

Martinez-Perez v Carias
2014 NY Slip Op 33237(U)
January 3, 2014
Supreme Court, Bronx County
Docket Number: 305897/11
Judge: Howard H. Sherman
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NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 4

-----x
JUAN MARTINEZ-PEREZ,

Plaintiff(s),

-against-

YONI M. CARIAS, EMELY L. ACEBO and
JUAN SANCHEZ, JR.,

Defendant(s).
-----x

Index No.: 305897/11

DECISION/ORDER

Howard H. Sherman

The following papers numbered 1 to 4 read on this motion for summary judgment duly submitted on the Motion Calendar of May 9, 2013.

	<u>PAPERS NUMBERED</u>	
Notice of Motion Exhibits and Affirmation Annexed	1	
Notice of Cross-Motion Exhibits and Affirmation Annexed	2	
Affirmation in Opposition - Exhibits A - K	3	
Affirmation in Reply	4	

Upon the foregoing papers this motion and cross-motion for an orders awarding summary judgment dismissing the complaint on the grounds that plaintiff did not sustain a serious injury are granted to the extent and for the reasons set forth below.

FACTS AND PROCEDURAL BACKGROUND

Plaintiff seeks damages for injuries alleged to have been sustained in a motor vehicle accident occurring on September 19, 2010 on the southbound F.D.R. Drive at or near East 100th Street, New York County.

This action was commenced in June 2011, and issue was joined with the service of the answer of defendants Acebo and Sanchez in August. Co defendant Carias served an answer in October 2011.

Note of Issue was filed on October 17, 2012.

VERIFIED BILL OF PARTICULARS

Plaintiff alleges that he sustained the following permanent injuries as a result of the motor vehicle accident: **cervical spine** - herniation and bulge discs at C5-6, and radiculopathy; **lumbar spine** - herniated discs at L1 - 2 and L5 - S1, and radiculopathy **right shoulder** - rotator cuff tear and surgery; **right knee**; partial ACL tear [¶ 11]. In addition, it is alleged that these injuries caused plaintiff to be confined to his home for eight (8) months following the accident [¶ 13].

MOTION/CROSS-MOTION

Defendant Carias now moves for an order awarding summary judgment dismissing the complaint on the grounds that plaintiff did not sustain a serious injury as defined by Insurance Law §5104 (d). In support, defendants submit copies of the affirmed reports of independent medical evaluations, as well as a copy of the transcript of plaintiff's April 25, 2012 examination before trial.

Defendants Acebo and Sanchez cross-move for the same relief incorporating by reference the arguments and exhibits of the co-defendant's motion.

INDEPENDENT MEDICAL EVALUATIONS

1) Plaintiff presented for an orthopedic examination on June 11, 2012¹ with complaints of pain in his right arm that he has to lift slowly, something which he was able to do unimpaired before the accident.

Upon examination of the cervical spine Dr. Gregory Montalbano found neither paraspinal spasm nor tenderness upon palpation along the cervical paraspinals and pericapular muscles.

Range of motion, which was tested with the use of a goniometer, was found to be full in all planes as quantified and compared to normal readings.²

The **right shoulder** was observed to have healed portals and no evidence of heat, erythema or swelling. Range of motion was found to be full as quantified and compared to normal in flexion, abduction, and internal and external rotation. Rotator cuff strength was measured as 5/5 in scaption, abduction, external and internal rotation. Drop Arm testing was negative , as were Apprehension, and relocation testing for instability. Impingement Sign also tested negative.

The **left shoulder** was found to have full range of motion in all planes with Drop Arm, relocation and Apprehension tests all yielded negative findings as did Impingement Sign.

Upon examination of the lumbar spine, Dr. Montalbano found full range of motion for extension, bilaterally as quantified and compared to normal readings and

¹ Exhibit F to Moving Papers.

² Range of motion for flexion was found to be 80 degrees (normal 90 degrees).

straight leg raising test was found to be negative bilaterally.

Examination of both knees revealed identical full findings on ranges of motion, and negative findings on stability examinations including on Lachman, anterior and posterior drawer, and McMurray testing.

