

Lopez v Tucker

2014 NY Slip Op 30463(U)

February 20, 2014

Supreme Court, Suffolk County

Docket Number: 11-9501

Judge: Ralph T. Gazzillo

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To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must “show facts sufficient to require a trial of any issue of fact” (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]).

Pursuant to Insurance Law § 5102 (d), “[s]erious injury’ means a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or 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 ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.”

The term “significant,” as it appears in the statute, has been defined as “something more than a minor limitation of use,” and the term “substantially all” has been construed to mean “that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment (*Licari v Elliot*, 57 NY2d 230, 455 NYS2d 570 [1982]).

On a motion for summary judgment to dismiss a complaint for failure to set forth a prima facie case of serious injury as defined by Insurance Law § 5102 (d), the initial burden is on the defendant to “present evidence in competent form, showing that plaintiff has no cause of action” (*Rodriquez v Goldstein*, 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once the defendant has met the burden, the plaintiff must then, by competent proof, establish a *prima facie* case that such serious injury exists (*DeAngelo v Fidel Corp. Services, Inc.*, 171 AD2d 588, 567 NYS2d 454, 455 [1st Dept 1991]). Such proof, in order to be in competent or admissible form, shall consist of affidavits or affirmations (*Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). The proof must be viewed in a light most favorable to the non-moving party, here the plaintiff (*Cammarere v Villanova*, 166 AD2d 760, 562 NYS2d 808, 810 [3d Dept 1990]).

In order to recover under the “permanent loss of use” category, a plaintiff must demonstrate a total loss of use of a body organ, member, function or system (*Oberly v Bangs Ambulance Inc.*, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the “permanent consequential limitation of use of a body organ or member” or “significant limitation of use of a body function or system” categories, either a specific percentage of the loss of range of motion must be ascribed or there must be a sufficient description of the “qualitative nature” of plaintiff’s limitations, with an objective basis, correlating plaintiff’s limitations to the normal function, purpose and

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use of the body part (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*Licari v Elliott, supra*).

In support of motion (001), the defendants have submitted, inter alia, an attorney's affirmation; a copy of the summons and complaint, answer, and plaintiffs' verified bill of particulars; an unsigned copy of the transcripts of the examination before trial of Carlos Lopez dated February 22, 2012, which is not accompanied by proof of service upon the plaintiff, but is not objected to by plaintiff; the properly sworn report of the chiropractic examination of the plaintiff; the notarized report of Martin P. LoCascio dated December 22, 2010 concerning his independent acupuncture examination of plaintiff; the report of Theresa Habacker, M.D. dated December 13, 2010 concerning her independent orthopedic examination of plaintiff; the report of Jerrold Gorski, M.D. dated June 15, 2012 concerning his independent medical examination of the plaintiff; the report of Chandra Sharma, M.D. dated June 19, 2012 concerning the independent neurological examination of the plaintiff; and an uncertified and unauthenticated copy of a peer review report of Uriel Davis, D.O. which is not in admissible form pursuant to CPLR 3212 and 4518.

Carlos Lopez alleges that he sustained the following injuries as a result of the accident: L5-S1 disc herniation with impingement of the thecal sac and nerve root; pars fracture of L5; L2-3 disc bulge with flattening of the ventral thecal sac and encroachment; L3-4 disc bulge with flattening of the ventral thecal sac and encroachment; L4-5 disc bulge with thecal sac impingement and foraminal encroachment; extensive tear of the glenoid labrum (anteroinferior, inferior and posterior glenoid labrum) of the right shoulder; extensive tear of the glenoid labrum of the left shoulder; acromioclavicular joint hypertrophy; supraspinatus impingement of the right shoulder; straightening of the lumbar lordosis; loss of the normal cervical lordosis; cervical radiculopathy; lumbar radiculopathy; derangement of the left shoulder; derangement of the right knee; and right hip sprain.

Upon review of the evidentiary submissions, it is determined that the defendants have not established prima facie entitlement to summary judgment dismissing the complaint on the basis that Carlos Lopez did not sustain a serious injury. It is further determined that the moving papers raise triable issues of fact which preclude summary judgment.

Dr. Michael Berke, Martin P. LoCascio, Theresa Habacker, M.D., and Jerrold Gorski, M.D. have not provided copies of their curriculum vitae to qualify as experts in this matter, and have not set forth their qualifications, training, and work experience as a basis for their respective opinions.

Copies of the medical records, reports, and x-ray report which Dr. Berke stated he reviewed have not been submitted. Martin LoCascio, Dr. Theresa Habacker, Jerrold Gorski, M.D., and Chandra Sharma, M.D. set forth the records each reviewed, however, no records or reports or diagnostic studies have been submitted. The general rule in New York is that an expert cannot base an opinion on facts he did not observe and which were not in evidence, and the expert testimony is limited to facts in evidence (see *Allen v Uh*, 82 AD3d 1025, 919 NYS2d 179 [2d Dept 2011]; *Marzuillo v Isom*, 277 AD2d 362, 716 NYS2d 98 [2d Dept 2000]; *Stringile v Rothman*, 142 AD2d 637, 530 NYS2d 838 [2d Dept 1988];

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O'Shea v Sarro, 106 AD2d 435, 482 NYS2d 529 [2d Dept 1984]; *Hornbrook v Peak Resorts, Inc.* 194 Misc2d 273, 754 NYS2d 132 [Sup Ct, Tomkins County 2002]).

