

Peters v Rice

2014 NY Slip Op 30421(U)

February 13, 2014

Supreme Court, Queens County

Docket Number: 700440/2011

Judge: Robert J. McDonald

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the impact.

The plaintiffs commenced this action by filing a summons and complaint on August 3, 2011. Issue was joined by service of defendant Garrett's verified answer with cross-claims dated January 25, 2012. The motion by defendants Kenneth Garrett and Lela L. Garrett for summary judgment dismissing the plaintiffs' complaint against them was granted by this court by decision and order dated January 31, 2014 on the ground that said defendants established that they were not liable for causing the accident. The action against defendants Rice and Hall is presently calendared in the Trial Scheduling Part for February 25, 2014.

Defendants now move for an order pursuant to CPLR 3212 dismissing the complaint of plaintiffs, Sean M. Peters and Joseph McFadden on the ground that the injuries claimed by each plaintiff fail to satisfy the serious injury threshold requirement of Section 5102(d) of the Insurance Law.

In support of the motion, the defendants submit an affirmation from counsel, Melissa Moran, Esq., a copy of the pleadings; a copy of the police accident report; plaintiff's verified bill of particulars; a copy of the transcript of each plaintiff's examination before trial; a copy of the affirmed medical report of Dr. J. Mervin Lloyd, an orthopedist, a copy of the radiology report of Dr. Steven Mendelsohn; and copies of a motion for summary judgment in regard to a 2007 accident involving plaintiff Joseph McFadden.

In the verified bill of particulars, plaintiff Sean M. Peters alleges that as a result of the subject accident he sustained, inter alia, disc herniations at L5-S1 and T1-2 and disc bulges at C3-C4, C4-C5, C5-C6 and C6-C7. Plaintiff Joseph McFadden alleges that as a result of the accident he sustained disc bulges at L1-L2 through L4-L5 and T11-T12. Joseph McFadden was confined to bed for 3 days following the accident and to the house for 5 days following the accident. Both plaintiffs contend that they sustained a serious injury as defined in Insurance Law §5102(d).

Joseph McFadden, age 53, testified at an examination before trial on August 21, 2012. He stated that on the date of the accident he was a restrained front seat passenger in the vehicle operated by defendant Rice. He stated that he worked as a crane operator for Muss Construction. He worked two days following the accident in December and January before he was laid off. He stated that Mr. Rice, struck the vehicle in front of him. He stated that as a result of the impact he hit his neck on the back

of the seat. When the police came to the scene he stated that he did not need an ambulance. The next day he sought treatment for pain in his neck and back at Sutphin Medical Center. Following an initial examination he was prescribed a course of treatment that included physical therapy, chiropractic, acupuncture, heating pads and electrical stimulation. He was treated at Sutphin Medical for seven and a half months. He testified that as a result of the treatment his neck became better but his back symptoms remained the same. He has not seen any other doctors other than the ones at Sutphin Medical. The last time he was treated was in June of 2010. He stated that in 2007 as a pedestrian he had been struck by a cab. He stated that he injured his right elbow as a result of that accident. He testified that he never had a previous injury to his back. He states he still has pain about 4 days per week.

Defendants' counsel also submits a court decision and court records from Queens Supreme Court, Index No. 20225/2009, dated June 24, 2011, on a motion for summary judgment with regard to McFadden's accident of 2007. At that time McFadden alleged he sustained a disc bulge at L1-S1. He claimed in a prior deposition that when he was struck by the cab he injured his lower back. The decision, by Justice Pineda-Kirwan states that Dr. Reddy, an orthopedist examined McFadden in January 2008 and found that he suffered from restricted range of motion of the lumbar spine. He was also examined by Dr. Reddy in December 2010 at which time Dr. Reddy found that defendant continued to suffer from loss of range of motion in his lumbar spine and that his injury was causally related to the prior accident of December 29, 2007 and was permanent in nature. On the basis of those examinations the court denied a motion for summary judgment on threshold grounds.

In the instant matter, Mr. McFadden was seen for an independent medical evaluation on September 18, 2012 by orthopedist, Dr. J. Mervyn Lloyd, a physician retained by the defendant. At the time of the examination he complained of low back pain. He told Dr. Lloyd that he was involved in a prior accident as a pedestrian in which he injured only his right elbow. He denied previous back or neck problems. Dr. Lloyd conducted range of motion testing, finding that there was no loss of range of motion of the cervical spine and shoulders but there was a loss of range of motion of the plaintiff's lumbar spine. He found that the plaintiff suffered from cervical sprain, resolved, thoracic sprain resolved and lumbar sprain superimposed upon pre-existing degenerative disc disease thoracolumbar spine, resolved. He explained that the abnormalities of the lumbar spine were pre-existing degenerative disc disease.

