Robinson v Buffolino
2014 NY Slip Op 33253(U)
December 11, 2014
Supreme Court, Suffolk County
Docket Number: 37452/12
Judge: Paul J. Baisley

Short Form Order

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

COPY

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

INDEX NO.: 37452/12
CALENDAR NO.: 201301863MV
MOTION DATE: 8/14/14
MOTION SEQ. NO.: 001 CASEDISP

FELTON ROBINSON,

Plaintiff,

-against-

ANTHONY BUFFOLINO,

Defendant.

ATTORNEY FOR PLAINTIFF:
SHULMAN KESSLER, LLP
510 Broad Hollow Road, Suite 110
Melville, New York 11747

ATTORNEY FOR DEFENDANT:
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Upon the following papers numbered 1 to 32 read on this motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1-18 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 19-30 ; ~~Replying Affidavits and supporting papers~~ 31-32 ; ~~Other~~ ___ ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (motion sequence no. 001) of defendant for an order pursuant to CPLR R. 3212 granting summary judgment in his 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 November 20, 2011 when his vehicle was rear-ended by defendant's vehicle on the eastbound Southern State Parkway at or near the ramp of Exit 42 South in Islip, New York. By his verified bill of particulars, plaintiff alleges that as a result of the subject accident he sustained serious injuries including disc herniation at C3/4 and C4/5 effacing the left lateral recesses with right and left foraminal narrowing, requiring multiple trigger point injections; disc herniation at L4/5 narrowing the spinal canal and foramen bilaterally with impingement on the L4 nerve root; disc bulge at L3/4 with bilateral foraminal narrowing; and pain, numbness and tingling in the upper and lower extremities. Plaintiff claims that following the accident he was confined to Southside Hospital for half a day, and to his bed for four days. He also alleges that he sustained economic loss in excess of basic economic loss 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. His submissions in support of the motion include the pleadings, plaintiff's verified bill of particulars, the affirmed reports of his examining neurologist Mark J. Zuckerman, M.D. and his examining orthopedic surgeon Craig B. Ordway, M.D., and plaintiff's deposition transcript.

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 Eyler*, 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]).

In his affirmed report, Dr. Zuckerman noted plaintiff's history of a prior motor vehicle accident in 2006 in which plaintiff injured his lower back and received epidural injections, right carpal tunnel release in 2007, and right shoulder and left foot surgery. He provided the results of his neurological examination indicating, among other things, that there was no focal weakness during motor examination of upper extremity strength, that lower extremity strength was intact, that plaintiff was able to toe walk but that heel walk was diminished due to complaints of plantar fasciitis. In addition, Dr. Zuckerman found decreased pinprick response in plaintiff's right first, second and third fingers but normal sensation in his left fingers, palms, forearms, arms, feet and legs without dermatomal loss. Dr. Zuckerman also provided cervical and lumbar spinal range of motion testing results using a goniometer and observation which reflected a 22% decrease in right lateral flexion of the cervical spine with no cervical, suboccipital or paraspinal tenderness or spasm but with mild bilateral trapezius tenderness without spasm and Tinel's sign at the right wrist. Dr. Zuckerman concluded the following: right median neuropathy at the wrist or carpal tunnel, status post history of right carpal tunnel release; no evidence of cervical or lumbosacral radiculopathy or central nervous system dysfunction; lumbar sprain appeared clinically resolved; cervical sprain, clinically resolved but with subjective residual symptoms; degenerative disc

disease of the cervical and lumbar spine, as evidenced by imaging; and complaints of plantar fasciitis. He opined that there was no neurologic disability or impairment and noted that plaintiff had returned to his work activities.

Dr. Ordway provided the results of his orthopedic examination in his affirmed report which included the results of range of motion testing of plaintiff's cervical and lumbar spine by visual observation as confirmed by goniometer. He reported the measured values and compared them to normal values in accordance with the *AMA Guides to Evaluation of Permanent Impairment*, 5th edition and found them all to be within normal limits. Among Dr. Ordway's other findings were no weakness or atrophy of any flexor or extensor muscle group in plaintiff's upper extremities; reflexes of the biceps, triceps and brachioradialis measured 2+ and were brisk, equal and bilaterally active; no spasm in the paravertebral musculature, trapezii or anterior strap muscles; no weakness or atrophy of any flexor or extensor muscle group in the lower extremities; and deep tendon reflexes brisk and equal and measuring +2 at the knees and ankles. Dr. Ordway concluded that plaintiff had subjective complaints of pain in his neck, upper back and lower lumbar area secondary to the subject accident but that the examination of the affected areas was completely within normal limits. He opined that there was no evidence of any post-traumatic neurologic/orthopedic impairment nor evidence of any impairment that existed for an extended period of time in the past.

