

Lomnicki v Briere

2015 NY Slip Op 30249(U)

February 10, 2015

Supreme Court, Suffolk County

Docket Number: 37850/12

Judge: Paul J. Baisley

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

COPY

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.
-----X
ROBERT F. LOMNICKI,

INDEX NO.: 37850/12
MOTION DATE: 10/16/14
MOTION NO.: 004 MG

Plaintiff,

PLAINTIFF'S ATTORNEY:
PARKER WAICHMAN, LLP
6 Harbor Park Drive
Port Washington, New York 11050

-against-

STEPHEN R. BRIERE and TABITHA B. BRIERE,

Defendants.
-----X

DEFENDANTS' ATTORNEY:
DAVID J. SOBEL, P.C.
811 West Jericho Tpke., Suite 105W
Smithtown, New York 11787

Upon the following papers numbered 1 to 46 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-25; ~~Notice of Cross Motion and supporting papers~~ ; Answering Affidavits and supporting papers 26-33; Replying Affidavits and supporting papers 34-36; Other ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that the motion (motion sequence no. 001) of defendants Stephen R. Briere and Tabitha B. Briere for an order granting defendants summary judgment pursuant to CPLR R. 3212 dismissing the complaint of plaintiff Robert F. Lomnicki on the ground that he failed to sustain a "serious injury" as defined in the Insurance Law is granted.

The instant action arose out of a motor vehicle accident that occurred on July 26, 2010 when defendants' vehicle rear-ended the mini-school bus that plaintiff was driving. Defendants' liability for the happening of the accident was previously established pursuant to the order of this Court (BAISLEY, J.) dated May 28, 2014. Defendants now move to dismiss plaintiff's complaint on the ground that he failed to sustain a serious injury as defined in Insurance Law §5102(d).

In support of their motion defendants have submitted the affirmation of their attorney dated June 30, 2014, the pleadings, plaintiff's verified bill of particulars dated May 8, 2013, the transcript of the deposition of plaintiff taken on December 3, 2013, and the affirmation of their orthopedic expert Marc Chernoff, M.D., dated April 10, 2014.

At his deposition, plaintiff testified that as a result of the impact to the rear of the bus, his knees struck the dashboard, his head hit the steering wheel, and his hands, back and neck were impacted. He was taken by ambulance to the hospital where he was examined in the emergency room and released. He did not remember whether any tests were performed on him while he was in the hospital, or whether he was given any prescriptions for drugs when he was discharged from the hospital. He testified that he was not given any types of devices such as collars, braces, crutches, canes or slings. Plaintiff testified further that he worked a full shift driving a school bus the day after the accident, that he experienced pain in his neck, back, hands, wrists and knees, and that he never returned to work thereafter because of pain.

Plaintiff testified that following the accident he treated with a chiropractor, Dr. Sosnick, and received back adjustments, electro-stimulation, and spinal injections. He also received treatment at a physical therapy and pain management facility, and subsequently underwent surgery

for trigger finger corrections on both hands. Plaintiff testified that Dr. Sosnick and David Benatar, M.D. recommended that he undergo bilateral knee replacement surgery for the injuries claimed as a result of the accident. Plaintiff testified further that as a result of the accident, he is unable to drive a school bus, attend networking seminars, or dance; and that he is unable to walk for more than a city block and his church activities are restricted. Plaintiff testified that prior to the accident on July 26, 2010, he never had problems with either of his hands or the fingers of either hand, or problems with his neck, and never had any MRIs performed to his neck or back although he had prior MRIs of the shoulders. He testified that prior to the accident he had carpal tunnel of one hand, minor problems with his lower back, and that knee replacement surgery had been recommended to him because of degenerative arthritis and that he had prior arthroscopic surgery to his knees. Plaintiff testified that prior to the accident, he did not have problems with walking distances, getting up or sitting down, or going up and down stairs, or standing for any period of time. Plaintiff's verified bill of particulars reflects that he is making claims under the following categories of "serious injury" set forth in Insurance Law §5102(d): fracture; significant disfigurement; permanent loss 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 plaintiff from performing substantially all of the material acts which constitute plaintiff's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence.

