Padovani v Little Richie Bus Serv. Inc.
2013 NY Slip Op 33955(U)
August 5, 2013
Supreme Court, Bronx County
Docket Number: 310330/10
Judge: Mitchell J. Danziger
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 FILED Aug 06 2013 Bronx County Clerk

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: Part IA-2
---X
JOSEPH PADOVANI,

Plaintiff,

-against-

DECISION and ORDER
Index No. 310330/10

Present: Hon. Mitchell Danziger
AJSC

LITTLE RICHIE BUS SERVICE INC.,
JO LO BUS CO. INC. and FRANTZ LOUIS,

Defendants.
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Defendants' motion seeking summary judgment and dismissal of the within action on the grounds that plaintiff did not sustain a "serious injury" as defined in Section 5102(d) of the Insurance Law has been administratively referred to this court for determination and is decided as follows:

From a review of the papers submitted herein it appears that on February 04, 2010, plaintiff Joseph Padovani was crossing the street at Metropolitan Avenue and McGraw Avenue in Bronx County when he was struck by a school bus operated by defendant Frantz Louis and owned by defendants Little Richie Bus Service Inc., and Jo Lo Bus Co. Inc. The plaintiff was approximately forty three years old on the date of the accident. Thereafter, plaintiff commenced this lawsuit seeking to recover monetary damages for injuries sustained as a result of this incident. Defendants assert that dismissal of this action is warranted as a result of plaintiff's failure to satisfy the threshold of "serious injury" as defined in Section 5102(d) of the Insurance Law.

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Serious Injury

The defendants, Little Richie Bus Service, Inc., Jo Lo Bus Co. Inc. and Frantz Louis, offer as proof of the absence of serious injury to plaintiff the affirmation of Isaac Cohen, MD an orthopedic surgeon. Dr. Cohen conducted an orthopedic evaluation of the plaintiff on July 10, 2012. He reviewed medical reports including x-rays of the right elbow and chest, MRI of the cervical and lumbar spine, and EMG/NCV of the upper and lower extremities. The doctor also conducted range of motion tests of the cervical and lumbar spine, right hand and right elbow. Review of the May 10, 2010 MRI of the cervical spine demonstrated multi-level degenerative disease with no evidence of post traumatic pathology. MRI of the lumbar spine performed on the same date, revealed L4-5 level posterior central disk herniation with annular tear and otherwise no evidence of neural compromise or foraminal involvement. The report indicated that the plaintiff had a normal functional capacity of the cervical and lumbosacral spine areas as well as the chest wall and right upper extremity. Dr. Cohen's report concluded that as a consequence of the accident of record on February 04, 2010, the claimant sustained some soft tissue complaints with complete resolution of the symptoms documented at the time of the evaluation.

In opposition to the motion, the plaintiff submits the affidavit of Bruce Lambert, DC a chiropractor. Therein, the doctor reported that he initially examined the plaintiff on February 5, 2010, the day after the accident. During the examination plaintiff complained of "pain and stiffness in the back …right hand … right buttock …neck … right scapula …right elbow … and right side chest." Dr. Lambert's examination of the plaintiff's lumbar spine showed the following range of motion restrictions: "Flexion: 65 degrees (28% restricted) (normal 90 degrees); Extension: 05 degrees (83% restricted) (normal 30 degrees)." The examination

revealed no restrictions of the cervical spine. Kemp, Patrick Fabre, Bragards and Milgrams tests were positive for back dysfunction. The doctor also states that Mr. Padovani was examined on May 08, 2012. Range of motion tests revealed that plaintiff still exhibited quantified restrictions in range of motion of his cervical and lumbar spines. Dr. Lambert also reviewed MRI and EMG reports of the plaintiff's spine and his impression was that the plaintiff sustained "disc herniations and post traumatic radiculopathy." The doctor concluded that Mr. Padovani sustained a partial and permanent disability of the cervical and lumbar spine and that the injuries are causally related to the February 4, 2010 accident. Dr. Lambert documented the number of times the plaintiff was examined from February 2010 through October 2012.

The affidavit of R.C. Krishna, MD a neurologist was also submitted. Dr. Krishna initially examined the plaintiff on February 05, 2010. The doctor also examined the plaintiff on November 20, 2012. MRI of the cervical spine revealed multiple posterior disc herniations at C3-C4, C4-C5, C5-C6 and C6-C7; no abnormal cord signal intensity or foraminal stenosis identified. MRI of the lumbar spine L4-L5 level demonstrated posterior central disc herniation with annular tear and thecal sac deformity, no central canal, lateral recess or neural foraminal stenosis identified. EMG/NCV of the upper and lower extremities revealed right C5-C6 and right L5-S1 radiculopathies. Dr. Krishna's impression was that the plaintiff sustained multilevel cervical and lumbar disc herniations resulting in cervical and lumbar radiculopathy. The doctor's report concluded that the injuries are causally related to the accident resulting in permanent partial residual disabilities and limitations. He recommended epidural steroidal injections, and if they should fail, facet block injections or dorsal column stimulator implantation.

In addition, plaintiff submits the affirmation of Samuel Mayerfield, MD a radiologist. Dr. Mayerfield evaluated the May 07, 2010 MRI of the cervical and lumbar spines. The doctor's

impression of the cervical spine MRI was multiple posterior disc herniations of C3-4, C4-5, C5-6 and C6-7. No abnormal cord signal intensity or foraminal stenosis. The MRI of the lumbar spine L4-5 level demonstrated posterior central disc herniation with annular tear and thecal sac deformity. No central canal, lateral recess or neural foraminal stenosis was observed.

