Colon v Lopez
2014 NY Slip Op 33558(U)
October 28, 2014
Supreme Court, Queens County
Docket Number: 703056/2012
Judge: Rudolph E. Greco
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Hon. Rudolph E. Greco, Jr.
Justice

IAS PART 32

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CHRISTIAN COLON,

Plaintiff,

-against-

JUAN LOPEZ and PEDRO E. LOOR,

Defendants.

---X

Index. No.: 703056/2012

Motion Dated: September 5, 2014
Seq. No. 2
Cal. No. 16

FILED
NOV - 9 2014
COUNTY CLERK
QUEENS COUNTY

The following papers numbered 1 to 10 read on defendants' motion pursuant to CPLR §3212 for summary judgment and dismissing plaintiff's complaint on the ground that plaintiff's alleged injuries fail to meet the serious injury threshold requirement of Insurance Law §5102(d).

	Papers Numbered
Notice of Motion, Affirmation, Memorandum, Exhibits	1-4
Opposition, Exhibits	5-7
Reply	8-10[1]

Upon the foregoing papers, it is ordered that this motion is determined as follows:

FACTUAL BACKGROUND

This is an action to recover for personal injuries allegedly sustained by plaintiff in a motor vehicle accident that occurred on March 10, 2012 at approximately 5:25 a.m. at West 42nd Street and Vanderbilt Avenue when plaintiff was a passenger in a vehicle that was struck by defendants' vehicle. In his verified bill of particulars plaintiff alleges thoracic disc herniations, lumbar disc bulges, displacement and stenosis, cervical disc bulges and displacement, spinal radiculopathy and subluxation, nerve entrapment at the right wrist, occipital neuritis, and spasm, pain and restricted motion. Further, that he was confined to bed and home for a period of time following the accident without offered the exact period. At a deposition on November 19, 2013 plaintiff testified as follows: that at the time of the accident he was a file clerk at a law firm but left this position in June 2012 because it required heavy lifting which, he could not perform and he has not been employed since; that he was taken from the scene of the accident by ambulance and brought to Bellevue Hospital emergency room where x-rays of his neck and back and a CAT

[1]The Court notes the reply affirmation was submitted in an incomplete fashion.

scan of his head were preformed, and he was giving pain medication and released; that on the Monday following the accident he visited a chiropractor who he began treating with until September 2012; that he underwent a neurological consult on one occasion when MRIs were performed; that he also engaged in physical therapy and acupuncture treatments; and finally, that he has trouble walking long distances, tying his shoes, and lifting heavy objects.

Defendant argues that the alleged injuries do not meet the threshold requirement of Insurance Law §5102(d) and therefore, summary judgment dismissing his complaint is warranted.

APPLICABLE LAW

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact, (*see* CPLR §3212[b]; Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986], Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 852 [1985], Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). The question of whether plaintiff sustained a "serious injury" as defined by Insurance Law §5102(d) is one of law that can be disposed of by summary judgment, (*see* Licari v Elliot, 57 NY2d 230, 237-38 [1982]), and defendant in seeking same has the burden to show that plaintiff's injuries do not rise to the level of those enumerated in such statute, (*see* Gaddy v Eyler, 79 NY2d 955, 956-57 [1992]). This may be accomplished through submission of plaintiff's deposition testimony and/or affidavits, affirmations or sworn reports of medical experts who examine the plaintiff and conclude that no objective medical findings support the plaintiff's claim, (*see* Grossman v Wright, 268 AD2d 79, 84 [2nd Dept. 2000]; *see also* Toure v Avis Rent A Car Sys., 98 NY2d 345, 352 [2002], Gaddy at 956, Batista v Olivia, 17 AD3d 494 [2nd Dept. 2005]).

With this established, the burden shifts to the plaintiff to come forward with evidence demonstrating a material issue of fact with respect to their injuries being serious within the meaning of section 5102(d), (*see* Gaddy at 957). What is required of plaintiff in this endeavor is evidence of the injury by quantitative objective findings (*see* Toure at 350, Grossman at 84), free of mere conclusory assertions tailored to meet the statutory requirements, (*see* Lopez v Senatore, 65 NY2d 1017, 1020-21 [1985]; *see also* Powell v Hurdle, 214 AD2d 720 [2nd Dept. 1995]), and based on a recent examination, (*see* Murray v Hartford, 23 AD3d 629 [2nd Dept. 2005], Mohamed v Dhanasar, 273 AD2d 451 [2nd Dept. 2000], Kauderer v Penta, 261 AD2d 365 [2nd Dept. 1999]). Subjective complaints of pain and limitation are insufficient (*see* Gaddy at 957-58, Scheer v Koubek, 70 NY2d 678, 679 [1987], Licari at 239).