Dr. Montalbano based his discussion and evaluation upon his clinical examination and a detailed review of contemporaneous medical records including reports of MRI studies of the cervical and lumbar spine dated, respectively, October 18th and 25th, 2010 as well as those of the right knee and shoulder dated November 8, and 10, 2010, and treatment notes for the period 10/22/10 through 3/31/11, and the operative report of the 01/17/11 arthroscopy/debridement/acromioplasty/rotator cuff repair of the right shoulder.

Dr. Montalbano opined to a reasonable degree of medical certainty that plaintiff did not sustain any permanent injury to the right shoulder as a result of the accident and that he has a pre-existing condition of degenerative joint disease related to his age³ and not as a result of the accident. Dr. Montalbano also opined that "there may be a prior injury to the shoulder as reported by the facility radiologist," and that plaintiff's ability to drive home from the accident and to defer medical treatment for several weeks "is inconsistent with the accident having caused a rotator cuff tear and labral tear, etc. as claimed." Montalbano concludes that the surgical procedure performed "was for the sole purpose of treating a degenerative shoulder condition and not for treatment of the injury related to the accident."

³ Plaintiff was sixty-four years old at the time of the examination.

With respect to the spinal injuries asserted, Montalbano concludes that his clinical evaluation and review of the records reveal that plaintiff did not sustain any accident-related permanent injury to the cervical or lumbar spine, and that he has a pre-existing condition of degenerative disc disease throughout the spine.

With respect to the claimed injury to the right knee, Dr. Montalbano concluded that the knee as clinically examined was normal, and the contemporaneous medical records revealed no evidence of any traumatic injury to the knee.

2) Jeffrey N. Lang, M.D. reviewed MRI studies of plaintiff's cervical and lumbar spine conducted in October 2010, and of the right shoulder dated 11/10/10.⁴

With respect to the cervical study, he concluded that the "severely limited quality" films revealed spondylosis at C5 - 6 with disc osteophyte complex and that these findings were chronic and degenerative and unrelated to the accident.

The films of the lumbar spine study were found to reveal diffuse disc desiccation and endplate hypertrophic changes evidencing diffuse degenerative disc disease. Dr. Lang found no evidence of post-traumatic findings.

The study of the right shoulder was found to reveal a high grade partial tear of the supraspinatus tendon and subcorecoid bursitis, with the former finding concluded to be "highly likely chronic and a degenerative tear."

⁴ Exhibit E.

Testimony

In pertinent part, plaintiff testified that he felt one heavy impact to the rear of his SUV, and then after five seconds he felt another “not too heavy” impact [MARTINEZ -PEREZ: 27 - 28; 39]. As a result of the first impact, his body moved forward, and his right shoulder hit the steering wheel and his right knee, the console [Id. 37 - 39].

After the police left the scene, plaintiff drove to his daughter’s house [Id. 41]. Two weeks later he commenced therapy four to five times weekly at a Bronx medical facility recommended by a friend [Id. 42 - 43; 49]. The therapy included acupuncture and chiropractic treatment. In January 2011, he underwent right shoulder surgery after which he wore an arm sling and commenced therapy that continued for eight months [Id. 52 - 57].

After the accident, but before the surgery plaintiff spent “like two months” in bed, and after the surgery, he was confined to bed “[l]ike three months.” [Id. 57]. No physician advised him that he had to do so [Id. 58].

Plaintiff also testified that he had never injured nor had problems with his neck, shoulder, knee, or back prior to the accident [Id. 58 - 59]. Since he was fifty-one, plaintiff had been receiving social security disability for high blood pressure and other unspecified illnesses [Id. 50 - 51].