Gap in Treatment

In *Pommels v. Perez* (4 NY 3d 566, [2005]), the Court of Appeals explained that "a patient who terminates therapeutic measures following an accident, while claiming serious injury, must offer some reasonable explanation for having done so." Here, the over two and a half year absence from neurological treatments or visits with Dr. Krishna is explained by the fact that the plaintiff was under the care of his treating chiropractor. In his deposition, the plaintiff stated that he was treated weekly for over two years after the accident. Treatment consisted of "spinal adjustments, physiotherapeutics, and moist heat pack therapy." (*Brown v. Achy*, 9 AD 3d 30 [1st Dept 2004].)

Discussion

The proponent of a motion for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (*Smalls v. AJI Indus., Inc.*, 10 NY 3d 733 [2008], quoting *Alvarez v. Prospect Hospital*, 68 NY 2d 320 [1986]; *Ramkumar v. Grand Style Transp. Enters. Inc.*, 94 AD 3d 484 [1st Dept 2012]; *Anemedi v. Archibala*, 70 AD 3d 449 [1st Dept 2010].) In the present action, the defendants met their burden by submitting the affirmation of Dr. Cohen who conducted the medical examination. He examined the patient on July 10, 2012 and found based upon objective tests and the review of medical reports multilevel

degenerative disease with complete resolution of the symptoms. No evidence of sequelae or permanence and no evidence of any functional disability present. Once this showing has been made, the burden shifts to the plaintiff to establish the existence of material issues of fact which require a trial of the action. (*Zambrana v. Timothy*, 95 AD 3d 422 [1st Dept 2012]; *Townes v. Harlem Group, Inc.*, 82 AD 3d 583 [1st Dept 2011].)

Insurance Law §5102(d) provides that a serious injury is "a personal injury which results in death; dismemberment; ......significant limitation of use of a body function or system and 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 90 days during the 180 days immediately following the occurrence of the injury or impairment." The Court of Appeals in *Pommells v. Perez* held that "proof of a herniated disc, without additional objective medical evidence establishing that the accident resulted in significant physical limitations, is not alone sufficient to establish a serious injury." (*Pommels v. Perez*, NY 3d 566, *supra)*. In *Toure v. Avis Rent a Car* the Court of Appeals reasoned that "in order to prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion" or "an expert's qualitative assessment of a plaintiff's condition may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system. (*Toure v. Avis Rent a Car Sys*., 98 NY 2d 345 [2002]; *Ramkumar v. Grand Style Transp. Enters. Inc.*, 94 AD 3d 484, *supra*.)

In *Colon v. Bernabe*, 65 AD 3d 969 [1st Dept 2009], the court held that evidence of range of motion limitations, especially when coupled with positive MRI and EMG test results, are

sufficient to defeat summary judgment. In the present case, the plaintiff submitted physician affidavits and objective medical reports which raise a triable issue of fact as to serious injury. The reports contain quantitative range of motion measurements of the cervical and lumbar spine based on testing performed from the day immediately following the accident until 2012. Plaintiff's MRIs and EMG reflect disc herniations resulting in cervical and lumbar radiculopathy. Plaintiff's affirmation in opposition states that he was treated weekly for almost two years following the accident. Plaintiff's neurologist, Dr. Krishna concurred with the chiropractor's diagnosis that Mr. Padovani has partial and permanent disability of the cervical and lumbar spine. (*McClelland v. Estevez*, 77 AD 3d 403 [1st Dept 2010].)

The medical report findings conflict with those of the defendant's expert, who found no restriction in range of motion. This raises an issue of fact as to whether the plaintiff sustained a significant limitation of use or permanent consequential limitation of use of his cervical and lumbar spine.

Defendants met their burden of proof showing that the plaintiff did not suffer a 90/180-day injury. In opposition, the plaintiff failed to raise a triable issue of fact, given his testimony that he went back to work as a jewelry vendor and session musician immediately after the accident. Mr. Padovani's deposition testimony shows that he was able to conduct normal work activities e.g. (a) set up and breakdown of his sidewalk vending tables, (b) carry his tables, chair and merchandise to storage a block away, (c) stand and sell his wares, and (d) perform as a studio musician. There is no evidence in the record suggesting that the plaintiff was prevented from performing substantially all of the material acts that constituted his usual and customary daily activities for 90/180 days following the accident. (*Licari v. Elliot*, 57 NY 2d 230 [1982];

Amamedi v. Archibala, 70 AD 3d 449, *supra*; *Colon v. Bernabe*, 65 AD 3d 969, *supra*; *McClelland v. Estevez*, 77 AD 3d 403, *supra*.)

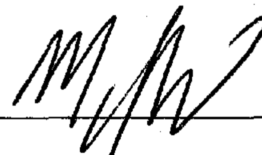
Viewing the objective medical evidence in a light most favorable to the plaintiff, this Court finds that the plaintiff's limitations of motion of his cervical and lumbar spine describe a serious injury and raise a triable issue of fact. The plaintiff's claim under the 90/180 category of Insurance Law §5102(d) is dismissed in light of his deposition testimony that he went back to work as a jewelry vendor and musician immediately after the accident. (*Toure v. Avis Rent a Car Systems, Inc.*, 98 NY 2d 345, *supra*; *Brown v. Achy*, 9 AD 3d 30, *supra*; *Tsamos v. Diaz*, 81 AD 3d [1st Dept 2011]; *De La Cruz v. Hernandez*, 84 AD 3d 652 [1st Dept 2011].)

For the forgoing reasons, the motion by the defendants for summary judgment on threshold is denied with the exception of the branch of the defendants' motion to dismiss plaintiff's claim under the 90/180 day category which is granted.

This constitutes the Decision and Order of this Court.

Dated: August 05, 2013

So ordered,



Mitchell Danziger, AJSC