

Ruiz v Gonzalez

2015 NY Slip Op 30845(U)

April 16, 2015

Supreme Court, Bronx County

Docket Number: 307857/12

Judge: Wilma Guzman

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

Index No. 307857/12
Motion Calendar No. 27
Motion Date: 4/9/15

MANUEL O. RUIZ

Plaintiff,

-against-

DECISION/ ORDER

Present:

Hon. Wilma Guzman
Justice Supreme Court

OLGA L. GONZALEZ and ANA J. OSORIO.

Defendants.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for summary judgment:

<u>Papers</u>	<u>Numbered</u>
Defendants Notice of Motion, Affirmation in Support, and Exhibits Thereto.....	1
Affirmation in Opposition	2
Reply Affirmation	3

Upon the foregoing papers and after due deliberation, and following oral argument, the Decision/Order on this motion is as follows:

Defendants moves for an Order granting summary judgment dismissing plaintiff's complaint on the grounds that plaintiff fails to meet the burden of a sustainable serious injury under Ins. Law sections 5102(d) and 5104(a). Plaintiffs submitted written opposition.

Plaintiffs commenced this cause of action seeking damages for injuries allegedly sustained on July 10, 2011 as the result of motor vehicle accident.

In support of the motion for summary judgment, a defendant may rely either on the sworn statements of the defendant's examining physician or the unsworn reports of the plaintiff's examining physician. Pagano v. Kingsbury, 182 A.D.2d 268, 587 N.Y.S.2d 692 (2nd Dept. 1992) Also, an affirmed physician's report, being in admissible form and showing that a plaintiff was not suffering from any disability or consequential injury from the accident would be sufficient to satisfy a defendant's burden of proof and shift to the plaintiff the burden of establishing the existence of a

triable issue of fact. See Gaddy v. Eyler, 79 N.Y.2d 955, 582 N.Y.S.2d 990 (1992), where defendant established a prima facie case that plaintiff's injuries were not serious through the affidavit of a physician who examined plaintiff and concluded that plaintiff had a normal examination. When the movant has made such a showing, the burden shifts and it then becomes incumbent upon the plaintiff to produce prima facie evidence in admissible form to support the claim of serious injury. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). To raise a triable issue of fact as to whether a herniated disc constitutes a serious injury, a plaintiff is required to 'provide objective evidence of the extent or degree of the alleged physical limitations resulting from the [injury] and their duration' (Noble v. Ackerman, 252 A.d.2d 392, 394). In lieu thereof, "[a]n expert's qualitative assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system (see Dufel, 85 N.Y.2d at 798.'" (Toure v. Avis Rent A Car Systems, Inc., 98 N.Y.2d 345, 350.).

Defendants have met the burden of prima facie entitlement to summary judgment through the submission of the affidavits of Dr. Frank Olivito and Dr. Michael Carciente. Upon reviewing the plaintiff's medical records, Dr. Carciente performed a neurological evaluation on February 25, 2014. Dr. Carciente's report does not numerically quantify the range of motion in the cervical spine or thoracic/lumbar spine noting only that the straight leg maneuver was negative to 80 degrees which is normal. Dr. Carciente noted that there was no evidence of an ongoing neurological injury, disability or permanency.

Upon the review of the plaintiffs medical records performed an orthopedic examination on the plaintiff on December 9, 2013. Dr. Oliveto noted normal ranges of motion in the plaintiff's cervical spine and left shoulder. However, range of motion limitations as compared to the norm was noted in the thoracolumbosacral spine in flexion 60 degrees (90 degrees normal), extension 20 degrees (40 degrees normal), right and left lateral rotation 20 degrees (30 degrees normal) and right and left lateral flexion 20 degrees (30 degrees normal). Dr. Oliveto opined that this range of motion limitation was subjective as there was no spasm or tenderness. Dr. Olivito opined that the plaintiff's injuries had resolved and healed and that he has made recovery from all orthopedic injuries sustained in July 10, 2011. No further orthopedic treatment was necessary and there was no evidence of

disability.

Dr. Heiden reviewed the plaintiff's MRI's of the left ankle and left shoulder taken on August 30, 2008 and cervical spine and lumbar spine taken on September 2, 2008. On the left ankle Dr. Heiden opined that plaintiff evinced no fracture and that the injuries to the left ankle, cervical spine, lumbar spine and left shoulder were consistent with degeneration

Plaintiff's submission of Dr. Jean D. Miller's report which chronicles plaintiff's physical condition from July 13, 2011 through October 11, 2011 which includes the report of Dr. Lyudmila Poretskaya is sufficient to raise a triable issue of fact. During treatment, both doctors conducted range of motion testing and found limitations as compared to the norms, throughout the aforementioned period of time, in the cervical and lumbosacral spine as well as bilateral. In the initial report of July 13, 2011, Dr. Miller recommended plaintiff to physical therapy and to because of his injuries no heavy work should be performed at this time.

Plaintiff was also referred to further diagnostic testing. Dr. Gary Ritholz, examined the plaintiff on October 4, 2011 and noted range of motion limitations in the cervical spine. Normal range of motion existed in the all other areas. Dr. Ritzholz review of he cervical spine MRI taken on July 20, 2011 noted dherniation at c4-C5. C5-C6 and straightened cervical lordisis which might have been due to muscle spasm. Dr. Ritzholz review of the left shoulder MRI noted partial tear of the supraspinatus tendum and irregularity in the labrum. A tear could not be excluded. Plaintiff was to continue with trigger point injections and scheduled for further trigger point injections and was to follow up for pain management.

Plaintiff was examined by Dr. Mark McMahon on August 4, 2014. Using a goniometer, Dr. McMahon noted range of motion limitations in the cervical spine, lumbar spine and left shoulder as compared to the norms. Based upon his examination and the review of the medical records, Dr. McMahon diagnosed plaintiff with a left shoulder partial tear of the supraspinatus tendon, cervical spine C4-5, C5-6 and C6-7 herniations and radiculopathy and a lumbar spine injury. Dr. McMahon opined that the plaintiff's injuries were causally related to the subject accident as the only thing that predated the accident was the cervical osteophytes and spondylosis. Dr. McMahon opined that the plaintiff's condition is permanent and his injuries interfere with his quality of life and activities. Dr. McMahon further opined that plaintiff would benefit from left should arthroscopic surgery, cervical

spine discetomy with fusion at C4-C7 and lumbar spine magnetic resonance evaluation.

As it pertains to the report of Dr. McMahon, this Court finds the defendants contentions unavailing. Salcedo v. Weng Ju Qu, 106 A.D3d 977 (2nd Dept. 2013). As such, Plaintiff has submitted sufficient proof to raise a triable issue of fact as to whether he sustained a permanent injury under Ins. Law 5104.

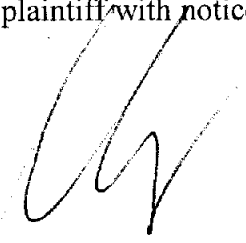
Accordingly, it is

ORDERED that defendants motion for summary judgment under Ins. Law 5104 is hereby denied. It is further

ORDERED that defendants serve a copy of this order upon plaintiff with notice of entry, within thirty(30) days of this order.

This constitutes the decision of the Court.

DATE 4/16/15



HON. WILMA GUZMAN, JSC.