Santana v Mancuso
2013 NY Slip Op 33982(U)
June 25, 2013
Supreme Court, Bronx County
Docket Number: 300103/09
Judge: Ben R. Barbato
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Present: Honorable Ben R. Barbato

ALBERTO SANTANA,

Plaintiff,

-against-

MATTHEW MANCUSO, THERESA MANCUSO and LIM BENEDICT,

Defendants.

DECISION/ORDER

Index No.: 300103/09

The following papers numbered 1 to 9 read on this motion and cross-motion for summary judgment noticed on May 16 and May 30, 2012 and duly transferred on April 1, 2013.

Papers Submitted	Numbered
Notice of Motion, Affirmation & Exhibits	**1, 2, 3**
Notice of Cross-motion, Affirmation & Exhibits	**4, 5, 6**
Affirmation in Opposition & Exhibits	**7, 8**
Reply Affirmation	**9**

Upon the foregoing papers, and after reassignment of this matter from Justice Alison Y. Tuitt on April 1, 2013, Defendants, Matthew Mancuso and Theresa Mancuso seek an Order granting summary judgment dismissing Plaintiff's Complaint for failure to satisfy the serious injury threshold under Insurance Law §5102(d). By Cross-motion the Defendant, Lim Benedict, seeks an Order granting summary judgment dismissing Plaintiff's Complaint for failure to satisfy the serious injury threshold under Insurance Law §5102(d).

This is an action to recover for personal injuries allegedly sustained as a result of a motor vehicle accident which occurred on June 6, 2008, on the Queensborough Bridge, upper level, at or near East 62nd Street, in the County, City and State of New York.

On April 28, 2010, the Plaintiff appeared for an orthopedic examination conducted by Defendants' appointed physician Dr. Robert Israel. Upon examination, Dr. Israel determined that

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Plaintiff suffered sprains to his cervical, thoracic and lumbar spine, bilateral shoulders, knees, arms and legs, which, at the time of the examination had resolved. Dr. Israel states that Plaintiff requires no orthopedic treatment and that he has no disability as a result of the accident of record. Dr. Israel further opines that Plaintiff can perform all of his usual work activities and activities of daily living without restriction.

On May 27, 2010, the Plaintiff appeared for a neurological examination conducted by Defendant's appointed physician Dr. Daniel Feuer. Upon examination and review of Plaintiff's records, Dr. Feuer determined that Plaintiff had a normal neurological examination with no evidence of clinical deficits to support a diagnosis of lumbosacral radiculopathy. Dr. Feuer states that Plaintiff's examination revealed no muscle spasm and that cervical and lumbar range of motion was normal. Dr. Feuer also opines that Plaintiff did not suffer any neurological disability or permanency causally related to the subject accident and that he can engage in full active employment as well as full activities of daily living without restriction.

Defendants further offer the reports of Dr. Peter Ross, a radiologist who reviewed the MRIs of Plaintiff's cervical and lumbosacral spine. His review of the cervical spine MRI revealed vertebral spondylosis changes involving the C3 through the C6 vertebrae, which are pre-existing to the accident of June 6, 2008. Dr. Ross also noted that the C4-5 level showed a small smooth diffuse broad based annular bulge mildly deforming the ventral subarachnoid space, which is degenerative in nature, associated with degenerative vertebral changes, pre-existing and not caused or related to the subject accident. Dr. Ross' review of the lumbar spine MRI revealed vertebral spondylosis changes involving the L4 through the S1 vertebrae, with dessication and narrowing of the L4-5 and L5-S1 interspaces, all pre-existing to the subject accident. Dr. Ross further noted that the L4-5 and L5-S1 levels showed focal disc herniation components associated

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with degenerative vertebral and discogenic changes, pre-existing and not caused or related to the subject accident.

Plaintiff offers the Affidavit of Dr. Walter J. Cesarski, a chiropractor, who indicates that he has treated and examined the Plaintiff from June 10, 2008 until May 7, 2012. Dr. Cesarski's initial and most recent examination of Plaintiff revealed loss of range of motion of the cervical and lumbar spines. Upon examination and review of Plaintiff's records, Dr. Cesarski determined that Plaintiff suffered chronic traumatic cervical herniated discs with radiculopathy at levels C3-4 and C5-6, chronic traumatic lumbar herniated discs with radiculopathy at levels L4, L4-5 and L5-S1, a bulging disc at C4-5 and myofascitis to the cervical and lumbar regions. Dr. Cesarski opines that Plaintiff sustained permanent injuries to his cervical and lumbar spine and that this permanent partial disability is causally related to the June 6, 2008 accident. Dr. Cesarski further states that Plaintiff's injuries are affecting his ability to perform all of his previous routine activities of daily and social living.

