

Titikpina v Conde

2015 NY Slip Op 30797(U)

March 6, 2015

Sup Ct, Bronx County

Docket Number: 309885/2012

Judge: Julia I. Rodriguez

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

-----X Index No. 309885/2012

Buyam B. Titikpina,
Plaintiff,

-against-

DECISION and ORDER

Present:

Anixa E. Conde and Onix M. Conde,
Defendants.

Hon. Julia I. Rodriguez
Supreme Court Justice

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Recitation, as required by CPLR 2219(a), of the papers considered in review of defendants' motion for summary judgment on the ground that plaintiff did not sustain a "serious injury" pursuant to Insurance Law §5102(d).

<u>Papers Submitted</u>	<u>Numbered</u>
Notice of Motion, Affirmation & Exhibits	1
Affirmation in Opposition & Exhibits	2
Reply Affirmation	3

In the instant action, Plaintiff alleges that he sustained injuries as a result of a motor vehicle accident that occurred on December 28, 2009. Defendants move for summary judgment, dismissing the complaint, on the ground that Plaintiff has not sustained a "serious injury" within the meaning of Insurance Law §5102(d).

In support of the motion, defendants submitted, *inter alia*, the affirmed medical report of **Dr. Joseph Y. Margulies, M.D., Ph.D.**, an orthopedic surgeon, plaintiff's deposition testimony and bill of particulars.

Dr. Margulies reported that he conducted an orthopedic examination of plaintiff on May 29, 2014. He indicated that various medical records were available for his review, including but not limited to, plaintiff's bill of particulars, an MRI report of the lumbar spine, a chest X-ray, Bronx Lebanon Hospital records, an electrodiagnostic report, an operative report and physical therapy notes. Dr. Margulies examined and conducted range of motion testing of plaintiff's lumbosacral spine, cervical spine, shoulders and elbows.

Dr. Margulies found normal ranges of motion in all planes of the lumbar and cervical spine, shoulders and elbows, and diagnosed plaintiff with resolved cervical and lumbar sprains, a resolved chest contusion and a resolved left humerus contusion. Dr. Margulies' impression was that there were no residual objective orthopedic findings. Dr. Margulies found "no functional disability" and concluded that Plaintiff "may continue with activities of daily living, as well as the present employment."

In his bill of particulars, Plaintiff alleges that he was confined to bed for approximately three weeks, confined to home for approximately three weeks, and incapacitated from his employment for approximately three weeks following the accident due to the injuries he sustained in the accident. At his deposition, Plaintiff testified that he missed approximately two weeks of work following the accident due to his injuries.

The issue of whether a claimed injury falls within the statutory definition of a "serious injury" is a question of law for the courts which may be decided on a motion for summary judgment. *See Licari v. Elliott*, 57 N.Y.2d 230, 237. This court finds that defendants met their initial burden of proof that Plaintiff did not sustain a "serious injury." Once a defendant sets forth a *prima facie* case that the claimed injury is serious, the burden shifts to the Plaintiff to demonstrate, by the submission of objective proof, that there are substantial triable issues of fact as to whether the purported injury was serious. *See Toure v. Avis Rent-A-Car Sys., Inc.*, 98 N.Y.2d 345; *Rubenscastro v. Alfaro*, 29 A.D.3d 436.

In opposition to summary judgment, Plaintiff submitted the affirmed reports and affirmation with attached notes and electrodiagnostic study of **Dr. Gautam Khakhar, M.D.**, the affirmation and MRI report of **Narayan Paruchuri, M.D.**, a board-certified radiologist, the affirmed report and two unsworn operative reports of **Henry Sardar, D.O.**, a physiatrist, and the unsworn report of **Sebastian Lattuga, M.D.**, a board-certified orthopedic surgeon.

While Plaintiff contends that the unsworn operative reports of Dr. Sardar and the unsworn report of Dr. Lattuga are properly before the Court because Dr. Margulies relied upon them, in his report, Dr. Margulies merely states that the operative reports and report of Dr. Lattuga "were available for [his] review," not that he relied upon them in forming his

conclusions. As such, the unsworn operative reports and unsworn report of Dr. Lattuga are not properly before the Court and, therefore, have not been considered.

Dr. Khakhar examined the Plaintiff on January 4, 2010 and August 11, 2014 and performed electrodiagnostic testing on Plaintiff on February 15, 2010. In his report dated January 4, 2010, Dr. Khakhar reported quantified restrictions in range of motion of the lumbar spine which he attributed to the accident. Of note, Dr. Khakhar found plaintiff's lumbar spine flexion range of motion to be 70 degrees with 90 degrees being normal (22% limitation) and extension range of motion to be 20 degrees with 30 degrees being normal (33% limitation). At that time, Dr. Khakhar's impression was that plaintiff sustained "injuries to the left humerus, anterior chest, and lumbar spine." Dr. Khakhar recommended that Plaintiff obtain X-rays of the left humerus and chest and an MRI of the lumbar spine.

In his report dated August 11, 2014, Dr. Khakhar found plaintiff's lumbar spine flexion range of motion to be 80 degrees with 90 degrees being normal (11% limitation) and extension range of motion to be 25 degrees with 30 degrees being normal (17% limitation). Dr. Khakhar's impression was that Plaintiff sustained a "lumbar disc bulge" and "right L5 radiculopathy as per electrodiagnostic testing" as a result of the accident. Dr. Khakhar concluded that plaintiff will experience "chronic pain with exacerbations affecting activities of daily living." Dr. Khakhar stated that he "advised [plaintiff] to continue therapy via home exercises and return to follow up on a p.r.n. basis."

