

Ardito v Gurbuz

2014 NY Slip Op 33248(U)

December 10, 2014

Supreme Court, Suffolk County

Docket Number: 11-5712

Judge: Joseph A. Santorelli

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 6-19-14
ADJ. DATE 9-30-14
Mot. Seq. # 001 - MG; CASEDISP

-----X
FRANCIS C. ARDITO,

Plaintiff,

- against -

MARJORIE A. GURBUZ,

Defendant.
-----X

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Upon the following papers numbered 1 to 26 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 19; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 20 - 24; Replying Affidavits and supporting papers 25 - 26; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant for an order pursuant to CPLR 3212 granting summary judgment in her favor dismissing the complaint on the ground that plaintiff failed to sustain a "serious injury" as defined in Insurance Law § 5102 (d) as a result of the subject accident is granted.

This is an action to recover damages for injuries allegedly sustained by plaintiff on April 30, 2008 in a rear-end motor vehicle accident that occurred on the westbound Long Island Expressway 1000 feet west of Oyster Bay Road in the Town of Oyster Bay, New York. By his bill of particulars, plaintiff alleges that as a result of the subject accident he sustained serious injuries including disc space narrowing at C6-7 level, straightening of the spine, radiculopathy, pain and tenderness and numbness and tingling of the extremities. Following the accident, plaintiff was treated at and then released from the emergency department of Syosset Hospital. He also seeks to recover economic loss in excess of basic economic loss as defined in as defined in Insurance Law § 5102 (a).

Defendant now moves for summary judgment dismissing the complaint on the ground that plaintiff failed to sustain a "serious injury" as defined in Insurance Law § 5102 (d) as a result of the subject accident. Her submissions in support of the motion include the pleadings, plaintiff's bill of particulars, plaintiff's deposition transcript, plaintiff's emergency department hospital records, the unsworn report of plaintiff's treating orthopedic surgeon Michael C. Schwartz, M.D., and the affirmed

report of her examining orthopedic surgeon Lee M. Kupersmith, M.D.

Insurance Law § 5102 (d) defines “serious injury” as “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.”

In order to recover under the “permanent loss of use” category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (*Oberly v Bangs Ambulance*, 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 a “significant limitation of use of a body function or system” categories, either objective evidence of the extent, percentage or degree of plaintiff’s limitation or loss of range of motion must be provided 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 use of the body part (*see Perl v Meher*, 18 NY3d 208, 936 NYS2d 655 [2011]; *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865 [2000]). In order to qualify under the 90/180-days category, an injury must be “medically determined” meaning that the condition must be substantiated by a physician, and the condition must be causally related to the accident (*see Damas v Valdes*, 84 AD3d 87, 921 NYS2d 114 [2d Dept 2011]).

On a motion for summary judgment, the defendant has the initial burden of making a prima facie showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a “serious injury” within the meaning of Insurance Law § 5102 (d) (*see Gaddy v Eycler*, 79 NY2d 955, 582 NYS2d 990 [1992]; *Akhtar v Santos* 57 AD3d 593, 869 NYS2d 220 [2d Dept 2008]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; *Boone v New York City Tr. Auth.*, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]).

Plaintiff’s deposition testimony reveals that his complaints at the scene of the accident consisted of pain in his neck, left wrist, back and left arm, that he underwent x-rays at Syosset Hospital and that he was released with prescription medication and a neck brace, which he wore for three days. A few days thereafter he saw his treating orthopedic surgeon Dr. Schwartz who had treated him for a prior knee injury, and that he saw Dr. Schwartz once or twice with complaints of pain in his neck, back and left arm and numbness in his left hand. Plaintiff underwent an MRI of his neck and then began receiving physical therapy for his neck, back and left arm twice a week for approximately one month and then he stopped going for treatment and instead continued the exercises at home. One week after undergoing the MRI, plaintiff returned to Dr. Schwartz who referred him to a pain management specialist whom he saw solely for consultation and who recommended injections to his neck. Plaintiff stated that his last medical treatment for conditions related to the subject accident was in the spring or summer of 2008. He explained that at the time of the accident he was sales manager for Automatic Data Processing, that his

duties involved selling health insurance, that he did not lose any time from work and was not confined to bed or home but that as a result of this accident he lost a prospective client and a commission of between \$10,000 and \$15,000. Plaintiff further testified that he has continuous neck pain and numbness in his left hand, that he has difficulty looking over his shoulder while driving and has had to hire landscapers to mow his lawn, but that there is no activity that is impossible for him to do.

