

Samuel v Shmael Cab Corp.

2014 NY Slip Op 33567(U)

October 1, 2014

Supreme Court, Bronx County

Docket Number: 304751/10

Judge: Howard H. Sherman

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NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 4

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Olusegun V. Samuel ,

Plaintiff,

-against-

Shmael Cab Corp., and Lal Chand

Defendants

Index No. 304751/10

DECISION/ORDER

Howard H. Sherman
J.S.C.

-----x
The following papers numbered 1-3 read on this motion noticed on and duly submitted on the Motion Calendar of December 3, 2013

	<u>PAPERS NUMBERED</u>	
Notice of Motion - Exhibits A-H and Affidavits Annexed	1	
Affirmation in Opposition - Exhibits A-M	2	
Replying Affirmation	3	

Upon the foregoing papers defendants' motion for an order awarding summary judgment dismissing the complaint on the grounds of lack of a serious injury as defined by Insurance Law §§ 5102 and 5104(d) is granted to the extent and for the reasons set forth below.

Facts and Procedural Background

Plaintiff seeks damages for injuries allegedly sustained on January 14, 2009 in a motor vehicle collision that occurred on Broadway between West 76th and 77th Streets in New York County, New York .

This action was commenced in May 2010, and issue was joined with the service of defendants' answer in the following month. As pertinent here, the answer interposed an affirmative defense alleging that this action is precluded by virtue of Article 51, Sections 5101-5104 of the Insurance Law .

Verified Bill of Particulars

It is alleged that plaintiff sustained and/or aggravated, *inter alia*, the following permanent injuries as a result of the motor vehicle accident: **cervical spine** - limited range of motion; **lumbar spine** - decreased range of motion; **thoracic spine** - tenderness and discopathy; sprain//strain [¶ 5].

In addition, it is alleged that as a result of the injuries and their sequelae, plaintiff was confined to bed and home from 10/31/09 through 11/01/09. No claim for last wages is interposed [Id. ¶¶ 7-8].

It is alleged that these injuries are "serious" within the following three statutory categories; a significant limitation of use of a body function or system; a permanent consequential limitation of a use of a body organ and member, and a medically determined injury or impairment which prevented plaintiff from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence.

Motion

In support of the motion defendants submit the affirmed reports of the independent medical evaluations [Exhibits E, F], as well as copies of reports of

contemporaneous studies [Exhibit G, H], as well as a copy of plaintiff's April 26, 2012 deposition testimony [Exhibit D].

Independent Medical Evaluations

1) On June 11, 2012, plaintiff presented for an independent **orthopedic** evaluation by Julio V. Westerband, M.D. with complaints of pain in his neck, mid and lower back.

For purposes of his evaluation Dr. Westerband reviewed the reports of contemporaneous MRI and EMG studies as well as emergency treatment hospital records and treatment records for the period 1/23/09 through 1/27/10, and rehabilitation notes dated 1/28/11; 6/10/11 and 1/27/12.

On examination, Dr. Westerband found no evidence of spasm on palpation of the cervical spine as well as full range of motion as quantified and compared to normal readings.¹ Soto-Hall testing was negative. The thoracic spine exhibited no spasm or tenderness upon palpation.

The lumbar spine was found to reveal no spasm on palpation with a complaint of mild tenderness over the L1 and L5 midline, and S1 joint space levels, bilaterally. Range of motion was full in every plane as quantified and compared to normal readings. Straight leg raising was negative at a normal 80 degrees, bilaterally.

Upon these findings, Dr. Westerband concluded that plaintiff exhibit no evidence of a permanent disability and was capable of performing his activities of daily living

¹ The A.D.M. testing was conducted with the use of goniometer with normal ranges as per A.M.A. guidelines.

without limitations.

2) Dr. Marianna Golden conducted a neurological evaluation of plaintiff on the following day.

For purposes of her evaluation she renewed the reports of the MRI studies and four reports of the treating physician for the period 11/13/09 through 3/10/10 and variously dated SOAP progress notes.

