

Foster-Smith v Argrett
2015 NY Slip Op 30555(U)
April 16, 2015
Sup Ct, Queens County
Docket Number: 05783/2013
Judge: Robert J. McDonald
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of defendant's verified answer dated May 30, 2013. Plaintiff filed a Note of Issue on July 17, 2014. This matter is presently on the calendar of the Trial Scheduling Part for June 17, 2015.

Defendant now moves for an order pursuant to CPLR 3212(b), granting summary judgment dismissing the plaintiff's complaint on the ground that plaintiff did not suffer a serious injury as defined by Insurance Law § 5102. In support of the motion, defendants submit a copy of the pleadings; a copy of plaintiff's verified bill of particulars; a copy of the transcript of the plaintiff's examination before trial; an affirmed medical report from orthopedic surgeon, Dr. Joseph Stubel; and an affirmed radiological report from Dr. Jordan Haber.

Plaintiff, age 25, contends that as a result of the accident he sustained, inter alia, impingement on the rotator cuff of the right shoulder and a disc herniation at the L5-S1 level.

Plaintiff asserts that he sustained a serious injury as defined in Insurance Law § 5102(d) in that he sustained a permanent loss of use of a body organ, member function or system; a permanent consequential limitation or use of a body organ or member; a significant limitation of use of a body function or system; and a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute his 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.

The plaintiff, Courtney Foster-Smith, a sales associate at Home Depot states that on the date of the accident he was operating his mother's car and was traveling northbound on 200th Avenue. When he reached the intersection with 114th Street he stopped at a stop sign that was controlling traffic in his direction. After being stopped for 30 seconds he proceeded into the intersection and stopped again in front of the stop sign at which point his vehicle was struck on the front passenger side by the defendant's vehicle. When the ambulance arrived at the scene plaintiff told the EMT that he was not injured and declined to go to the hospital. The plaintiff left the scene in his own vehicle and drove to his home. He testified that he was confined to his home for one week following the accident. The following day he sought medical treatment with Dr. Baldeo, his primary care physician due to pain in his back, neck, and left shoulder. On April 27, 2012 the plaintiff began a course of physical therapy at Total Rehab having been referred there by his attorney. He treated at Total Rehab three times per week for a period of six months. He was referred for MRIs of his back, neck and left

shoulder while undergoing treatment. Other than physical rehabilitation the plaintiff had no other treatment for his injuries. The plaintiff stated that he stopped treating because he began to feel better. The plaintiff testified that following the subject accident he was involved in two other accidents one on December 30, 2013 and one on April 22, 2014. The first accident occurred when a driver hit his vehicle having gone through a stop sign. He states that he injured his back, chest and neck in that accident but received no treatment. On April 22, 2014, he was involved in another accident when the car he was driving was struck by another motor vehicle. He again injured his neck, back, chest, both shoulders and his head. He stated he has constant headaches resulting from the accidents. The plaintiff treated with Dr. Sunshine for the 2014 accident and is presently undergoing physical therapy at a rate of four times per week. He presently feels pain in the middle part of his back from the most recent accident.

Dr. Joseph Stubel, an orthopedist retained by the defendant examined the plaintiff on June 16, 2014. The doctor states that the plaintiff sustained neck, back, and left shoulder pain as a result of the impact. He states that the plaintiff started physical therapy the day following the accident on April 23, 2012 and continued until October 2012. The plaintiff presented with continued pain to the neck, back, and left shoulder. Upon physical examination, using a goniometer, the physician found that the plaintiff had no loss of range of motion of the cervical spine, lower back, and left shoulder. He states that in his opinion although the plaintiff has subjective complaints of pain there are no objective signs of disability with reference to the subject accident.

Dr. Jordan Haber reviewed the MRI taken of the plaintiff's lumbar spine and found that degenerative changes were noted at L4-L5 but that there was no evidence of a herniated disc at L5-S1 or at any other location.

Defendant's counsel contends that the medical report of Drs. Haber and Stubel, together with the plaintiff's testimony at his examination before trial stating that he was confined to his home for two weeks following the accident is sufficient to demonstrate that the plaintiff has not sustained a permanent consequential limitation or use of a body organ or member; a significant limitation of use of a body function or system; or a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute his 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 opposition, plaintiff's attorney, Seth Michael Goldstein, Esq., submits his own affirmation as well as an affidavit from the plaintiff dated January 22, 2015; the affirmed medical report of Dr. Surendranath K. Reddy, a board certified orthopedist; neurologist Dr. Hannanian; and an affirmed report from board certified radiologist, Dr. William Weiner.

Dr. Reddy states that he initially examined the plaintiff on May 2, 2012, ten days following the accident. At that time plaintiff complained of neck pain, lower back pain, and left shoulder pain. Upon physical examination Dr. Reddy noted loss of range of motion in the neck, back, and left shoulder. Dr. Reddy started the plaintiff on a program of physical therapy and referred him for an MRI of the left shoulder. Dr. Reddy stated that in his opinion the plaintiff's injuries were causally related to the subject accident. He states that the plaintiff was discharged from physical therapy after his no-fault benefits were terminated. He states that plaintiff was re-examined on January 7, 2015, at which time he still exhibited loss of range of motion of the cervical and lumbar spines and left shoulder. He states that three years after the accident the plaintiff has yet to achieve a full range of motion in his left shoulder. He states that in his opinion the plaintiff is permanently partially disabled as a result of the subject motor vehicle accident.