As to the categories of injuries, there are nine in total, generally those in dispute are subsections six through nine; more specifically, "6) permanent loss of use of a body organ, member, function or system; 7) permanent consequential limitation of use of a body organ or member; 8) significant limitation of use of a body function or system; and 9) 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 90 days during the 180 days immediately following

the occurrence of the injury or impairment", (Insurance Law §5102[d]). As to subsection six, the injury must be a total loss (*see* Oberly v Bangs Ambulance, Inc., 96 NY2d 295, 299 [2001]), and continue for the duration of the injured person's life. As to subsections seven and eight, there is much overlap in that the words consequential and significant have been held to mean something more than minor, mild or slight (*see* Gaddy at 957, Scheer at 679, Licari at 236). As opposed to a loss, these sections deal with a limitation, the extent and degree of which must be quantified by objective testing (*see* Barrett v Howland, 202 AD2d 383 [2nd Dept. 1994]; *see also* Micelson v Padang, 237 AD2d 495, 496 [2nd Dept. 1997]), that must be noted within the report, (*see* Mobley v Riportella, 241 AD2d 443, 444 [2nd Dept. 1997], Lincoln v Johnson, 225 AD2d 593, 593-94 [2nd Dept. 1996]). In the latter there is an element of duration (*see* Partlow v Meehan, 155 AD2d 647, 648 [2nd Dept. 1997]), while the former requires permanency. Mere repetition of the word "permanent" in a report is insufficient to meet this requirement, (*see* Lopez at 1019). Finally, with respect to these two subsections the objective findings must be the result of a recent examination and any lapse in time between the cessation of medical treatment after the accident and the physical examination conducted by plaintiff's expert must be adequately explained, (*see* Grossman at 84; *see also* Smith v Askew, 264 AD2d 834 [2nd Dept. 1999]). With respect to the final category commonly referred to as 90/180, it must be shown by more than self-serving testimony, (*see* Phillips v Costa, 160 AD2d 855, 856 [2nd Dept. 1990]), that substantially all of the plaintiff's activities were curtailed to a great extent rather than slightly, (*see* Licari at 236) by a medically determined injury or impairment of a non-permanent nature, (*see* Toure at 357).

ANALYSIS

Here, defendant presents admissible proof by way of the affirmed medical evaluation of Edward A. Toriello, M.D. an orthopedic surgeon who examined plaintiff on March 4, 2014 as well as plaintiff's own testimony. Dr. Toriello indicates the medical records he reviewed as well as the tests and the means by which they were performed. The results of such testing as compared to normal are documented and demonstrate all normal ranges of motion. His assessment is that all injuries or complaints asserted had been resolved, and that plaintiff could return to work and activities of daily living without restriction.

As to the 90/180 category, plaintiff's bill of particulars is silent as to the activities of daily living that he was prevented from performing save alleging that he was confined to bed and home for a period of time following the accident. However, he indicates that he returned to work the Tuesday following the Saturday when the accident occurred. His testimony is likewise silent as to the activities affected save missing days from work for various visits to the doctor, as well as a difficulty walking long distances, tying his shoes and heavy lifting. Plaintiff further claims that he left his employment in June, more than three months after the accident as he was not able to perform the tasks assigned to him on account of the accident.

This is sufficient to meet defendant's *prima facie* burden. The Court declines to engage in the picayune arguments of both attorneys regarding the reports and evidence submitted unless such evidence is glaringly inadmissable which, is not the situation here. The Court would prefer to look to the merits and substance of each parties contention.

[* 4]

In light of the above, plaintiff must come forward to show that his injuries are serious under the law or, that there is, at least a material issue of fact with respect thereto, (*see* Grossman at 84; *see also* Toure at 352, Gaddy at 956). Submitted in the pursuit of this endeavor are the following: the report of Tara J. Kellogg, M.D., plaintiff's treating chiropractor who most recently examined him on May 23, 2014 as well as her treatment notes from March 2012 through September 2012; the chart review from Bellevue Hospital Center including records from the radiology department; correspondence from Lenox Hill Radiology & Medical Imaging Associates, P.C. regarding plaintiff's Lumbar MRI ; the report of Dominique Cozien, M.D. a neurologist who examined plaintiff on April 17, 2012; the physical therapy and acupuncture evaluation and treatment notes; and lastly plaintiff's affidavit and testimony.

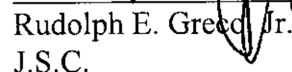
Most telling of the aforementioned are Dr. Kellogg's most recent evaluation notes and the results of plaintiff's MRI. The latter indicating that in April 2012 a "minimal bulging of the C5-C6 disc" and "small central T2-T3 herniation" were found, and the former despite finding decreased ranges of motion, only diagnosed plaintiff with cervical and lumbar pain and myalgia. Moreover, in May 2012 Dr. Cozien's impression was "mild right lumbosacral radiculopathy probably at the L4."

While generally the presentation of different findings as to plaintiff's ranges of motion and the usage of different norms presents a issue of fact (*see generally* Toure *supra*; *see also* Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395 [1957]), such findings should lead to a congruent diagnosis. In this instance, Dr. Kellogg's findings of decreased range of motion only lead her to find pain and myalgia. Additionally, categorization of plaintiff's alleged injuries throughout the records provided are only mild, minimal, small and probable. The lack of evidence supporting plaintiff's complaints of pain, his own failure to sufficiently detail those activities he could not perform within the first 90 of the 180 days following the accident by anything more than an insufficient self-serving affidavit, as well as findings of only mild, minimal or small injuries are fatal to his opposition, (*see* Gaddy at 957, Scheer at 679, Licari at 236).

CONCLUSION

Defendants' motion is granted.

Dated: October 28, 2014



Rudolph E. Greco Jr.
J.S.C.