In his examination before trial, taken on June 5, 2013, plaintiff, Sean M. Peters, age 26, testified that he was involved in a motor vehicle accident on December 10, 2009. He was a rear seat passenger in a vehicle operated by his uncle's friend. An ambulance came to the scene but he declined to go to the hospital. He stated that four days after the accident he began treating at Sutphin Medical for pain to the lower back. He underwent physical therapy, chiropractic treatment, massage and electric therapy. He continued treating for six months. He states he still experiences back pain and has treatments at HIP.

Sean Peters was examined by Dr. J. Mervyn Lloyd on June 11, 2013. At that time he complained of low back pain. Objective range of motion testing showed that the plaintiff had no loss of range of motion of the cervical spine, shoulders, or lumbar spine. Dr. Lloyd states that the plaintiff suffered from cervical sprain, resolved, and lumbar sprain superimposed upon pre-existing degenerative disc disease of the lumbar spine, resolved. He states that there is no objective abnormality found on his examination.

Defendants also submit an affirmed radiological report from Dr. Mendelsohn who examined the MRI study of Sean Peters' lumbar spine. He states that there were no herniations or any abnormalities seen which are causally related to the trauma of December 10, 2009. He states that there was moderate L5-S1 degenerative changes.

Defendants' counsel contends that the affirmed medical reports of Drs. Lloyd and Mendelsohn are sufficient to establish, prima facie, that each plaintiff has not sustained a permanent loss of a body organ, member, function or system; 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 plaintiffs did not produce any evidence that they sustained a medically determined injury or impairment of a nonpermanent nature which prevented each 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, William Pager Esq., submits his own affirmation as well as medical affirmations from Dr. Arnoff; an affidavit from each plaintiff; and unaffirmed treatment records for each plaintiff.

Dr. Natalie Arnoff submits an affirmation stating that she personally examined Sean Peters on October 11, 2013 and reviewed unaffirmed records regarding the plaintiff's treatment. She

performed range of motion testing and found limitations of range of motion of the lumbar spine and cervical spine. Dr. Arnoff did not discuss the type of test she utilized. She states that based upon her review of Peters' prior treatment records she confirms the findings and diagnosis of his previous physicians. She states he is presently partially disabled, that his condition is permanent and that his injury is causally related to the accident of December 10, 2009.

In his affidavit, Sean Peters states that as a result of the accident of December 10, 2009 he experienced pain in his back and right shoulder. He states that he attended treatment at Sutphin but stopped when told he had reached maximum benefit from therapy. He states he still has pain everyday as a result of the accident.

Dr. Arnoff states she examined Joseph McFadden on November 8, 2013. At that time she found limitations of range of motion of his lumbar spine. She reviewed the plaintiffs unaffirmed medical reports and states that she confirms the findings and diagnosis of his prior treatment providers. She states that she is aware he was involved in a prior accident 3 - 4 years prior to the 2009 accident. She states that the injuries sustained in 2009 were superimposed upon the preexisting conditions, and the 2009 accident exacerbated the pre-existing condition.

In his affidavit Mr. McFadden states that in 2007 he was involved in a prior accident wherein he sustained injuries to his back. He states he was completely recovered from the 2007 accident when this accident occurred in 2009.

Plaintiffs' counsel argues that with respect to McFadden, the defendant failed to meet their prima facie burden as their own retained orthopedist, Dr. Lloyd, found restricted range of motion of McFadden's lumbar spine. Plaintiff also argues that Dr. Lloyd did not claim that McFadden's restrictions are attributable to his prior accident. As to Peters, counsel argues that there is a question of fact, as the results of Dr. Lloyd's range of motion testing conflicts with the results of the testing done by Dr. Arnoff.

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]).

MOTION AS TO SEAN PETERS

As to Mr. Peters, the competent proof submitted by the defendant, including the affirmed medical reports of Drs. Mendelsohn and Lloyd as well as the plaintiff's deposition testimony, in which he stated he was not confined to his home or bed for a substantial time after 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]).

In opposition, the plaintiff failed to raise a question of fact. Although Dr. Arnoff found that the plaintiff had limited range of motion of the cervical and lumbar spines when she first examined him in October 2013, the plaintiff did not submit competent objective medical evidence that revealed any treatment or the existence of an injury to his neck or back that was contemporaneous with the subject accident. Although a quantitative assessment or numerical assessment of range of motion of injury is not required on an initial or contemporaneous examination, the courts still require a contemporaneous qualitative assessment of injuries from an examination close to the time of the accident (see Perl v Meher, 18 NY3d 208[2011][a contemporaneous doctor's report is important to proof of causation];e Griffiths v Munoz, 98 AD3d 997 [2d Dept. 2012]; Rosa v Mejia, 95 AD3d 402 [1st Dept. 2012]).

