

Ansari v Butt

2014 NY Slip Op 33569(U)

October 27, 2014

Supreme Court, Bronx County

Docket Number: 305872/2012

Judge: Alison Y. Tuitt

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NEW YORK SUPREME COURT-----COUNTY OF BRONX

PART IA - 5

ADIL ANSARI and CINDY CRUZ,
 Plaintiff,
 -against-
 ZAFAR J. BUTT and ROGER G. HENRY,
 Defendants.

INDEX NUMBER: 305872/2012

Present:
HON. ALISON Y. TUITT
Justice

The following papers numbered 1 to 4
Read on this Defendants' Motions for Summary Judgment

On Calendar of 6/2/14

Notice of Motion-Exhibits and Affirmation	<u>1</u>
Affirmation in Opposition and Exhibits	<u>2</u>
Reply Affirmation	<u>3</u>

Upon the foregoing papers, defendants' motions for summary judgment are consolidated for purposes of this decision. For the reasons set forth herein, the motions are denied.

The within action arises from a motor vehicle accident on October 1, 2011 in which plaintiff alleges he sustained serious injuries. Defendants move for summary judgment on the grounds that plaintiff failed to prove a serious injury as required by §5102(d) of the Insurance Law.

The court's function on this motion for summary judgment is issue finding rather than issue determination. Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1978). The movant must come forward with evidentiary proof in admissible form sufficient to direct judgment in its favor as a matter of law. Zuckerman v. City of New York,

49 N.Y.2d 557, 562 (1980). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. Stone v. Goodson, 8 N.Y.2d 8, (1960); Sillman v. Twentieth Century Fox Film Corp., *supra*.

In the present action, the burden rests on defendant to establish, by the submission of evidentiary proof in admissible form, that plaintiff has not suffered a serious injury. Lowe v. Bennett, 511 N.Y.S.2d 603 (1st Dept. 1986), *aff'd*, 69 N.Y.2d 701 (1986). When a defendant's motion is sufficient to raise the issue of whether a "serious injury" has been sustained, the burden shifts and it is then incumbent upon the plaintiff to produce prima facie evidence in admissible form to support the claim of serious injury. Licari v Elliot, 57 N.Y.2d 230 (1982); Lopez v. Senatore, 65 N.Y.2d 1017 (1985). When a claim is raised under the "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 prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion is acceptable. Toure v. Avis Rent A Car Systems, Inc., 98 N.Y.2d 345 (2002). In addition, an expert's qualitative assessment of a plaintiff's condition is also probative, provided that: (1) the evaluation has an objective basis and, (2) the evaluation compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system. Toure, *supra*.¹

In the instant action, defendants move for summary judgment arguing that plaintiff has not suffered a serious injury pursuant to §5102 of the Insurance Law. In his bill of particulars, plaintiff alleges to have sustained, in relevant part, L5-S1 left paracentral disc protrusion with impingement on the left anterior aspect of the sac and left S1 nerve root; L3-L4 generalized disc bulge with impingement on the anterior aspect of the sac, reversal of the lumbar lordosis; L4-L5 central disc bulge with impingement on the ventral sac with a

¹The Toure decision appears to indicate that claims of neck or back injury resulting from bulging or herniated discs may be considered either under the category of a "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system," as well as the 90/180 day category (Toure v. Avis Rent A Car Systems, Inc., 98 N.Y.2d 345, 352, 774 N.E.2d 1197, 746 N.Y.S.2d 865 [2002].)

left lateral foraminal disc herniation encroaching into the left neural foramen as well as some right neural foraminal narrowing; C3-C4 disc bulge with some impingement on the anterior aspect of the sac; C4-C5 central disc bulge with impingement of the ventral sac; C5-C6 central disc bulge with impingement on the anterior aspect of the sac; tear of the posterior horn of the medial meniscus chondromalacia patella of the left knee, joint effusion; tear of the anterior labrum of the left shoulder and a full thickness tear of the supraspinatus tendon.

In support of their motion, defendants submit the affirmed reports of Dr. Joseph Y. Margulies and Dr. Frank D. Oliveto. Both physicians examined plaintiff and conducted range of motion testing in plaintiff's left shoulder and left knee. Dr. Oliveto provides in his affirmed report that the examination of plaintiff's left shoulder resulted in the following range of motion: abduction at 170 (he states that 170 is normal) and internal rotation at 40 (he states that 40 is normal). By comparison, Dr. Margulies states in his affirmed report that plaintiff's abduction was at 180 (he states that 180 is normal) and internal rotation was at 40 (he states that 40 is normal). The physicians also provide different "normal" range of motion for plaintiff's left knee. Dr. Oliveto states that flexion was at 145 and 145 is normal; and internal rotation was at 40 and 40 is normal. Dr. Margulies states that flexion was 125 and normal is 135; and internal rotation was at 80 and 80 is normal.