Here, defendant met her prima facie burden of showing that plaintiff did not sustain a “serious injury” within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (*see Kabir v Vanderhost*, 105 AD3d 811, 962 NYS2d 703 [2d Dept 2013]; *Caputo v Gutman*, 103 AD3d 606, 959 NYS2d 268 [2d Dept 2013]). Plaintiff’s Syosset Hospital records include the x-ray report of his cervical spine indicating degenerative changes of the mid to lower cervical spine and straightening of the cervical spine and a report diagnosing cervical sprain/spasm. The report of plaintiff’s treating orthopedic surgeon Dr. Michael C. Schwartz, M.D., based on his examination of plaintiff’s cervical spine 12 days after the accident on May 12, 2008, indicates the following:

On examination of the cervical spine, the skin is intact. No erythema is seen. There is no palpable spasm within the paraspinal musculature. The patient exhibits full forward flexion as well as extension of the neck. He has posterior pain with left sidebending. The patient exhibits 5/5 motor strength throughout the bilateral upper extremities including deltoids, biceps, triceps, wrist flexion and extension and finger abduction and adduction strength testing. Sensation is grossly intact throughout the bilateral upper extremities. Deep tendon reflexes are 2/2 bilateral biceps, triceps and brachial radialis. There is no clonus present. Negative Hoffman sign. Negative Lhermitte sign.

Dr. Schwartz noted that plaintiff’s cervical spine x-rays showed an anterior osteophyte at C5-C6 and mild degenerative disc disease at C5-C6. He diagnosed cervical spine strain status post motor vehicle accident with mild degenerative disc disease.

Dr. Kupersmith indicated in his report that he examined plaintiff on October 22, 2013 and that plaintiff complained of continuous pain in his neck and numbness and tingling down his left arm to his ring and small fingers as well as pain with range of motion. He provided the results of range of motion testing of plaintiff’s cervical spine that he performed visually and with the use of a hand-held goniometer, noting that plaintiff had minimal tenderness to palpation in the right paraspinal region without any evidence of spasm. Dr. Kupersmith reported forward flexion to 50 degrees (normal 50 degrees), extension to 60 degrees (normal 60 degrees), left and right lateral rotation 70 degrees (normal 80 degrees), and right and left lateral flexion to 35 degrees (normal 45 degrees). In addition, he found that plaintiff had 5/5 strength in the bilateral upper extremities with 2+ knee reflexes throughout, grossly intact sensation, and no sensory deficits in plaintiff’s upper extremities. Dr. Kupersmith diagnosed cervical sprain/strain, resolved, superimposed upon a preexisting history of cervical degenerative disc disease. He opined that plaintiff exhibited no orthopedic disability, prognosis was good, and that plaintiff’s slight cervical spine range of motion restriction was subjective and consistent with his degenerative disc disease, which was preexisting.

Here, defendant met her prima facie burden of showing that plaintiff did not sustain a “serious injury” within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (*see Keith v Duval*, 71 AD3d 1093, 898 NYS2d 184 [2d Dept 2010]). The Court initially notes that sprains and strains are not serious injuries within the meaning of Insurance Law § 5102 (d) (*see Rabolt v Park*, 50 AD3d 995, 858 NYS2d 197 [2d Dept 2008]; *Washington v Cross*, 48 AD3d 457, 849 NYS2d 784 [2d Dept 2008]; *Maenza v Letkajornsook*, 172 AD2d 500, 567 NYS2d 850 [2d Dept 1991]). Thus, plaintiff’s cervical spine strain and sprain injuries do not constitute serious injuries for which plaintiff can recover under the No Fault Law. In addition, the approximate 12 percent limitation in cervical left and right lateral rotation range of motion reported by Dr. Kupersmith was insignificant within the meaning of the no-fault statute (*see McLoud v Reyes*, 82 AD3d 848, 919 NYS2d 32 [2d Dept 2011]; *Waldman v Dong Kook Chang*, 175 AD2d 204, 572 NYS2d 79 [2d Dept 1991]). Although Dr. Kupersmith found a 22 percent decrease in right and left lateral flexion of the cervical spine, he concluded that this symptom was the result of preexisting degenerative disc disease and was not causally related to the subject accident (*see Kabir v Vanderhost*, *supra*; *Park v Shaikh*, 82 AD3d 1066, 918 NYS2d 887 [2d Dept 2011]). Defendant further established that plaintiff missed no time from work following the accident and, therefore, plaintiff did not sustain a serious injury under the 90/180-day category of Insurance Law § 5102 (d) (*see Jean v Labin-Natochenny*, 77 AD3d 623, 909 NYS2d 103 [2d Dept 2010]). Moreover, there is no evidence that plaintiff incurred economic loss in excess of basic economic loss as defined in Insurance Law § 5102 (a) (*see Moran v Palmer*, 234 AD2d 526, 651 NYS2d 195 [2d Dept 1996]).