DISCUSSION AND CONCLUSION

Upon review of defendant’s medical submissions as supported by objective testing upon recent examination including the lack of post-surgical residuals, and full ranges of motion of the right shoulder and full ranges of motion of the right knee cervical and lumbar spine and negative clinical findings on orthopedic testing, and the issues of

causality raised by the experts' assessment of extensive degenerative disc disease and the lack of indicia of trauma-related injury, it is submitted that defendants have met their prima facie burden to prove as a matter of law that plaintiff did not sustain a serious injury in either the "significant" or "permanent consequential limitation" of use categories of Insurance Law § 5102(d) asserted here.⁵

In addition, upon review of plaintiff's testimony that his confinement to bed was not at medical direction, as well as the above noted defendants' experts' findings of the lack of indicia of acute or recent injury in the contemporaneous diagnostic studies, it is the finding of this court that defendants have also established entitlement to judgment as a matter of law on the "90/180" category asserted.

Upon this showing, it is incumbent upon the plaintiff to come forward "with an objective medical basis supporting the conclusion that he sustained a serious injury (see Toure v Avis Rent A Car Sys., 98 NY2d 345, 350-351, 774 NE2d 1197, 746 NYS2d 865 [2002])." Baez v Rahamatali, 6 NY3d 868, 869; 850 NE2d 19 [2006].

MEDICAL SUBMISSIONS IN OPPOSITION

Plaintiff comes forward with the affirmed report of Richard E. Pearl, M.D., who performed the arthroscopic surgery on plaintiff's right shoulder, and who on April 2, 2013, examined plaintiff solely with respect to that injury and that to the right knee. Upon the recent clinical examination, Dr. Pearl found that the range of motion in internal and external rotation of the shoulder was approximately 30 degrees (normal, 50 - 55 degrees). Dr. Pearl found unspecified "limitation with regard to abduction and

⁵ It is clear that the injuries here do not qualify as either a "fracture" or a "significant disfigurement" or a "permanent loss of use" alleged here.

forward flexion.” However, the physician also found that plaintiff “has full range of motion.”

Dr. Pearl concludes that the shoulder “is better since the rotator cuff was repaired, but the patient has residual weakness in the right shoulder area and has continued pain of undetermined origin in the right knee most likely secondary to the trauma causing tendinitis.”

The unsigned Final Report of Dr. Clyde Weissbart dated 2/11/13 is inadmissible.

Plaintiff also submits copies of the contemporaneous reports of MRI and NCV-EMG studies, and Dr. Pearl’s operative report, and reports of examinations conducted by Chantal Hilaire, M.D. on 1/31/11, 2/28/11 and 3/28/11.

The MRI reports though unsworn are admissible as having been relied upon by defendants’ experts. Likewise, in light of Dr. Montalbano’s reliance upon the unsworn operative report and his discussion of the first of Dr. Hilaire’s unsworn reports, it is submitted that they may be considered in opposition to the motion.

Discussion and Conclusion

Upon review of the medical submissions in opposition, as afford all favorable inferences it is submitted that plaintiff raises an at least arguable issue of fact that he sustained an accident-related serious injury in the “significant” and “permanent consequential” limitations of use of the right shoulder. Dr. Pearl’s, albeit somewhat equivocal, recent evaluation concludes that despite having full range of motion upon his last post-operative examination in May 2011, plaintiff now has significant quantified limitations in external and internal rotation and “residual weakness” not further delineated.

It is noted as well that while raising the issue of a "highly likely" degenerative etiology for the right shoulder injury, defendants did not dispositively prove that the injury, including the complete tear of the supraspinatus tendon was not traumatically induced by the motor vehicle accident.

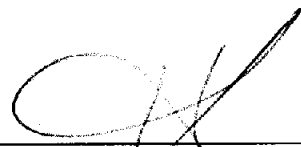
Finally, it is the finding of this court that plaintiff fails to come forward with any probative medical evidence to raise an issue of fact that his confinement to bed for five months was medically determined to be necessary. Dr. Pearl's conclusory statement that plaintiff "was immobilized" for three to six weeks after the surgery, is insufficient for such purpose.

Accordingly, it is

ORDERED that the motion and the cross-motion be granted to the extent of awarding partial summary judgment dismissing all claims of serious injury with the exception of the "significant limitation" and "permanent consequential" categories asserted.

This constitutes the decision and order of this court.

Dated: January 3, 2014
Bronx, New York



Howard H. Sherman
J.S.C.