

Franklin v Gareyua

2014 NY Slip Op 33837(U)

May 13, 2014

Supreme Court, Bronx County

Docket Number: 20308/2012

Judge: Fernando Tapia

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: Part 13**

KYRESSE L. FRANKLIN,

Plaintiff,

v.

Index No. 20308/2012

**CARMEN ROSA GAREYUA and MENSCH
MANAGEMENT INC.,**

Hon. Fernando Tapia

Defendants.

DECISION

This is a negligence action arising from a motor vehicle accident on or about November 3, 2011, in which plaintiff suffered injury to his cervical and lumbar spine, and left shoulder. Defendants now seek summary judgment pursuant to CPLR 3212, dismissing the Complaint based on plaintiff's failure to meet the "serious injury" threshold requirement under NY Insurance Law § 5102(d). Plaintiff opposes. After a review of the motion papers, defendants' motion for summary judgment is **GRANTED** only as to plaintiff's left shoulder.

Discussion

A motion for summary judgment is a drastic remedy for any movant to use, and as such, has an extremely high burden to meet. (*Rotuba Extruders, Inc. v. Ceppos*, 46 NY2d 223, 231 [1978]). One of the recognized purposes of a summary judgment motion is to determine if any material facts exist. (*Wayburn v. Madison Land Ltd. Partnership*, 282 AD2d 301, 302 [1st Dept 2001]). Thus, to prevail on a motion for summary judgment, the movant 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 *Friends of Animals v. Associated Fur Mfrs.*, 46 NY2d 1065 [1979]). The movant

bears the initial burden of showing entitlement to summary judgment. (*Winegrad v. New York Univ. Med. Cen.*, 64 NY2d 851 [1985]). However, once such a showing has been made, the burden shifts to the opposing party, who must “show facts sufficient to require a trial of any issue of fact” in order to defeat the motion. (CPLR 3212(b); *Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

Where a summary judgment motion centers on whether a plaintiff has sustained a serious injury within the meaning of NY Insurance Law §5104, it is the movant’s initial burden to demonstrate that the plaintiff has not sustained such an injury. Once a movant meets this initial burden, the burden shifts to the plaintiff to submit admissible evidence rebutting the presumption that no issue of fact exists as to the threshold question. (*See Shinn v. Catanzaro*, 1 AD3d 195, 197 [1st Dept 2003]).

It is well settled that submitting a physician’s Affirmation, based on objective evidence, which indicates a lack of serious injury is sufficient to not only satisfy a defendant’s burden but also to shift the burden to the plaintiff to raise an issue of fact. (*Gaddy v. Eyler*, 79 NY2d 955, 957 [1992]). Here, defendants met their prima facie burden by submitting affirmed medical reports from radiologist, Dr. Robert Tantleff, and orthopedist, Dr. Alan M Crystal. The examinations conducted by Dr. Crystal revealed normal ranges of motion in plaintiff’s lumbar and cervical spine, and left shoulder. (*See Defs.’s Aff at Ex. D*). Dr. Crystal opined that the alleged injuries to plaintiff’s lumbar and cervical spine were resolved and that plaintiff was fully functional to perform all normal and usual activities of daily living. Dr. Crystal also noted that the operative findings from plaintiff’s surgeon was compatible with chronic impingement and not acute trauma.

Defendants also submitted an affirmation from radiologist, Dr. Robert Tantleff, who reviewed an MRI of plaintiff’s left shoulder. Dr. Tantleff found a congenital absence of the superior

anterior labrum and mild age-related osteoarthritic changes in plaintiff's left shoulder, which he deemed unrelated to the accident. (*Id.* at Ex. C).

In opposition, plaintiff failed to raise a triable issue of fact as to the injury to his left shoulder. Plaintiff submitted an affirmation from his treating physician, Dr. Louis Rose, however, Dr. Rose never addressed the defendants' prima facie showing that plaintiff's left shoulder condition was degenerative or pre-existing. (*See Kendig v. Kendig*, 981 NYS2d 411, 413 [1st Dept 2014]; *see also Rampersaud v. Eljamali*, 100 AD3d 508 [1st Dept 2012])(medical expert's report failed to raise a triable issue of fact as to causation by failing to address the degenerative conditions)). Therefore, plaintiff failed to establish a causal connection between the MRI findings and the accident. (*Reyes v. Brito*, 57 AD3d 395 [1st Dept 2008]).

Plaintiff did, however, raise a triable issue of fact with respect to the injury to his cervical and lumbar spine. In his report, Dr. Rose stated that when he examined plaintiff the day after the accident and again on November 4, 2013, he found decreased ranges of motion in the cervical and lumbar spine. Dr. Rose attributed plaintiff's injury directly to the accident and further stated that the injury was permanent and would continue to worsen with age. (PI's Aff at Ex. 3).

Thus, material issues of fact exist as to the seriousness of plaintiff's injuries to his lumbar and cervical spine under NY Insurance Law § 5102(d) as evidenced by conflicting medical reports. As such, this Court cannot resolve these material questions in the context of a summary judgment motion where "conflicting [medical] affidavits submitted to the motion court [present] a factual dispute regarding the extent of the plaintiff's injury." (*Cassagnol v. Williamsburg Plaza Taxi Inc.*, 234 AD2d 208, 210 [1st Dept 1996]).

With respect to plaintiff's 90/180 claim, defendant's evidentiary submissions are insufficient


to establish prima facie entitlement to summary judgment on this category of injury. Defendant argues that their expert opinions showed that plaintiff suffered no trauma as a result of the accident; however, no where in their opinions do defendants' physicians reference that plaintiff was not prevented from performing his usual activities during the first 90 days immediately following the accident. (*See Correa v. Saifuddin*, 95 AD3d 407 [1st Dept 2012]).

Accordingly, it is

ORDERED that defendants' motion for summary judgment is GRANTED only as to plaintiff's left shoulder.

This Constitutes the Decision and Order of the Court.

Dated: May 13 , 2014
Bronx, NY



Hon. Fernando Tapia, J.S.C.