In opposition to the motion for summary judgment, plaintiff contends that he did sustain a “serious injury” as defined in Insurance Law § 5102 (d) as a result of the subject accident. He submits the affirmed report of his examining chiropractor, Dr. Neil Levin, DC and the affirmed report of his examining neurologist Ahmed Elfiky, M.D. with attached test results.

In opposition, plaintiff did not raise a triable issue of fact (*see Nieves v Michael*, 73 AD3d 716, 901 NYS2d 100 [2d Dept 2010]; *compare Park v Shaikh*, *supra*). The mere existence of a herniated disc, a bulging disc, or radiculopathy is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the injury and its duration (*see Keith v Duval*, 71 AD3d 1093, 898 NYS2d 184 [2d Dept 2010]; *Casimir v Bailey*, 70 AD3d 994, 896 NYS2d 122 [2d Dept 2010]). The affirmed report of Dr. Levin, a chiropractor, is not in admissible form and cannot be considered by this Court (*see CPLR 2106*; *Vejselovski v McErlean*, 87 AD3d 1062, 929 NYS2d 760 [2d Dept 2011]; *Casas v Montero*, 48 AD3d 728, 853 NYS2d 358 [2d Dept 2008]; *see also Austin v McPherson*, 111 AD3d 610, 974 NYS2d 281 [2d Dept 2013]; *Paul-Austin v McPherson*, 91 AD3d 924, 937 NYS2d 627 [2d Dept 2012]). In any event, although Dr. Levin and Dr. Elfiky reported significant limitations of motion in the cervical region of plaintiff’s spine, based on their recent examinations of June 26, 2014 and July 31, 2014 respectively, neither they nor plaintiff proffered any objective medical evidence that revealed the existence of a significant limitation of motion in the cervical region of plaintiff’s spine contemporaneous with the subject accident (*see Kreimerman v Stunis*, 74 AD3d 753, 902 NYS2d 180 [2d Dept 2010]). Also, Dr. Elfiky diagnosed “C3-C4 left sided disc osteophyte resulting in encroachment of the canal, C4-C5 diffuse disc bulge associated with disc herniation resulting in mild encroachment of the canal, left sided foraminal narrowing, C5-C6 diffuse disc bulge associated with degenerative disc disease and edematous changes of the endplate creating

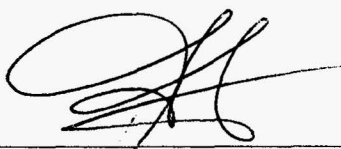
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mild encroachment of the canal and bilateral foraminal narrowing with radiculitis, r/o nerve root injury/s, radiculopathy versus peripheral nerve entrapment” but did not address whether said injuries were caused by the subject accident (see *Henry v Hartley*, 119 AD3d 528, 989 NYS2d 94 [2d Dept 2014]).

Moreover, plaintiff failed to submit competent medical evidence that the injuries he allegedly sustained as a result of the subject accident rendered him unable to perform substantially all of his daily activities for not less than 90 days of the first 180 days thereafter (see *Catalano v Kopmann*, 73 AD3d 963, 900 NYS2d 759 [2d Dept 2010]). Furthermore, plaintiff failed to establish economic loss in excess of basic economic loss (see *Diaz v Lopresti*, 57 AD3d 832, 870 NYS2d 408 [2d Dept 2008]).

Accordingly, the instant motion is granted and the complaint is dismissed in its entirety.

Dated: DEC 10 2014



HON. JOSEPH A. SANTORELLI
J.S.C.

X FINAL DISPOSITION _____ NON-FINAL DISPOSITION