In his affirmation, dated September 11, 2014, Dr. Khakhar reported, *inter alia*, that he reviewed the MRI report of Dr. Paruchuri, dated January 29, 2010. Dr. Khakhar opined that as a result of the accident Plaintiff sustained "a disc bulge at L4/5 with impingement along with right L5 radiculopathy per electrodiagnostic testing" and that this injury "has caused a significant and permanent restriction in the normal range of motion of [Plaintiff's] lumbar spine." Dr. Khakhar diagnosed the Plaintiff with "lumbar spine myofascial derangement with disc bulge and radiculopathy with persistent pain and range of motion loss." According to Dr. Khakhar, Plaintiff "continued to receive physical therapy from January 4, 2010 through August 9, 2010 at which time all physical therapy was discontinued as the patient reached the maximum medical

improvement from conservative management.” Dr. Khakhar advised the Plaintiff that he could return to work as a cab driver on February 8, 2010 with restricted light duties. In Dr. Khakhar’s assessment, plaintiff’s lumbar spine injury “has permanently impaired and weakened the affected areas” and the injury to his lumbar spine “will further impede his ability to function as he gets older.”

The electrodiagnostic testing performed by Dr. Khakhar on February 15, 2010 revealed “evidence of right sided L5 radiculopathy.”

Dr. Sadar reported that he examined plaintiff on February 22, 2010. According to Dr. Sadar, an examination of plaintiff’s lumbar spine “reveal[ed] a positive decrease in the range of motion of all planes, particularly with forward flexion, with reported pain at the end range” and “significant spasms, taut muscle bands, and tenderness in the lumbar paraspinal region.”

The MRI report of Dr. Paruchuri states, in pertinent part:

L4-5: There is a disc bulge and bilateral foraminal impingement.
There is no thecal sac impingement.

L5-S1: There is no bulge or herniation. There is no evidence of foraminal or thecal sac impingement.

IMPRESSION: AT L5-S1, THERE IS A DISC BULGE WITH BILATERAL FORAMINAL IMPINGEMENT.

It appears that the bill of particulars and some of Dr. Khakhar’s conclusions are based on Dr. Paruchuri’s impression of a disc bulge and bilateral foraminal impingement at L5-S1. However, as defendants point out, the language preceding Dr. Paruchuri’s impression creates ambiguity as to whether the disc bulge and impingement present at L5-S1 or at L4-5. However, as either finding would include the lumbar spine at L5, this ambiguity does not necessarily call into question Dr. Khakhar’s electrodiagnostic finding of “right L5 radiculopathy” in 2010 or his diagnosis of “lumbar spine myofascial derangement with disc bulge and radiculopathy with persistent pain and range of motion loss.”

Defendants contend that the alleged limitations of a 22 percent decrease in lumbar flexion and 33 percent in lumbar extension, immediately after the accident, and an 11 percent

decrease in lumbar flexion and a 17 percent decrease in lumbar extension, based on a recent examination, are not significant as a matter of law. In support of this argument, defendants cite, *inter alia*, *Colon v. Kempner*, 20 A.D.3d 372, 799 N.Y.S.2d 213 (1st Dept. 2005). *Id.* While plaintiff's doctor concluded that his injuries were permanent and significantly limited his activities, the court found this conclusion "wholly inconsistent" with the fact that plaintiff began working as a police officer one year after the accident, after successfully undergoing a police department medical examination which included physical agility tests. *Id.* Here, as defendants note, at his deposition, plaintiff testified that he can no longer: (1) work for more than four hours a day, (2) lift objects heavier than 20 kilograms or (3) walk for long distances. The court also notes that, defendants have not cited, nor has the court found, a case in which the First Department has found that limitations such as those reported by Dr. Khakhar were not significant as a matter of law.

While defendants argue that plaintiff cannot establish that he sustained a "serious injury" due to a gap in medical treatment, in his affirmation, Dr. Kakhak stated that physical therapy was discontinued because plaintiff reached maximum medical improvement.

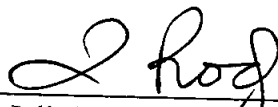
After consideration of plaintiff's submissions, the Court finds that the differing and/or contradictory medical opinions expressed by the parties' respective doctors raise issues of fact and credibility which should be determined by the trier of fact. Consequently, the Court holds that although defendants met their initial burden, plaintiff's submissions raised material issues of fact and credibility as to whether he sustained a "significant limitation of use of a body function or system," and "permanent consequential limitation of use of a body organ or member." Insurance Law §5102(d). At this juncture the Court declines to dismiss these Insurance Law claims as a matter of law. *See Pommells v. Perez*, 4 N.Y.3d 566, 577.

However, the Court finds that plaintiff has not met his burden of rebuttal regarding the 90/180 claim, i.e., that he suffered "a medically determined injury or impairment of a nonpermanent 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.”

For the foregoing reasons, defendants’ motion for summary judgment dismissing the complaint is **granted** solely to the extent that plaintiff’s 90/180 claim is **dismissed**, as these claims were not medically substantiated. Defendants’ motion is otherwise **denied**, as herein above described.

Dated: Bronx, New York
March 6, 2015



Hon. Julia I. Rodriguez, J.S.C.