

Vasquez v Adalissa Limo, Inc.
2014 NY Slip Op 32682(U)
September 11, 2014
Supreme Court, Bronx County
Docket Number: 305858/2011
Judge: Alison Y. Tuitt
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

NEW YORK SUPREME COURT-----COUNTY OF BRONX

PART IA - 5

CARLOS VASQUEZ,

INDEX NUMBER: 305858/2011

Plaintiff,

-against-

Present:

HON. ALISON Y. TUITT

Justice

ADALISSA LIMO, INC., JOSE A. TAVERAS and RAHSEAN L. ALSTON,

Defendants.

The following papers numbered 1 to 2

Read on this Defendant Rahsean L. Alston's Motion for Summary Judgment

On Calendar of 2/10/14

Notice of Motion-Exhibits and Affirmation 1

Affirmation in Opposition and Exhibits 2

Reply Affirmation 3

Upon the foregoing papers, defendant Rahsean L. Alston's (hereinafter "Alston") motion for summary judgment on the issue of threshold is denied for the reason set forth herein.

The within action arises from a motor vehicle accident on February 18, 2009 in which plaintiff alleges he sustained serious injuries. Defendant Alston moves for summary judgment on the grounds that plaintiff failed to prove a serious injury as required by §5102(d) of the Insurance Law.

The court's function on this motion for summary judgment is issue finding rather than issue determination. Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1978). The movant must come forward with evidentiary proof

in admissible form sufficient to direct judgment in its favor as a matter of law. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. Stone v. Goodson, 8 N.Y.2d 8, (1960); Sillman v. Twentieth Century Fox Film Corp., *supra*.

In the present action, the burden rests on defendant to establish, by the submission of evidentiary proof in admissible form, that plaintiff has not suffered a serious injury. Lowe v. Bennett, 511 N.Y.S.2d 603 (1st Dept. 1986), *aff'd*, 69 N.Y.2d 701 (1986). When a defendant's motion is sufficient to raise the issue of whether a "serious injury" has been sustained, the burden shifts and it is then incumbent upon the plaintiff to produce prima facie evidence in admissible form to support the claim of serious injury. Licari v Elliot, 57 N.Y.2d 230 (1982); Lopez v. Senatore, 65 N.Y.2d 1017 (1985). When a claim is raised under the "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," in order to prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion is acceptable. Toure v. Avis Rent A Car Systems, Inc., 98 N.Y.2d 345 (2002). In addition, an expert's qualitative assessment of a plaintiff's condition is also probative, provided that: (1) the evaluation has an objective basis and, (2) the evaluation compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system. Toure, *supra*.¹

In the instant action, defendant Alston moves for summary judgment arguing that plaintiff has not suffered a serious injury pursuant to §5102 of the Insurance Law. In his bill of particulars, plaintiff alleges to have sustained, in relevant part, left knee meniscus tear, chondral injury patellofemoral joint left knee requiring surgical intervention, arthroscopy of the left knee, partial medial meniscectomy, chondroplasty

¹The Toure decision appears to indicate that claims of neck or back injury resulting from bulging or herniated discs may be considered either under the category of a "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system," as well as the 90/180 day category (Toure v. Avis Rent A Car Systems, Inc., 98 N.Y.2d 345, 352, 774 N.E.2d 1197, 746 N.Y.S.2d 865 [2002].)

patellofemoral joint, synovectomy multiple compartment left knee and injection of the left knee performed May 8, 2009; posterior-medial menisco-capsulate tear and anterior cruciate ligament sprain of the left knee, confirmed by MRI dated March 6, 2009; L2-3 annual tears, confirmed by MRI dated March 6, 2009; herniation at L4-5 extending behind the superior endplate of L5 and into both neural foramina indenting the sac, moderate right sided and server left sided L4-5 foraminal stenosis, confirmed by MRI dated March 6, 2009; herniation at L1-2 right sided paracentral disc herniation causing sac deformity, confirmed by MRI dated March 6, 2009; and, traumatic cervical and lumbar radiculopathy.

In support of his motion, defendant submits the affirmed reports of Dr. Marianna Golden, M.D., neurologist; Dr. Thomas Nipper, orthopedist; and Dr. Bert Hyligers, radiologist. Dr. Golden examined plaintiff on October 9, 2012 and states that she found no objective evidence of an accident related neurologic disability or permanency; plaintiff is capable of working and may perform his normal activities of daily living without restrictions or limitations; she did not find any objective clinical evidence of radiculopathy and found that plaintiff had normal reflex, motor and sensory examination. Dr. Nipper examined plaintiff on October 9, 2012 and found that plaintiff's cervical and lumbar spine had full range of motion. Straight leg raising was negative at 90 degrees bilaterally. Dr. Nipper noted healed surgical scars on plaintiff's left knee and found full range of motion on the knee. Dr. Nipper opines that there is no objective evidence of an orthopedic disability and that plaintiff is capable of working and performing all of his daily living activities without limitations. Dr. Heyligers states that he reviewed plaintiff's MRI films and the following are his findings: with respect to the lumbar spine, degenerative disc disease L1-2 through L4-5; right paracentral disc herniation L1-2; degenerated disc herniation L4-5. With respect to the left knee, Dr. Heyligers opines that there was a small joint effusion related to localized swelling.