Here, the accident occurred in December 2009. Although the plaintiff submitted unaffirmed records of treatment following the accident, the plaintiff did not submit any competent medical evidence in admissible form regarding the extent of his injuries from December 2009 through October 2013. Dr. Arnoff's conclusions, based only upon her recent examination and based upon her review of prior treating physicians' unaffirmed and unsworn reports are inadmissible (see Lazu v Harlem Group, Inc., 89 AD3d 435 [1st Dept. 2011]). Further, the unaffirmed conclusions and opinions of the plaintiff's treating physicians were not submitted in admissible form necessary to demonstrate a contemporaneous injury (see Irizarry v Lindor, 110 AD3d 846 [2d Dept. 2013]; Scheker v Brown, 91 AD3d 751 [2d Dept. 2012]; Bernier v Torres, 79 AD3d 776 [2010]; Marziotto v Striano, 38 AD3d 623 [2d Dept. 2007]; Iusmen v Konopka, 38 AD3d 608 [2d Dept. 2007]; Mahoney v Zerillo, 6 AD3d 403 [2d Dept. 2004]).

Therefore, this Court does not have before it competent evidence of contemporaneous treatment resulting from the plaintiff's accident. Dr. Arnoff's affirmation describing the plaintiff's medical condition in 2013 is insufficient to raise a triable issue of fact as to whether plaintiff's alleged injuries existed for a sufficient period of time to constitute a serious injury under the limitations of use categories of the Insurance Law. Thus, the plaintiff's opposition papers do not raise a triable issue of fact as to whether Peters sustained a serious injury under the permanent consequential limitation of use or the significant limitation of use category of Insurance Law § 5102 (d) (see Taylor v Flaherty, 65 AD3d 1328 [2d Dept. 2009]; Ferraro v Ridge Car Serv., 49 AD3d 498 [2d Dept. 2008]).

With respect to the 90/180 category, the plaintiff failed to submit competent medical evidence that the injuries allegedly sustained in the subject accident rendered him unable to perform substantially all of her usual and customary daily activities for not less than 90 days of the first 180 days subsequent to the subject accident (see Nieves v Michael, 73 AD3d 716 [2d Dept. 2010]; Sainte-Aime v Ho, 274 AD2d 569 [2d Dept. 2000]).

Further, plaintiff failed to adequately explain the over three year gap in treatment from the time he stopped treating after six months. He did not offer a reasonable explanation as to why he did not receive any further treatment sustained in the accident (see Smyth v McDonald, 101 AD3d 1789 [4th Dept. 2012] [the 31-month gap in treatment fatally undermines plaintiffs' claim of serious injury with respect to the permanent consequential limitation of use and significant limitation of use categories of serious injury]; Ayala v Katsionis, 67 AD3d 836 [2d Dept. 2009]; Maffei v Santiago, 63 AD3d 1011 [2d Dept. 2009]).

MOTION AS TO JOSEPH McFADDEN

As stated above, in his affirmed medical report, Dr. Lloyd stated that upon examination of the plaintiff's lumbar spine plaintiff exhibited range of motion limitations. He explained that the abnormalities of the lumbar spine were pre-existing degenerative disc disease. As the independent physical indicated that the plaintiff has a limitation of range of motion of the lumbar spine, the defendant's independent medical report is insufficient to eliminate all triable issues of fact. Therefore, the defendants have failed to make a prima facie showing that the plaintiff Joseph Mcfadden does not have a physical injury as defined in the Insurance Law (see Balducci v Velasquez, 92 AD3d 626 [2d Dept. 2012]; Katanov v County of Nassau, 91 AD3d 723 [2d Dept. 2012]; Astudillo v MV Transp., Inc., 84 AD3d 1289 [2d Dept. 2011]). Although the defendants claim that the lumbar injury was due to the prior accident in which the plaintiff also injured his lumbar spine, the findings of Dr. Lloyd raise an issue of fact as to whether the plaintiff suffered a significant limitation of use of the lumbar spine from the subject accident in 2009 or was an exacerbation of his injury sustained in the prior accident in 2007 (see Raguso v Ubriaco, 97 AD3d 560 [2d Dept. 2012]; Artis v Lucas, 84 AD3d 845 [2d Dept. 2011];

Since the defendants failed to meet their prima facie burden, it is unnecessary to consider whether the papers submitted by the plaintiff in opposition were sufficient to raise a triable issue of fact (see Torres v Torrano, 79 AD3d 1124 [2d Dept. 2011]; Coscia v 938 Trading Corp., 283 AD2d 538 [2d Dept. 2001]).

Accordingly, for all of the above stated reasons, it is hereby,

ORDERED, that with respect to plaintiff SEAN M. PETERS, the defendants' motion for summary judgment is granted and the complaint of plaintiff SEAN M. PETERS is dismissed, and it is further,

ORDERED, that with respect to plaintiff, JOSEPH McFADDEN, the defendants' motion for an order granting summary judgment dismissing the plaintiffs' complaint on the ground that plaintiff JOSEPH McFADDEN did not sustain a serious injury is denied.

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

ROBERT J. MCDONALD
J.S.C.