Defendants' motions must be denied as defendant failed to meet his initial burden of presenting competent evidence that plaintiff has not sustained a serious injury. Therefore, the Court need not consider the sufficiency of plaintiff opposing papers. See, Nix v. Yang Goa Xiang, 798 N.Y.S.2d 5 (1st Dept. 2005) (Defendant's motion should have been denied without even considering the sufficiency of plaintiff's opposing papers because defendant failed to meet his initial burden. See, also Rodriguez v. Goldstein, 582 N.Y.S.2d 396 (1st Dept. 1992)(Defendants failed to make a sufficient evidentiary showing to entitle them to summary judgment. The initial burden on a motion for summary judgment belongs to defendant and if defendant fails to meet that burden, the plaintiff need not come forward with admissible proof that she sustained a serious injury); Bray v. Rosas, 815 N.Y.S.2d 69 (1st Dept. 2006)(Defendants failed to make a prima facie showing that plaintiff did not sustain a serious injury where defendant's physician specified the degrees of range of motion found in plaintiff's spine but failed to compare those findings to the normal range of motion "thereby leaving the court to speculate as to the meaning of those figures." Bray, 815 N.Y.S.2d at 69 quoting Manceri v. Bowe, 798

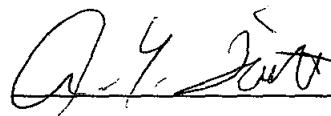
N.Y.S.2d 441 (2d Dept. 2005)); Webb v. Johnson, 786 N.Y.S.2d 22 (1st Dept. 2004)(Defendant's physician is required to specify the degree of plaintiff's range of motion and what constitutes normal range of motion).

Based on the inconsistent norms utilized in the findings of the defendants' examining physicians as to the range of motion tests for plaintiff, defendants have failed to establish prima facie entitlement to judgment as a matter of law. See, Cracchiolo v. Omerza, 928 N.Y.S.2d 644 (2d Dept. 2011). Where defendants' own experts cannot agree on what constitutes a normal range of motion, defendants have not met their prima facie burden to show that plaintiff has not sustained a serious injury. See, Martinez v. Pioneer Transportation Corp., 851 N.Y.S.2d 194 (1st Dept. 2008). The physicians' reported differences in the baseline, absent explanation, which has not been made here, erodes the reliability of the physicians' assessments, leaving the Court to speculate as to their ultimate meaning. At a minimum, they permit varying inferences as to whether there are significant restrictions on plaintiff's functioning. Id. Under these circumstances, where defendants' experts have provided conflicting ranges for what is deemed normal, other Courts have held that defendants have not met their burden and have denied the motions for summary judgment. In Joseph v. Hummel, 21 Misc.3d 1105(A)(Sup. Ct. Queens County 2008), the defendants' two medical experts stated different normal range of motion for the cervical spine and the lumbar spine. The Court held that the "disparate opinions offered by the defendants' physicians as to what constitutes normal range of motion is fatal to the defendants' attempt to establish, *prima facie*, that the plaintiff's injuries were not 'serious' within the meaning of the Insurance Law. See also, Knokhinov v. Murray, 27 Misc.3d 1211(A) (Sup. Ct. Kings County, 2010)(Denying defendant's motion, the Court noted that "[w]hen a defendant is seeking dismissal of an action on motion without a trial, it does not seem too burdensome that the defendant show agreement of its experts that the plaintiff's condition is 'normal.'"); Warren v. Byun, 889 N.Y.S.2d 410 (Sup. Ct. Queens County, 2009)(Defendants' doctors' opinions conflicted significantly concerning what the "normal" anatomical range of motion was for flexion and extension in the cervical spine was fatal to defendants' motion for summary judgment on threshold.)

Thus, defendants' motions for summary judgment on the serious injury must be denied as defendants failed to meet their prima facie burden. In any event, plaintiff's submissions raise issues of fact as to whether plaintiff sustained a serious injury.

This constitutes the decision and order of this Court.

Dated: 10/27/14



Hon. Alison Y. Tuitt