In opposition to the motion, plaintiff submits his own affidavit, the affirmation of his treating physician, Dr. Richard M. Seldes and Dr. Seldes narrative report of the surgery performed on plaintiff's knee; neurological records of Dr. Noel Fleischer; plaintiff's MRI reports; treatment records of Stuart Landesberg, D.C.; and emergency room records from New York Presbyterian Hospital. Plaintiff's accident occurred on February 18, 2009. Following the accident, plaintiff was treated at the emergency room of New York Presbyterian Hospital where he complained of back pain and left knee pain. He was treated and released. Thereafter, on February 23, 2009, plaintiff sought and received treatment from Dr. Landesberg. Plaintiff

received treatment in the form of physical therapy from Dr. Landesberg approximately two to three times per week for approximately five months, and then further, more intermittent treatment, for a total of about one year. Plaintiff states that since the date of the accident, he experienced and continues to experience to this day, extreme neck pain radiating to both arms and limitation of motion, extreme pain radiating to his lower extremities, chronic pain and stiffness in his left knee. Plaintiff claims that he was employed in payroll department of a construction company and that as a result of the accident, he was unable to work for nearly two years.

Dr. Seldes states that plaintiff was referred to him in March 2009. Dr. Seldes performed the surgery on May 8, 2009. He confirms the injuries that plaintiff pleads in his bill of particulars based on his physical examinations of the plaintiff, the review of the medical records and MRI reports, and the surgery that he performed on plaintiff's knee. Dr. Seldes most recent examination of the plaintiff was in April, 2013. Dr. Seldes states that prior to the accident, plaintiff was asymptomatic and that four years later, he continues to suffer severe pain and discomfort. Dr. Seldes further states that plaintiff sustained a permanent consequential limitation of use of his left knee and lumbar spine and that his injuries prevented him from performing substantially all material acts which constituted his usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident. It is also his opinion within a reasonable degree of medical certainty that his injuries are directly and causally related to the accident.

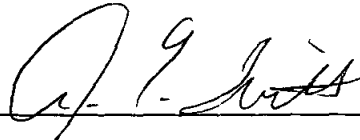
Defendant's motion for summary judgment on the issue of serious injury must be denied. Plaintiff has presented evidence which raises issues of fact as to whether he sustained a serious injury. Plaintiff shows contemporaneous objective proof of the limitations sustained as a result of the injury such as an expert's designation of a numeric percentage of loss of range of motion or the extent or degree of physical limitation, in Dr. Landesberg's records, for the physical examinations on February 23, 2009 through July 13, 2009, and in the records of Dr. Noel Fleischer, a neurologist, who also treated plaintiff on February 27, 2009, March 20, 2009 and April 3, 2009. See, Lazarus v. Perez, 901 N.Y.S.2d 39 (1st Dept. 2010) citing Franchini v. Palmieri, 1 N.Y.3d 536 (2003). Additionally, EMG studies taken of plaintiff by Dr. Fleischer on March 20, 2009 revealed evidence of right L5-S1 nerve root injury. Dr. Fleischer noted that the EMG was useful in localizing a symptomatic nerve root in the face of multiple MRI abnormalities and the EMG documented a definite neurogenic problem contributing to his lower extremity weakness. Dr. Fleischer ordered the MRI's of plaintiffs

left knee and lumbar spine which also indicated objective findings that can be found by a jury to constitute serious injuries. That plaintiff's MRI reports and medical records as they are not in admissible form is of no consequence as they were affirmatively relied upon by defendants' examining physician in rendering his opinion that plaintiff did not sustain a serious injury. See, Grasso v. Angerami, 79 N.Y.2d 178 (1991); Toledo v. A.P.O.W. Auto Repair Towing, 762 N.Y.S.2d 495 (1st Dept. 2003). In support of a claim that plaintiff has not sustained a serious injury, a defendant may rely either on the sworn statements of the defendant's examining physician or the unsworn reports of plaintiff's examining physician. See, Pagano v. Kingsbury, 587 N.Y.S.2d 692 (2d Dept. 1992). Moreover, plaintiff here submits the affirmation of his treating physician and a medical affirmation which is based on a physician's personal examination and observations of the plaintiff which is an acceptable method to provide a doctor's opinion regarding the existence and extent of a plaintiff's serious injury. O'Sullivan v. Atrium Bus Co., 668 N.Y.S.2d 167 (1st Dept. 1998). Insofar as "the evidence adduced by the first-hand observations" of Dr. Seldes, "it does not avail defendants that the MRI reports are unsworn". Rice v. Moses, 752 N.Y.S.2d 318 (1st Dept. 2002). Thus, plaintiff has raised an issue of fact as to whether he sustained a permanent consequential limitation of use of his left knee and lumbar spine.

Moreover, defendants failed to make a prima facie showing that plaintiff did not sustain a medically determined injury of a nonpermanent nature that prevented her from performing substantially all of her customary and daily activities for 90 of the 180 days immediately following the accident. See, Delgado v. Papert Tr., Inc., 939 N.Y.S.2d 457 (1st Dept. 2012). Defendants' physicians' examinations took place well after the relevant 180-day period, and defendants submitted no other evidence disproving plaintiff's claim that he was disabled and unable to return to work for nearly two years due to a medically determined injury caused by the accident. See, Jeffers v. Style Tr. Inc., 952 N.Y.S.2d 541 (1st Dept. 2012); Quinones v. Ksieniewicz, 915 N.Y.S.2d 70 (1st Dept. 2011). In light of defendants' failure to meet their initial burden on the 90/180-day claim, plaintiff's proof need not be reviewed.

Accordingly, defendant's motion for summary judgment is denied.
This constitutes the decision and order of this Court.

Dated: 9/11/14



Hon. Alison Y. Tuitt