In his affidavit, plaintiff states that the day following the accident he experienced severe pain in the neck, back, and left shoulder and went to see Dr. Philip Baldeo. He then began treating at Total Medical Rehab in St. Albans. He states that he went for 35 physical therapy treatments through October 2012. After his no-fault benefits were discontinued he stopped treating because he could no longer afford to pay out of pocket. He stated that he also consulted with an orthopedist, Dr. Reddy, and a neurologist, Dr. Hannanian. He states that he still has pain in his mid to lower back and his range of motion is limited in his neck, back, and left shoulder compared to how it was prior to the accident.

Dr. Hannanian, a neurologist, states in his affirmed report that he met with the plaintiff on May 7, 2012, two weeks following the accident. His physical examination noted

loss of range of motion of the cervical spine and lumbar spine and left shoulder. He found that the injuries were sustained as a result of the subject motor vehicle accident and that plaintiff was partially disabled. He re-examined the plaintiff on January 5, 2015, and found that he still had loss of range of motion of the cervical spine and lumbar spine. He found that the plaintiff is expected to have a 10 - 15% permanent restriction of range of motion of the left shoulder and lumbar spine as a result of the accident.

Dr. William Weiner, a radiologist, submits an affirmed report in which he states that upon review of the plaintiff's MRIs there was impingement on the left rotator cuff straightening of the cervical lordosis and a disc herniation at the L5-S1 level.

On a motion for summary judgment, where the issue is whether the plaintiff has sustained a serious injury under the no-fault law, the defendant bears the initial burden of presenting competent evidence that there is no cause of action (Wadford v Gruz, 35 AD3d 258 [1st Dept. 2006]). "A defendant can establish that a plaintiff's injuries are not serious within the meaning of Insurance Law § 5102(d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (Grossman v Wright, 268 AD2d 79 [1st Dept. 2000]). Whether a plaintiff has sustained a serious injury is initially a question of law for the Court (Licari v Elliott, 57 NY2d 230 [1982]).

Where defendant's motion for summary judgment properly raises an issue as to whether a serious injury has been sustained, it is incumbent upon the plaintiff to produce evidentiary proof in admissible form in support of his or her allegations. The burden, in other words, shifts to the plaintiff to come forward with sufficient evidence to demonstrate the existence of an issue of fact as to whether he or she suffered a serious injury (see Gaddy v Eyler, 79 NY2d 955 [1992]; Zuckerman v City of New York, 49 NY2d 557 [1980]; Grossman v Wright, 268 AD2d 79 [2d Dept. 2000]).

Here, the proof submitted by the defendant, including the affirmed medical report of Drs. Stubel and Haber, together with the plaintiff's testimony at his examination before trial that he was confined to his home for only two weeks immediately following the accident, are sufficient to meet defendants' prima facie burden by demonstrating that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject

accident (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]).

In opposition, this Court finds that the plaintiff failed to raise triable issues of fact by submitting the affirmed medical reports of Drs. Reddy and Hannanian. Although both physicians attested to the fact that the plaintiff had significant permanent limitations in range of motion both contemporaneous to the accident and in a recent examination, neither physician addressed the fact that the plaintiff was involved in two subsequent motor vehicle accidents in which he injured his neck, back, and shoulders. Neither Dr. Reddy nor Dr. Hannanian, who examined the plaintiff as recently as January 2015, addressed plaintiff's subsequent injuries to his neck and back and shoulders as a result of his motor vehicle accidents in 2013 and 2014. Further, the report of Dr. Weiner does not set forth a causal relationship between the results of his MRI studies of the plaintiff and the subject accident.

As neither Dr. Reddy nor Dr. Hannanian acknowledged or addressed the significance of the fact that the plaintiff sustained injuries in two subsequent motor vehicle accidents in which he injured his neck and back and shoulders (as testified to in his examination before trial) the treating physicians' conclusions that the plaintiff sustained significant limitations of a permanent nature as a result of the subject accident are merely speculative (see Yunatanov v Stein, 69 AD3d 708 [2d Dept. 2010]; Yun v Barber, 63 AD3d 1140 [2d Dept. 2009]; Cantave v Gelle, 60 AD3d 988 [2d Dept. 2009]; Joseph v A & H Livery, 58 AD3d 688 [2d Dept. 2009]; Silla v Mohammad, 52 AD3d 681 [2d Dept. 2008]; Rabolt v Park, 50 AD3d 995 [2d Dept. 2008]; cf. Keum Lee Jeong v Imperial Contract Cleaning, Inc., 63 AD3d 795 [2d Dept. 2009]).

Further, plaintiff failed to proffer competent medical evidence that he sustained a medically-determined injury of a nonpermanent nature which prevented him, for 90 of the 180 days following the subject accident, from performing his usual and customary activities. The plaintiff acknowledged that he returned to his job on a full time basis three days following the accident (see Valera v Singh, 89 AD3d 929 [2d Dept. 2011]; Nieves v Michael, 73 AD3d 716 [2d Dept. 2010]; Ranford v Tim's Tree & Lawn Serv., Inc., 71 AD3d 973 [2d Dept. 2010]; Rivera v. Bushwick Ridgewood Props., 63 AD3d 712 [2d Dept. 2009]; Furrs v Griffith, 43 AD3d 389 [2d Dept. 2007]).

Accordingly, based upon the foregoing, it is hereby

ORDERED, that the defendant's motion for summary judgment is granted and the plaintiff's complaint is dismissed.

The clerk is directed to enter judgment accordingly.

Dated: April 16, 2015
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.