Dr. Chernoff's affirmation reflects that he conducted an independent medical examination of the then-70-year-old plaintiff on April 10, 2014. Dr. Chernoff's report reflects that he reviewed plaintiff's verified bill of particulars, which alleges injuries including, *inter alia*, right middle finger trigger finger requiring surgical release; facet nerve blocks C5-6, L4-5, L5-S1; epidural steroid injections L3-4; marked hypertrophic changes of the acromioclavicular ("AC") joint; impingement of the subacromial structure of left shoulder; partial rotator cuff tear; biceps tenosynovitis of left shoulder; right shoulder subchondral cyst; hypertrophic changes of the AC joint; supraspinatus tendonosis; biceps tenosynovitis of right shoulder; central herniation C3-4 with hypertrophic changes C5-6, C6-7 creating central stenosis and foraminal impingement and loss of signal; loss of signal and central herniation L3-4, L4-5, L5-S1 creating stenosis; bilateral sensory motor median nerve neuropathy; C5-6 radiculopathy; L5-S1 radiculopathy; moderate to severe peripheral neuropathy; cervical thoracic lumbar myofasciitis sprain/strain; bilateral shoulder pain with impingement; bilateral knee pain; and aggravation and/or exacerbation of pre-existing conditions.

Dr. Chernoff noted that at the time of the examination plaintiff's chief complaint was of symptoms to both knees, lower back and both shoulders, for which plaintiff reported he had had treatment including physical therapy, spinal injections and chiropractic treatments. Dr. Chernoff reported that plaintiff attributed all of the foregoing conditions, together with trigger fingers and subsequent surgical releases (four on the dominant left hand and one on the right hand), to the motor vehicle accident of July 26, 2010. Plaintiff also reported a medical history of hypertension, type II diabetes, and restless leg syndrome, and a recent surgical history of removal of bladder stone and trigger finger releases. Plaintiff stated that he is disabled and had not worked since the accident.

Dr. Chernoff conducted a physical examination of plaintiff, using visual inspection and a goniometer to measure the range of motion of plaintiff's spine, knees and shoulders. Dr. Chernoff

reported a decreased range of motion in plaintiff's lumbar flexion (50°/90° normal), lumbar extension (10°/30° normal), cervical extension (10°/30° normal), and cervical lateral rotation bilaterally (60°/80° normal). Dr. Chernoff also found decreased range of motion in both of plaintiff's knees with pain on flexion at 120° (0 to 120° versus 0 to 140° normal). Dr. Chernoff noted that plaintiff had an abrasion of the left knee from a recent fall, and reported positive patellar grind with pain over the anterior aspect of the knee around the abrasion. On examination of both of plaintiff's shoulders, Dr. Chernoff reported elevation to 180° (normal 180°), abduction to 180° (normal 180°), external rotation to 45° (normal 45 to 55°), and internal rotation to T8 (normal thumb to scapular tip). Dr. Chernoff noted positive acromioclavicular joint tenderness of both the left and right shoulder. Dr. Chernoff reported benign exams of plaintiff's hands, with well healed incisional scars consistent with trigger finger release of the right long finger and several fingers of the left hand (plaintiff's dominant hand).

Dr. Chernoff's report reflected that in conjunction with his physical examination of plaintiff, he conducted a detailed review of plaintiff's extensive medical records and reports, including post-accident hospital emergency department records; chest x-ray; report of thoracolumbar x-ray; report of CT scan of the brain; fire department ambulance report; MRI reports of plaintiff's right shoulder, left shoulder, cervical spine and lumbar spine; chiropractic office notes; range of motion and impairment report; independent orthopedic evaluation report; pain management and rehab consultation reports and office notes; paravertebral nerve block reports; epidural steroid injection procedure notes; operative report for right middle trigger finger release; physical therapy notes; muscle testing report; diagnostic testing procedure reports; MRI of the brain report; report of chest x-ray; report of x-ray re right foot; fluoroscopy report; renal study report; renogram report; report of CT scan of abdomen and pelvis; and abdominal aortic ultrasound report.

Dr. Chernoff also reviewed plaintiff's pre-accident records dating from 2005 including chest x-ray report; reports of x-rays of left and right hips; reports of x-rays of left and right knees; right wrist x-ray report dated August 12, 2009; ankle x-ray report dated August 12, 2009; bone density report; report of x-rays of left and right hands dated January 23, 2009 (reflecting pre-existing right middle trigger finger); report of x-ray of left shoulder dated December 14, 2006; MRI report of lumbar spine dated July 11, 2006; orthopedic surgery consultation; MRI reports of right shoulder dated January 28, 2006; MRI of left shoulder dated January 28, 2006; radiograph of lumbar spine dated December 22, 2005; right hip x-ray report dated December 22, 2005; and orthopedic consultation notes.

