the verified bill of particulars (exh B to moving papers, ¶ 12), plaintiff claims a disc herniation at T12-L1 with impingement, a disc herniation at L5-S1 with impingement, and a disc bulge at C4-5 with impingement. Plaintiff also claims reduced range of motion, pain, abrasions, contusions, headaches, tenderness, sprain, spasms, and bilateral L5-S1 lumbar radiculopathy. Plaintiff also makes (exh B to moving papers, ¶ 14) a 90/180-day claim.

Defendant has satisfied his prima facie showing that the plaintiff did not sustain a permanent consequential or significant limitation to his spine by offering the affirmed report of defendant's orthopedist, Dr. Zaretsky (exh C), who noted the disc herniations as revealed by plaintiff's MRI, but found normal ranges of motion in plaintiff's cervical and lumbar spine. Additionally, defendant met his initial burden with respect to plaintiff's 90/180-day claim by submitting plaintiff's testimony that he was not confined to bed or home after the accident (exh

[* 4]

D at 91).

In opposition, plaintiff raises an issue of fact with respect to his claimed cervical and lumbar spinal injury by submitting the affirmed report of his treating physician, Dr. Goldenberg (exh D to opp), who found, on June 18, 2008 and again on July 23, 2012, continuing significant deficits in range of motion, which were caused by the accident. Dr. Goldenberg opines that plaintiff has limited use of the injured areas that prevent him from performing his activities of daily living and that the loss of mobility and pain are permanent. Plaintiff received epidural injections from Dr. Chapman in May and August 2010. Plaintiff also points out that the defendant's orthopedist, Dr. Zaretsky measures plaintiff's lumbar flexion as **approximately** 60 degrees (normal 60), but states every other flexion measurement in absolute terms.

In reply, defendant argues that there was an unexplained gap in treatment, that the MRI reports are in inadmissible form, and that plaintiff fails to provide sufficient medical evidence to satisfy the 90/180-day standard.

Defendant's gap in treatment argument is improperly raised for the first time in reply (*Sylla v Brickyard Inc.*, 104 AD3d 605 [1st Dept 2013]). In any event, plaintiff adequately explains his gap in treatment from September 2008 to January 2010 by stating that his no-fault coverage was denied, and that he could not continue treatment out-of-pocket (*Browne v Covington*, 82 AD3d 406 [1st Dept 2011]; *Peluso v Janice Taxi Co., Inc.*, 77 AD3d 491 [1st Dept 2010]).

Although the MRI report of plaintiff's radiologist is unaffirmed, it is undisputed that the MRI film shows two disc herniations and a disc bulge. While the MRI reports are unsworn, they are admissible, as the reports and MRI films were reviewed by Dr. Goldenberg and were

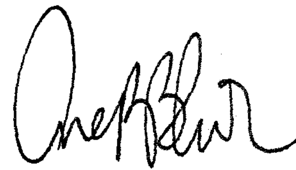
incorporated into her findings (*Duran v Kabir*, 93 AD3d 566, 567 [1st Dept 2012]). Dr. Goldenberg's affirmation, showing continuing quantified range of motion limitations, and permanency, provide the requisite proof of limitations (*Pietropinto v Benjamin*, 104 AD3d 617 [1st Dept 2013])

However, plaintiff fails to raise an issue of fact as to whether his claimed injuries prevented him from "performing substantially all of the material acts which constitute[d his] usual and customary daily activities" (Insurance Law § 5102 [d]; *Merrick v Lopez-Garcia*, 100 AD3d 456, 457 [1st Dept 2012]). Plaintiff's testimony (T. 59-61) that he took a few days off in the three weeks after the accident, but returned to work as a bar owner and manager on a reduced schedule, defeats his 90/180-day claim (*Martin v Portexit Corp.*, 98 AD3d 63 [1st Dept 2012]).

Accordingly, it is

ORDERED that defendant's motion for summary judgment dismissing this action on the ground that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5012 (d) is granted only to the extent that plaintiff's 90/180-day claim is dismissed, and is otherwise denied.

This is the Decision and Order of the Court.



Dated: New York, NY
July 26, 2013

Hon. Arlene P. Bluth, JSC

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