Plaintiff presented with complaints of neck and low back pain never experienced prior to the accident and he was wearing a back brace.¹

Upon examination, Dr. Golden found neither spasm nor tenderness of the cervical paraspinal musculature and full range of motion as quantified and compared to normal readings.² Cervical compression testing was negative.

The examination of the lumbar spine revealed no muscle spasm on palpation and SLR was negative as was the result of Hoover's test. Range of motion was found to be full in all planes as quantified and compared to normal readings.

Motor examination revealed 5/5 power in the upper and lower extremities and no weakness or atrophy was observed. Reflexes, sensory and cerebellar functions were all found to be normal.

Dr. Golden concluded that the examination was normal with no evidence of a

¹ The brace was removed for purposes of the lumbar spine examination.

² Measurements were made with the assistance of a goniometer with reference to A.M. A. Guides to the Evaluation of Permanent Impairment.

disability.

Contemporaneous Reports

1) Report of Suman Brahmabhatt, M.D., Board Certified Electro diagnostician, dated 7/30/09, finding upon testing, that there was no electrical evidence of cervical radiculopathy.

2) Dr. Brahmabhatt's report of a 8/20/09 electro diagnostic evaluation finding no electrical evidence of lumbosacral radiculopathy.

Deposition

As pertinent here, plaintiff testified that he did not return to work for two or three days after the accident [Id. 24].

A week later he began treating with Dr. Dassa at All Med [Id. 26 - 27], receiving thrice to twice weekly therapy at the facility for a period of six or eight months [Id. 30] or in 2011 [Id. 32]. Plaintiff testified that after an interruption in therapy for some months while out of the country, he continues to treat with Dr. Dassa [Id. 33].

Plaintiff also testified that he was involved in another motor vehicle accident with "no injuries" maybe six months before this one [Id. 35].

Discussion

It is the finding of this court that defendants have demonstrated, through probative medical evidence of negative findings upon objective testing at recent examinations as well as the negative findings for radiculopathy upon contemporaneous testing, that plaintiff did

not sustain a serious injury in the "significant limitation" and/or "permanent consequential" limitation of use categories of serious injury alleged.

With respect to the 90/180 claim asserted, plaintiff testified that he returned to work within three days of the accident and as such, defendants' initial burden is also met with respect to this category of serious injury asserted.

In light of this showing it is incumbent upon plaintiff to come forward with probative medical evidence to raise a material issue of fact that the accident related injuries he sustained are "serious."

Upon review of the affirmation of Dr. Dassa and his contemporaneous reports as well as his report of an examination conducted on August 19, 2013, it is the finding of this court that plaintiff has done so with respect to the "significant" and/or "permanent consequential" limitations of use categories asserted.

The treating physician opines within a reasonable degree of medical certainty that restrictions of range of motion of the cervical and lumbar diagnosed as quantified within ten days of the accident were causally related to it.

He further opines that quantified limitations of range of motion of the cervical and thoracolumbar spine found upon recent objective testing are permanent and accident-related.

Conflicts devolving from the medical experts' differing assessments of the existence of such limitations more than four years post-accident are issues of fact more properly

resolved by the triers of fact.

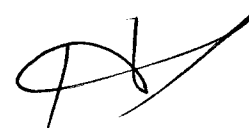
It is the further finding of this court that the admissible³ contemporaneous medical records fail to raise an issue of fact with respect to the "90/180" category of serious injury asserted.

Accordingly, it is

ORDERED that the motion be and hereby is granted to the extent of awarding partial summary judgment dismissing the 90/180 category of serious injury alleged and is otherwise, denied.

This constitutes the decision and order of this court.

Dated: October 1, 2014
Bronx, New York



Howard H. Sherman
J.S.C.

³ It is noted that to the extent those medical records submitted in opposition as "certified" contain medical opinions and diagnosis they cannot be admitted as business records (see, CPLR 4518; Komar v Showers, 227 AD 2d 155 [1st Dept. 1996]).