Dr. Chernoff's diagnostic impression was as follows:

- 1) Cervical and lumbar sprain status post motor vehicle accident, resolved.
- 2) Preexistent triggering of right long finger, unrelated, starting after pulling a car door handle as documented by Peter Ortner in 2009.
- 3) Preexistent tricompartmental knee degenerative arthritis, bilateral knees, with prior evaluation for total knee replacements.
- 4) Chronic lower back pain with preexistent right paracentral disc herniation L5-S1 and preexistent ligamentum hypertrophy and facet arthritis L4-5, L5-S1, unrelated to MVA on July 26, 2010.
- 5) Chronic neck pain dating back to 2005 with multiple preaccident MRI's demonstrating disc osteophyte complexes and degenerative changes C5-6, C6-7.

- 6) Prior wrist pain and multiple trigger fingers with De Quervain's and preexistent arthritis."

Dr. Chernoff concluded that:

"After review of the extensive medical records as above, as well as the Bill of Particulars related to the accident of record, the right middle trigger finger was certainly preexistent and well documented and unrelated to the July 2010 accident. This claimant also had chronic neck and back pain which is also well documented and unrelated to the motor vehicle accident. He did have diabetes which certainly is related to peripheral neuropathy. Bilateral shoulder pain and prior MRI's as well as bilateral knee pain, chronic arthritis, all predating the motor vehicle accident and are well documented in the medical records. I find no permanent injury related to the July 26, 2010 accident. I believe he sustained a cervical lumbar strain from the accident which has resolved. His current complaints are related to preexistent degenerative conditions. I further do not find any exacerbation of a preexistent injury from the July 26, 2010 accident, rather a continuation of his chronic symptomatology from prior to the accident. His left shoulder pain and impingement as well as his right shoulder pain and impingement documented on preexistent MRI's and multiple notes from the [Veterans Administration] is also considered to be preexistent and unrelated to the motor vehicle accident of record."

It is well established that a defendant may establish entitlement to summary judgment using the unsworn medical reports and records prepared by the plaintiff's own physicians (*see Fragale v Geiger*, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; *Torres v Micheletti*, 208 AD2d 519, 616 NYS2d 1006 [2d Dept 1994]; *Craft v Brantuk*, 195 AD2d 438, 600 NYS2d 251 [2d Dept 1993]; *Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692). Here, the report of Dr. Chernoff reflects that he conducted an exhaustive review of plaintiff's extensive medical history, the detailed recitation of which comprises nearly seven single-spaced pages of Dr. Chernoff's 12-page report. Dr. Chernoff's report reflects that plaintiff's own medical records establish that plaintiff's complaints of right middle trigger finger; neck and back pain; bilateral knee pain; and bilateral shoulder pain were chronic, preexisting conditions that were not related to the accident of July 26, 2010.

Although Dr. Chernoff identified reduced range of motion in plaintiff's knees, shoulders and cervical and thoracic/lumbosacral spines, his report attributed these findings to plaintiff's well-documented preexistent degenerative conditions predating the accident. Plaintiff's medical records reflected that plaintiff had been diagnosed with right middle trigger finger in January 2009; accordingly, the right middle trigger finger was not caused by the accident. Dr. Chernoff noted that plaintiff underwent left carpal tunnel release and bilateral trigger finger release with left Dupuytren's release on April 2, 2010, prior to the accident. The records also reflected that prior to the accident, plaintiff's treating physicians had recommended that he undergo bilateral knee replacements because of chronic knee pain. Dr. Chernoff found no evidence of any exacerbation of plaintiff's prior symptomatology and no causally related residuals from the accident. Dr. Chernoff's affirmation thus establishes, *prima facie*, that plaintiff Robert Lomnicki did not sustain a "serious injury" as defined in Insurance Law §5102(d) as a result of the motor vehicle accident that occurred on July 26, 2010. The burden of proof has thus shifted to plaintiff to submit proof that he did sustain a causally related serious injury (*Gaddy v Eyles*, 79 NY2d 955 [1992]).

