

Castro v Morales

2014 NY Slip Op 32629(U)

September 12, 2014

Supreme Court, Bronx County

Docket Number: 301039/2013

Judge: Lucindo Suarez

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 19

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MAXIMO CASTRO,

Plaintiff,

- against -

PEDRO MORALES and JORGE GARCIA,

Defendants.

DECISION AND ORDER

Index No. 301039/2013

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PRESENT: Hon. Lucindo Suarez

Upon defendants' notice of motion dated July 28, 2014 and the affirmation, affirmed reports (4), exhibits and memorandum of law submitted in support thereof; plaintiff's affirmation in opposition dated August 13, 2014 and the affidavits (7), affirmed reports (2), and exhibits annexed thereto; plaintiff's supplemental affirmation dated August 18, 2014 and the affirmed report (1) annexed thereto; defendants' reply affirmation dated September 5, 2014 and the exhibits and the reply memorandum of law submitted therewith; and due deliberation; the court finds:

In this action arising out of a September 15, 2012 motor vehicle accident, defendants move pursuant to CPLR 3212 for summary judgment on the ground that plaintiff did not sustain a "serious injury," as the phrase is defined in Insurance Law § 5102. Plaintiff alleges in his bill of particulars to have suffered partial thickness tears of the supraspinatus and infraspinatus tendons in his left shoulder; a complex tear of the medial meniscus in his left knee; disc herniations at C2-C3 through C4-C5 and at L5-S1; and disc bulges at C5-C6 and C7-T1, among other injuries. He was confined to his bed for two weeks and to his home for nearly six months. While plaintiff did not identify a specific category of serious injury, it is apparent that the first five categories are inapplicable.

In support of the motion, defendants submit the pleadings; excerpts from plaintiff's deposition

transcript; therapy records from Northcoast Physical Therapy & Rehab P.C.; the FDNY Prehospital Care Report dated September 15, 2012; emergency room records from Columbia Presbyterian Hospital; an unsigned evaluation dated September 21, 2012 from Alan C. Berger, D.C.; and emergency room records from Lincoln Hospital Center. Although the medical records are not certified, defendants may rely on the unsworn reports and uncertified records of plaintiff's treatment to demonstrate the lack of serious injury. *See Elshaarawy v. U-Haul Co. of Miss.*, 72 A.D.3d 878, 900 N.Y.S.2d 321 (2d Dep't 2010). The Columbia Presbyterian Hospital records show that plaintiff exhibited normal ranges of motion for all his extremities in an examination performed shortly after the accident. CT scans of the cervical spine revealed evidence of degenerative changes and osteoarthritis, and X-rays of the left knee showed mild osteoarthritis. Plaintiff treated at Lincoln Hospital following an October 23, 2013 motor vehicle accident. Ranges of motion for the cervical spine and all extremities were full and painless and examinations of the bilateral shoulders and knees were normal after that accident.

Defendants also offer affirmed reports from orthopedist Frank Segreto, M.D., neurologist Roy Shanon, M.D., orthopedist Marvin Winell, M.D. and orthopedist Edward S. Crane, M.D. Drs. Segreto and Shanon each performed independent medical evaluations of plaintiff in November 2012 and reported finding normal ranges of motion for all areas tested and normal or negative results for all objective tests administered. Dr. Segreto opined that plaintiff's spine, left shoulder and left knee sprains had resolved without any evidence of an orthopedic disability. Dr. Shanon concluded that plaintiff exhibited no signs of a neurological disability. Dr. Winell conducted a peer review of the treatment records and opined that there was no medical necessity for the lumbar spine treatment plaintiff received. Dr. Crane found normal ranges of motion for all areas tested and negative results for all objective tests administered when he examined plaintiff on April 28, 2014. He concluded that plaintiff did not suffer from an ongoing disability related to the accident.

Plaintiff testified that he was self-employed as a livery cab driver. He resumed work once he

purchased a vehicle in March 2013, and no medical professional advised him to refrain from work or reduce his work schedule after the accident.

Defendants have shown that plaintiff did not suffer a serious injury within the meaning of the Insurance Law. *See Boone v. Elizabeth Taxi, Inc.*, 117 A.D.3d 515, 986 N.Y.S.2d 62 (1st Dep't 2014). The differing normal standards cited by the examining physicians are minor as each physician concluded that plaintiff's sprains had resolved. *See Anderson v. Zapata*, 88 A.D.3d 504, 930 N.Y.S.2d 564 (1st Dep't 2011). Plaintiff's objection to the submission of reports from his no fault examiners is without merit; he could have obtained those reports himself prior to defendants' motion.

