

Bermudez v Pate

2014 NY Slip Op 30064(U)

January 13, 2014

Supreme Court, Queens County

Docket Number: 3747/2012

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

JEFF BERMUDEZ,	Index No.:	3747/2012
	Motion Date:	12/17/13
Plaintiff,	Motion No.:	19
- against -	Motion Seq.:	3
JULIE A. PATE,		
Defendant.		

- - - - - x

The following papers numbered 1 to 14 were read on this motion by defendant, Julie A. Pate, for an order pursuant to CPLR 3212 granting the defendant summary judgment and dismissing the complaint of plaintiff, Jeff Bermudez, on the ground that said plaintiff has not sustained a serious injury within the meaning of Insurance Law §§ 5102 and 5104:

Papers Numbered

Notice of Motion-Affidavits-Exhibits.....	1 - 7
Affirmation in Opposition-Affidavits.....	8 - 14

This is a personal injury action in which plaintiff, Jeff Bermudez seeks to recover damages for injuries he allegedly sustained on December 6, 2010, at approximately 6:10 p.m. when his vehicle was allegedly struck in the rear on the eastbound upper level of the Ed Koch Queensboro Bridge in New York County, New York. Plaintiff, alleges that as a result of the accident he sustained, inter alia, several herniated and bulging discs of the cervical and lumbar spines.

Plaintiff commenced the instant action by filing a summons and complaint on February 22, 2012. Issue was joined by service of defendant's verified answer dated April 26, 2012. Plaintiff filed a Note of issue on July 3, 2013. This matter is presently on the calendar of the Trial Scheduling Part on February 5, 2014.

Defendant now moves for an order pursuant to CPLR 3212 dismissing the plaintiff's complaint on the ground that the injuries claimed by the plaintiff fail to satisfy the serious injury threshold requirement of Section 5102(d) of the Insurance Law.

In support of the motion, defendant submits an affirmation from counsel, Jerry Christoforatos, Esq., a copy of the pleadings; plaintiff's verified bill of particulars; a copy of the transcript of plaintiff's examination before trial; and a copy of the affirmed medical reports of board certified orthopedic surgeon, Dr. Alan J. Zimmerman and radiologist, Dr. Mark J. Decker.

In his verified bill of particulars, the plaintiff, states that as a result of the accident, he sustained inter alia, disc bulges at C3-C4, C4-C5, C6-C7, L4-L5, and herniated discs at C3-C4, C5-C6, C6-C7 and L5-S1. The plaintiff contends that he sustained a serious injury as defined in Insurance Law §5102(d).

Plaintiff, Jeff Bermudez, age 45, an operations manager for Allied Barton Security Systems, was deposed on December 19, 2012. He stated that on the date of the accident he was driving his mother-in-law's 2004 Nissan Altima. He stated that he had left work in the Bronx and was proceeding towards his home in Queens. He was on the ramp approaching the Queensboro Bridge, traffic was moving at a moderate pace 10 - 15 miles per hour and he was struck from behind. He stated that although he had his seat belt on, the impact caused his head and shoulders to impact the back of his seat. He stated that he did not call for an ambulance and he was able to drive his vehicle home.

The following day he sought treatment with Dr. Brawner at Physical Medicine and Rehabilitation. On his first visit to Dr. Brawner he complained of pain to his lower back, neck and both shoulders. Subsequently he commenced physical therapy sessions at a rate of five times per week. After eight months to a year the session were less frequent until he stopped physical therapy after approximately one year. He stated that he was told the results of his EMG tests were normal and he did not sustain any nerve damage. He was referred to a pain management doctor for a consult regarding epidural injections but he refused the injections. He testified that he stopped treatments because he reached his peak. His symptoms were not getting any better or any worse so he just continued with exercises at home. He has not had any treatment since that time. He stated he missed one day from work as a result of the accident. He testified that he still suffers from intermittent low back pain and daily neck pain.

The plaintiff was seen for an independent medical evaluation on February 6, 2013 by orthopedic surgeon, Dr. Alan J. Zimmerman, a physician retained by the defendant. At that time the defendant reported to Dr. Zimmerman that he was involved in a motor vehicle accident in December 2010 at which time he injured his neck, lower back, and right shoulder. Dr. Zimmerman tested the plaintiff's range of motion using an orthopedic goniometer and found that the plaintiff had no limitations of range of motion of the cervical spine and lumbar spine. Based upon his examination, he states that his impression is cervical and lumbar sprain, resolved; shoulder complaints are cervical in origin. He states that he has no disability and no permanency. He states that the MRI of the lumbar spine shows a bulge at L4-L5 and a herniation at L5-S1. He states that the findings are degenerative, preexisting and not causally related. He states that the bulging discs have no clinical significance. In regard to the cervical spine, the multiplicity of levels involved from C3 to C7 indicates that all of the findings are degenerative, preexisting and not causally related.

Radiologist, Dr. Mark Decker examined the MRI studies and states that the MRIs show diffuse degenerative disease. He states that all of the findings with respect to the cervical and lumbar spines including multilevel bulging and herniation at C6-C7 and L5-S1 are all degenerative, longstanding and not causally related to the accident of December 6, 2010. He states that there is no evidence to suggest that a traumatic injury was sustained.

Defendant's counsel contends that the affirmed medical report of Drs. Zimmerman and Decker are sufficient to establish, prima facie, that the plaintiff has not sustained a permanent loss of a body organ, member, function or system and that he has not sustained a permanent consequential limitation of a body organ or member or a significant limitation of use of a body function or system. Counsel also contends that the plaintiff, who missed one day of work immediately following the accident did not sustain a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff, for not less than 90 days during the immediate one hundred days following the occurrence, from performing substantially all of his usual daily activities.