In opposition to defendant's motion, plaintiff has submitted the affirmation of his attorney dated October 21, 2014; the affirmation of plaintiff's orthopedic surgeon, Bradley D. Gerber, M.D. dated September 29, 2014; and the affirmation of plaintiff's orthopedic surgeon Bennett H. Brown, M.D. dated September 30, 2014; together with certain unsworn medical reports prepared by David Benatar, M.D. during the period from September 1, 2010 to August 19, 2011.

Dr. Gerber states that he began treating plaintiff on December 27, 2011 "when he presented with significant bilateral knee pain following his motor vehicle accident of July 26, 2010 that had not been alleviated by injections and physical therapy." He testified that his examination revealed mild effusion of the left and right knees with 120° range of motion in flexion bilaterally, as well as positive grind and crepitus with range of motion. Dr. Gerber recommended that plaintiff undergo bilateral knee replacements. Dr. Gerber acknowledged that plaintiff had a prior history of bilateral knee arthroscopy and that a recommendation for bilateral knee replacements had been made prior to the motor vehicle accident on July 26, 2010, but stated that plaintiff "never decided to undergo a bilateral knee replacement prior to the accident." Dr. Gerber also stated that after the accident "[plaintiff's] pain and difficulty ambulating increased significantly and he was unable to return to work. Dr. Gerber concluded that plaintiff's "prior bilateral knee complaints were exacerbated by his motor vehicle accident...necessitating bilateral total knee replacement." Dr. Gerber stated that he performed total knee replacements of plaintiff's right knee on April 14, 2014 and left knee on July 16, 2014.

Dr. Brown states that he began treating plaintiff on February 12, 2011 "when he presented with bilateral hand pain following a motor vehicle accident of July 26, 2010." Dr. Brown stated that plaintiff told him the his pain had been present since the accident, and that fentanyl patches, injections and physical therapy had been unsuccessful. Dr. Brown reported that he performed right middle trigger finger release on August 10, 2011 and left thumb, left middle, left ring and left small finger trigger releases on September 18, 2011. Dr. Brown concluded that plaintiff sustained a significant limitation of use of his left, dominant hand, as well as the right hand, and that the trigger fingers were causally related to the accident.

The Court finds that plaintiff's submissions in opposition to defendants' motion fail to raise a triable issue of fact as to whether plaintiff sustained a "serious injury" as a result of the accident on July 26, 2010. The affirmations of plaintiff's treating surgeons do not address, much less rebut, the well-substantiated conclusion of defendants' expert that plaintiff had chronic, longstanding degenerative conditions affecting his wrists, knees, shoulders and hands that were the cause of his present complaints (*Barry v Future Cab Corp.*, 71 AD3d 710 [2d Dept 2010]). Plaintiff's experts' respective opinions that plaintiff's need for bilateral knee replacement surgery and bilateral trigger finger releases, as well as his alleged inability to return to work, were caused by the accident are conclusory, rely almost exclusively on plaintiff's self-reporting and not on objective medical evidence (*Franchini v Palmiere*, 1 NY3d 536 [2003]), and do not reflect the painstaking and exhaustive review of plaintiff's extensive medical history evidenced by Dr. Chernoff's affirmation (*Frisch v Harris*, 101 AD3d 941 [2d Dept 2012]).

Moreover, to the extent plaintiff is claiming exacerbation of his preexisting injuries, plaintiff's experts failed to come forward with objective medical evidence that the accident

“aggravated [plaintiff’s] preexisting...condition so severely as to produce a statutory serious injury above and beyond the existing condition” (*Suarez v Abe*, 4 AD3d 288 [1st Dept 2004]).

Plaintiff’s submissions similarly fail to establish that plaintiff sustained a causally related non-permanent injury that prevented him from performing his usual and customary activities for 90 out of the 180 days immediately following the accident. The assertion of plaintiff’s treating physicians that plaintiff was “unable to return to work” after the accident is based on plaintiff’s own self-serving statements and is unsupported by any objective medical evidence, and accordingly is insufficient to create a triable issue of fact (*Sainte-Aime v Suwai Ho*, 274 AD2d 569 [2d Dept 2000]).

In light of the foregoing, defendants’ motion for summary judgment is granted and the complaint is dismissed.

Dated: February 10, 2015

HON. PAUL J. BAISLEY, JR.

J.S.C.