Plaintiff in opposition submits treatment records from Midtown Rehabilitation and Excel Surgery Center, LLC; affidavits from chiropractor Alan Berger, D.C.; an affirmed report from orthopedist Kenneth McCulloch, M.D.; MRI reports from Lenox Hill Radiology; and his full deposition transcript. The treatment records and MRI reports, while not certified, can be considered. *See Pietropinto v. Benjamin*, 104 A.D.3d 617, 961 N.Y.S.2d 461 (1st Dep't 2013). Defendants also object to the untimely exchange of a report prepared by neuroradiologist David R. Payne, M.D. *See Scott v. Westmore Fuel Co., Inc.*, 96 A.D.3d 520, 947 N.Y.S.2d 15 (1st Dep't 2012). Although plaintiff offers no excuse for the delay, the court may consider the report. *See Abreu v. Metropolitan Transp. Auth.*, 117 A.D.3d 972, 986 N.Y.S.2d 557 (2d Dep't 2014). Dr. Payne's report as annexed to plaintiff's papers lacks a signature page, but a signed copy is included in defendants' reply.

The submissions are sufficient to raise a triable issue of fact that plaintiff suffered a permanent consequential or a significant limitation of use of his lumbar spine. *See Pantojas v. Lajara Auto Corp.*, 117 A.D.3d 577, 986 N.Y.S.2d 87 (1st Dep't 2014). Dr. Berger found motion deficits in an examination performed six days after the accident and at subsequent examinations. He last examined plaintiff on April 28, 2014, the same day Dr. Crane evaluated plaintiff. Dr. Berger found motion deficits, moderate tenderness, and muscle spasms, and positive results for Lasegue's and Kemp's tests. He concluded that

there were no contributing factors from pre-existing conditions and that the injuries were causally related to the accident. Dr. Payne found no evidence of degenerative changes in the lumbar spine MRI and opined there was a causal relationship between the accident and plaintiff's injuries. Dr. McCulloch stated that the Lincoln Hospital records recorded only complaints of neck and chest pain.

Defendants argue in reply that plaintiff should not be permitted to submit his unsigned transcript, but defendants relied on the same transcript on their motion. *See Franco v. Rolling Frito-Lay Sales, Ltd.*, 103 A.D.3d 543, 962 N.Y.S.2d 54 (1st Dep't 2012). Although Dr. Berger did not identify the objective instrument used to measure plaintiff's ranges of motion, his examinations are sufficient. *See Frias v. Son Tien Liu*, 107 A.D.3d 589, 967 N.Y.S.2d 382 (1st Dep't 2013). Dr. Berger identified the other objective tests he used to measure plaintiff's limitations. *See Pantojas v. Lajara Auto Corp.*, *supra*; *Lopez v. Abdul-Wahab*, 67 A.D.3d 598, 889 N.Y.S.2d 178 (1st Dep't 2009). Since plaintiff has raised a triable issue concerning his lumbar spine injury, the court need not determine whether plaintiff's other claimed injuries meet threshold. *See Lee v. Cornell Univ.*, 112 A.D.3d 466, 976 N.Y.S.2d 85 (1st Dep't 2013). He is entitled to recover damages for all injuries causally related to the accident. *See Rubin v. SMS Taxi Corp.*, 71 A.D.3d 548, 898 N.Y.S.2d 110 (1st Dep't 2010).

Plaintiff, though, has not raised an issue concerning his permanent loss of use claim. Contrary to plaintiff's contention, a permanent loss of use requires a total loss of use. *See Oberly v. Bangs Ambulance Inc.*, 96 N.Y.2d 295, 751 N.E.2d 457, 727 N.Y.S.2d 378 (2001). As to his 90/180 claim, a claimed inability to work is not determinative. *See Weinberg v. Okapi Taxi, Inc.*, 73 A.D.3d 439, 899 N.Y.S.2d 597 (1st Dep't 2010). Plaintiff testified that no physician advised him to refrain from work, and he resumed work once he purchased a new vehicle. Dr. Berger's statements that plaintiff was temporarily totally disabled from work are too general. *See Santana v. Tic-Tak Limo Corp.*, 106 A.D.3d 572, 966 N.Y.S.2d 30 (1st Dep't 2013). An inability to play baseball during the summer months, dance the merengue two to three times a month, or lift a laundry cart are insufficient to show that plaintiff was

prevented from performing substantially all his daily activities. *See Gibbs v. Hee Hong*, 63 A.D.3d 559, 881 N.Y.S.2d 415 (1st Dep't 2009).

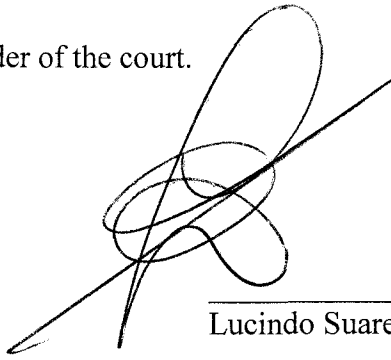
Accordingly, it is

ORDERED, that defendants' motion for summary judgment on the issue of serious injury is granted to the extent of dismissing plaintiff's claim of serious injury in the categories of death; dismemberment; significant disfigurement; fracture; loss of a fetus; permanent loss of use of a body organ, member, 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 ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment; and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of defendants Pedro Morales and Jorge Garcia dismissing plaintiff's claim of serious injury in the categories of death; dismemberment; significant disfigurement; fracture; loss of a fetus; permanent loss of use of a body organ, member, 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 ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

This constitutes the decision and order of the court.

Dated: September 12, 2014



Lucindo Suarez, J.S.C.