In opposition, plaintiff's attorney, I. Stefano A. Filippazzo, Esq., submits his own affirmation as well as the affirmed medical reports of Dr. Josephine Brawner, Dr. Vijay Sidhwani and Dr. Gautam Khakhar.

Plaintiff's treating physiatrist, Dr. Josephine Brawner of Physical Medicine and Rehabilitation of New York in Rego Park, New York, first examined the plaintiff on December 8, 2012, two days following the accident. At that time his chief complaints were neck pain radiating to the left shoulder and low back pain. He told Dr. Brawner that his neck snapped upon impact. Using a handheld goniometer, Dr. Brawner found that the plaintiff had significant limitations of range of motion of the cervical and lumbar spines. She recommended a course of physical therapy and MRIs. At that time she found that his injuries were causally related to the subject accident. In January 2011, the plaintiff was again examined by Dr. Brawner who states that the MRI of the lumbar spine showed disc herniations at L5-S1 and disc bulge at L4-L5. The plaintiff still had significant limitations of range of motion. In February 2011, the plaintiff underwent an EMG which showed a left L5 lumbar radiculopathy.

Dr. Vijay Sidhwani examined the plaintiff on February 28, 2011 and found limitations of range of motion. Dr Sidhwani reviewed the options for pain management with the plaintiff at that time including epidural injections.

Dr. Gautam Khakhar, a board certified physiatrist stated that the plaintiff treated at Physical Medicine and Rehabilitation of New York for four months through March 2011. He states that at the time he determined that the plaintiff had reached maximum medical improvement from conservative management and that further treatment would be merely palliative.

Dr. Khakhar re-evaluated the plaintiff on October 10, 2013 and found that plaintiff still suffered from limitations of range of motion up to 62 per cent of the cervical spine and up to 22 percent of the lumbar spine. He concluded that the limitations of motion were permanent, medically significant, and substantial in their effect on the plaintiff. He also disagrees with the report of Dr. Decker which stated that the herniated and bulging discs were degenerative. To the contrary, he states that the herniated discs of the cervical and lumbosacral spine were traumatically induced and caused by the accident of December 6, 2010. He states that the injuries and limitations to the plaintiff's neck and back are permanent.

On a motion for summary judgment, where the issue is whether the plaintiff has sustained a serious injury under the no-fault law, the defendant bears the initial burden of presenting competent evidence that there is no cause of action (Wadford v. Gruz, 35 AD3d 258 [1st Dept. 2006]). "A defendant can establish that plaintiff's injuries are not serious within the meaning of Insurance Law § 5102 (d) by submitting the affidavits or

affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (Grossman v Wright, 268 AD2d 79 [1st Dept. 2000]). Whether a plaintiff has sustained a serious injury is initially a question of law for the Court (Licari v Elliott, 57 NY2d 230 [1982]).

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 competent proof submitted by the defendant, including the affirmed medical reports of Drs. Zimmerman and Decker, as well as the plaintiff's deposition testimony, in which he stated that he missed one day of work following the accident, are 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]; Carballo v Pacheco, 85 AD3d 703 [2d Dept. 2011]; Ranford v Tim's Tree & Lawn Serv., Inc., 71 AD3d 973 [2d Dept. 2010]).

However, this Court finds that the plaintiff raised triable issues of fact by submitting the affirmed medical reports of plaintiff's treating physicians, Drs. Khakhar, Brawner and Sidhwani attesting to the fact that the plaintiff had significant limitations in range of motion of the cervical and lumbar spine both contemporaneous to the accident and in a recent examination, and concluding that the plaintiff's limitations were significant and permanent and resulted from trauma causally related to the accident (see Perl v Meher, 18 NY3d 208[2011]; Rosa v Mejia, 95 AD3d 402 [1st Dept. 2012]; Ortiz v Zorbas, 62 AD3d 770 [2d Dept. 2009]; Azor v Torado, 59 ADd 367 [2d Dept. 2009]). 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 Khaimov v Armanious, 85 AD3d 978 [2d Dept. 2011]; Jilani v. Palmer, 83 AD3d 786 [2d Dept. 2011]; 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 [2d Dept. 2010]).

Further, the findings of Dr. Khakhar that the plaintiff's injuries were traumatic and were causally related to the subject collision expressly addressed and rebutted the contention of the defendant's radiologist that the spinal injuries were degenerative in nature (see Fraser-Baptiste v New York City Tr. Auth., 81 AD3d 878 [2d Dept. 2011]; Harris v Boudart, 70 AD3d 643 [2d Dept. 2010]).

In addition, the plaintiff adequately explained the gap in his treatment by submitting the affirmation of Dr. Khakhar stating that plaintiff had reached maximum medical benefit from the treatment (see Ayala v Cruz, 95 AD3d 699 [1st Dept. 2012]; Jean-Baptiste v Tobias, 88 AD3d 962 [2d Dept. 2011]; Abdelaziz v Fazel, 78 AD3d 1086 [2d Dept. 2010]; Tai Ho Kang v Young Sun Cho, 74 AD3d 1328 [2d Dept. 2010]; Domanas v Delgado Travel Agency, Inc., 56 AD3d 717 [2d Dept. 2008]).

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

ORDERED, that the defendant's motion for an order granting summary judgment dismissing the complaint of plaintiff, JEFF BERMUDEZ, is denied.

Dated: January 13, 2014
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.