Plaintiff offers the Affirmation of Dr. Eric A. Lubin, a radiologist, who states that he reviewed the lumbar spine MRI of Plaintiff as well as his lumbar spine X-rays. The X-rays revealed narrowing of the L4-5 and L5-S1 interspaces consistent with disc disease and mild osteoarthritic changes at both hips. The lumbar MRI revealed posterior bulging disc at L3-4, posterior central herniated disc at L4-5, posterior central and slightly left lateral herniated disc at L5-S1 and degenerative changes at L4-5 and L5-S1. Dr. Lubin states that while there may some degeneration as a result of the aging process, he disagrees that there is no radiographic evidence of recent traumatic or causally related injury to the lumbar spine.

Plaintiff also offers the Affirmation of Dr. David R. Payne, a radiologist, who states that he reviewed the cervical spine MRI of Plaintiff. The cervical MRI revealed a left foraminal

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herniation at C3-4, a bulging disc at C4-5 and a right foraminal herniation at C5-6. Dr. Payne states that while there may some degeneration as a result of the aging process, he disagrees that there is no evidence of disc pathology or acute traumatic related injury to the cervical spine. Dr. Payne causally relates Plaintiff's cervical MRI findings to the accident of June 6, 2008.

Any reports, Affirmation or medical records not submitted in admissible form were not considered for the purpose of this Decision and Order.

Under the "no fault" law, in order to maintain an action for personal injury, a plaintiff must establish that a "serious injury" has been sustained. *Licari v. Elliot*, 57 N.Y.2d 230 (1982). The proponent of a motion for summary judgment must tender sufficient evidence to the absence of any material issue of fact and the right to judgment as a matter of law. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 (1985). In the present action, the burden rests on Defendants to establish, by submission of evidentiary proof in admissible form, that Plaintiff has not suffered a "serious injury." *Lowe v. Bennett*, 122 A.D.2d 728 (1st Dept. 1986) *aff'd* 69 N.Y.2d 701 (1986). Where a defendant's motion is sufficient to raise the issue of whether a "serious injury" has been sustained, the burden then shifts and it is incumbent upon the plaintiff to produce *prima facie* evidence in admissible form to support the claim of serious injury. *Licari,* supra; *Lopez v. Senatore*, 65 N.Y.2d 1017 (1985). Further, it is the presentation of objective proof of the nature and degree of a plaintiff's injury which is required to satisfy the statutory threshold for "serious injury". Therefore, simple strains and even disc bulges and herniated disc alone do not automatically fulfil the requirements of Insurance Law §5102(d). See: *Cortez v. Manhattan Bible Church,* 14 A.D.3d 466 (1st Dept. 2004). Plaintiff must still establish evidence of the extent of his purported physical limitations and its duration. *Arjona v. Calcano*, 7 A.D.3d 279 (1st Dept. 2004).

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In the instant case Plaintiff has demonstrated by admissible evidence an objective and quantitative evaluation that he has suffered significant limitations to the normal function, purpose and use of a body organ, member, function or system sufficient to raise a material issue of fact for determination by a jury. Further, he has demonstrated by admissible evidence the extent and duration of his physical limitations sufficient to allow this action to be presented to a trier of facts. The role of the court is to determine whether bona fide issues of fact exist, and not to resolve issues of credibility. *Knepka v. Tallman,* 278 A.D.2d 811 (4th Dept. 2000). The moving party must tender evidence sufficient to establish as a matter of law that there exist no triable issues of fact to present to a jury. *Alvarez v. Prospect Hospital,* 68 N.Y.2d 320 (1986). Based upon the exhibits and deposition testimony submitted, the Court finds that Defendants have not met that burden. However, based upon the medical evidence and testimony submitted, Plaintiff has not established that he has been unable to perform substantially all of his normal activities for 90 days within the first 180 days immediately following the accident and as such is precluded from raising the 90/180 day threshold provision of the Insurance Law.

Therefore it is

ORDERED, that Defendants' motion and cross-motion for an Order granting summary judgment dismissing Plaintiff's Complaint for failure to satisfy the serious injury threshold pursuant to Insurance Law §5102(d) is **granted** to the extent that Plaintiff is precluded from raising the 90/180 day threshold provision of the Insurance Law.

Dated: June 25, 2013

Hon. Ben R. Barbato, A.J.S.C.