Plaintiff testified at his deposition that he injured his neck, lower back and right hand in the subject accident; that he had injured his lower back in 2006 in a prior motor vehicle accident, and his right hand, a fracture of the tip of the ring finger, while in the military between 1989 and 1991; that he had surgery on his right hand in 2007 for carpal tunnel; that he received nerve root block injections to his lower back which made his lower back feel as it did prior to the 2006 accident; and that within a year prior to the subject accident he was not feeling any pain in the fingers of his right hand and his lower back felt good. In addition, he testified that following the accident he went to Southside Hospital complaining of lower back pain, and that he underwent x-rays and was given medication and was released on the same day. Plaintiff also testified that one week after his discharge from the hospital he went to Island Physical Therapy in Brentwood with complaints regarding his neck, hand and mid and lower back, and that he began receiving physical therapy five times a week and that he continues to receive physical therapy once a month. He also received acupuncture treatment. Plaintiff explained that he has not gotten better as a result of said treatment and that he still has a great deal of pain. He further testified that at the time of the accident he was a shift manager at a shelter run by the V.A. Hospital and that his duties included performing intakes and discharges, bed checks, giving out medications to residents, and preparing and stocking the pantry; that as a result of the accident he missed four days of work; and that upon returning to work he resumed working 40 hours a week. Plaintiff stated that since the subject accident he can no longer pick up pantry bags or milk crates to be put out for dinner, which he did daily, or laundry barrels which weigh over 50 pounds, which he used to carry every two weeks. He added that he can no longer coach basketball or bowl and has difficulty performing house cleaning chores.

Here, defendant met his *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 Kreimerman v Stunis*, 74 AD3d 753, 902 NYS2d 180 [2d Dept 2010]). Although defendant's

examining neurologist found a 22% decrease in right 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*, 105 AD3d 811, 962 NYS2d 703 [2d Dept 2013]; *Park v Shaikh*, 82 AD3d 1066, 918 NYS2d 887 [2d Dept 2011]). 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]). Defendant further established, *inter alia*, that plaintiff missed only four days of 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 Kabir v Vanderhost*, 105 AD3d 811, 962 NYS2d 703).

The burden then shifted to plaintiff to show, by admissible evidentiary proof, the existence of a triable issue of fact (*see Marietta v Scelzo*, 29 AD3d 539, 815 NYS2d 137 [2d Dept 2006]).

In opposition to the motion, plaintiff contends that he did sustain a "serious injury" as defined in Insurance Law §5102(d) as a result of the subject accident. In support of his opposition, plaintiff submits his affidavit, the affirmation of Paul Bonheim, M.D., his deposition transcript, his bill of particulars, his Southside Hospital records, and the unaffirmed report dated March 30, 2012 and the affirmed report dated January 20, 2014 of Scott Roteman, M.D., Medical Director of Eastern Island Medical Care, P.C.

In reply, defendant argues that plaintiff's opposition fails to raise triable issues of fact inasmuch as the uncertified emergency room records of Southside Hospital, the unaffirmed MRI reports of Dr. Velayudhan, and the unaffirmed report of Dr. Roteman are not in admissible form, and the examination of Dr. Roteman on January 20, 2014 revealed only minor range of motion limitations and he inappropriately relied on the unaffirmed MRI reports of Dr. Velayudhan in reaching his conclusions.

Plaintiff's hospital records are uncertified and thus fail to raise a triable issue of fact (*see D'Orsa v Bryan*, 83 AD3d 646, 919 NYS2d 881 [2d Dept 2011]). In addition, Dr. Bonheim states in his affirmation that copies of plaintiff's CT scan reports of his cervical and lumbar spine are attached thereto and incorporated by reference. However, copies of said reports were not provided to the Court. In any event, Dr. Bonheim states that the CT films were read by a radiologist no longer employed by BAB Radiology, Dr. Velayudhan, and that his impressions are contained in the reports. Therefore, Dr. Bonheim's affirmation is without probative value as would be the inadmissible unsworn MRI reports authored by Dr. Velayudhan (*see Vasquez v Doe 1*, 73 AD3d 1033, 905 NYS2d 188 [2d Dept 2010]; *Vickers v Francis*, 63 AD3d 1150, 883 NYS2d 77 [2d Dept 2009]). The mere existence of bulging or herniated discs, in the absence of objective evidence as to the extent of the alleged physical limitations resulting from the injuries and their duration, is not evidence of serious injury (*see Scheker v Brown*, 91 AD3d 751, 936 NYS2d 283 [2d Dept 2012]; *Pierson v Edwards*, 77 AD3d 642, 909 NYS2d 726 [2d Dept 2010]). The report dated March 30, 2012 of plaintiff's treating physician, Dr. Roteman, failed to raise a triable issue of fact because it was unaffirmed and his report dated January 20, 2014 also failed to raise a triable issue of fact as it did not contain any medical findings contemporaneous with the subject accident (*see D'Orsa v Bryan*, 83 AD3d 646, 919 NYS2d 881 [2d Dept 2011]; *Nieves v Michael*, 73 AD3d 716, 901 NYS2d 100 [2d Dept 2010]). Moreover, that portion of Dr.

Roteman's January 20, 2014 report that relied on the MRI findings of Dr. Velayudhan must be disregarded (*see Austin v Dominguez*, 79 AD3d 952, 913 NYS2d 757 [2d Dept 2010]). Also, plaintiff's affidavit is insufficient to raise a triable issue of fact as to whether he sustained a serious injury under the no-fault statute (*see Strenk v Rodas*, 111 AD3d 920, 976 NYS2d 151 [2d Dept 2013]; *Leeber v Ward*, 55 AD3d 563, 865 NYS2d 614 [2d Dept 2008]). 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]). Finally, plaintiff failed to raise a triable issue of fact as to whether he sustained a serious injury under the 90/180-day category of Insurance Law §5102(d) (*see Siew Hwee Lim v Dan Dan Tr., Inc.*, 84 AD3d 1213, 923 NYS2d 677 [2d Dept 2011]).

Accordingly, the instant motion is granted.

Dated: December 11, 2014

HON. PAUL J. BAISLEY, JR.

J.S.C.