Dr. Gorski indicated the plaintiff has a labral tear in the left shoulder pursuant to the MRI study he reviewed. He further indicated that he reviewed an MRI study dated November 19, 2010 of plaintiff's cervical spine and an MRI study dated November 30, 2010 of plaintiff's lumbar spine. Dr. Gorski stated that a lumbar pars fracture of the spine was identified on the left, and that there was a questionable fracture on the right side. Insurance Law § 5102 (d) classifies a fracture as a serious injury. No examining physician has set forth that said fracture at L5 is not causally related to the subject accident, precluding summary judgment.

While the plaintiff has pleaded that he sustained cervical and lumbar radiculopathy in this accident, no physician, including Dr. Sharma who reviewed plaintiff's upper and lower SSEP studies and NCV/EMG studies, has ruled out that such radicular injuries are causally related to the accident, precluding summary judgment.

Dr. Berke, Martin LoCascio, and Dr. Habacker, did not set forth the method employed to determine range of motion findings upon examining the plaintiff. Dr. Gorski utilized visual inspection in determining plaintiff's ranges of motion. Failure to set forth the objective method employed to obtain such range of motion measurements of the plaintiffs' cervical and lumbar spines, shoulders and knees, such as the goniometer, inclinometer or arthroidal protractor (*see Martin v Pietrzak*, 273 AD2d 361, 709 NYS2d 591 [2d Dept 2000]; *Vomero v Gronrous*, 19 Misc3d 1109A, 859 NYS2d 907 [Sup Ct, Nassau County 2008]), leaves it to this court to speculate as to how each examining physician, with the exception of Dr. Sharma, determined such ranges of motions when examining the plaintiff, precluding summary judgment.

Dr. Berke and Dr. Habacker did not compare their respective range of motion findings to the normal range of motion values. Dr. Habacker and Martin LoCascio compared their range of motion findings to some differing normal values, leaving this court to speculate as to which normal value is correct, precluding summary judgment. Dr. Gorski identified range of motion deficits with cervical lateral bending and rotation. Dr. Gorski did not provide range of motion findings for plaintiff's lateral spine except for extension and twisting, raising factual issues.

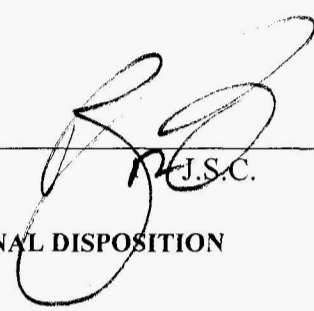
It is further noted that none of the defendants' examining physicians examined the plaintiff during the statutory period of 180 days following the accident, thus rendering the defendants' physician's affidavits insufficient to demonstrate entitlement to summary judgment on the issue of whether the plaintiff was unable to substantially perform all of the material acts which constituted the usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident (*Blanchard v Wilcox*, 283 AD2d 821, 725 NYS2d 433 [3d Dept 2001]; *see Uddin v Cooper*, 32 AD3d 270, 820 NYS2d 44 [1st Dept 2006]; *Toussaint v Claudio*, 23 AD3d 268, 803 NYS2d 564 [1st Dept 2005]), and the experts offer no opinion with regard to this category of serious injury (*see Delayhaye v Caledonia Limo & Car Service, Inc.*, 61 AD3d 814, 877 NYS2d 438 [2d Dept 2009]), only as to their findings on the date of their respective examinations.

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Based upon the foregoing, the defendants have failed to demonstrate entitlement to summary judgment on either category of injury defined in Insurance Law § 5102 (d) (*see Agathe v Tun Chen Wang*, 98 NY2d 345, 746 NYS2d 865 [2006]); *see also Walters v Papanastassiou*, 31 AD3d 439, 819 NYS2d 48 [2d Dept 2006]). Inasmuch as the moving party has failed to establish prima facie entitlement to judgment as a matter of law in the first instance on the issue of “serious injury”, it is unnecessary to consider whether the opposing papers were sufficient to raise a triable issue of fact (*see Yong Deok Lee v Singh*, 56 AD3d 662, 867 NYS2d 339 [2d Dept 2008]); *Krayn v Torella*, 40 AD3d 588, 833 NYS2d 406 [2d Dept 2007]; *Walker v Village of Ossining*, 18 AD3d 867, 796 NYS2d 658 [2d Dept 2005]).

Accordingly, motion (001) by the defendants for summary judgment dismissing the complaint on the basis that the plaintiff did not suffer serious injury as defined by Insurance Law §5102 (d) is denied.

Dated: 2/20/14



J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION