

John v Morgan

2015 NY Slip Op 30848(U)

April 6, 2015

Supreme Court, Bronx County

Docket Number: 308402/2012

Judge: Julia I. Rodriguez

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

-----X **Index No. 308402/2012**

Jefferson John,
Plaintiff,

-against-

DECISION and ORDER

Present:

Nikhailia M. Morgan,
Defendant.

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 July 18, 2012. Defendant moves 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, defendant 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 August 8, 2013. 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 cervical spine, EMG testing and reports of Drs. Wilson and Lal. Dr. Margulies examined and conducted range of motion testing of plaintiff's lumbar spine, cervical spine and shoulders.

Dr. Margulies found normal ranges of motion in all planes of the lumbar spine, cervical spine and shoulders, and diagnosed plaintiff with a resolved cervical sprain and resolved

contusions of both shoulders. 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 and incapacitated from work for one and one-half weeks directly following the accident due to the injuries he sustained in the accident. At his deposition, plaintiff testified that he missed a week and a half of work following the accident due to his injuries and that, when he returned to work, he resumed his normal duties and schedule. Plaintiff also testified that he was injured as a result of two prior motor vehicle accidents; he was treated with physical therapy after one of those accidents but does not recall the nature of his injuries; after the other accident, he injured his right hand and had pain in his neck and back but received no treatment.

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; *Rubensccastro v. Alfaro*, 29 A.D.3d 436.

In opposition to summary judgment, plaintiff submitted his affidavit and the affirmations of **Joseph O. Walters, M.D.**, and **Arnold B. Wilson, M.D.**, a board-certified orthopedist, and the affirmation and attached MRI report **Gregory Lawler, M.D.**, a board-certified radiologist.

In his affirmation and MRI report of plaintiff's cervical spine, Dr. Lawler assessed plaintiff with "Left paracentral C5-C6 disc herniation resulting in mild-to-moderate central stenosis, bulging disc/osteophyte complex results in mild bilateral foraminal stenosis; signs for muscle spasm with straightening of the normal cervical lordosis; degenerative disease changes affecting the C5-C6 and C6-C7 discs with endplate osteophytes affecting the C5 and C6 endplates." Dr. Lawler provided no opinion as to causation.

Dr. Walters examined plaintiff on July 20, 2012 and on May 14, 2014. Dr. Walters initial examination of plaintiff revealed “moderately severe cervical spasm.” Dr. Walters performed range of motion testing “with positive findings: bilateral rotation of the neck was limited to 30 degrees to the right and 20 degrees to the left; extension/flexion was 20 percent decreased. Back flexion was to 80 degrees. Straight leg raising was 75 degrees bilaterally.” Dr. Walters noted that MRI testing of plaintiff’s cervical spine revealed, *inter alia*, “[d]egenerative disease changes affecting the C5-C6 and C6-C7 discs with endplate osteophytes affecting the C5 and C6 endplates.” However, Dr. Walters’ diagnosis, which he indicated was based in part on the MRI tests, failed to include degenerative disc disease. Rather, Dr. Walters diagnosed plaintiff with “Cervical radiculitis R/O discogenic disease. Shoulder contusion. Left paracentral C5-C6 disc herniation resulting in mild-moderate central stenosis. Bulging disc/osteophyte complex results in mild bilateral foraminal stenosis. Signs for muscle spasm with straightening of the normal cervical lordosis.” Also, Dr. Walters concluded that plaintiff’s injuries were caused by the accident of July 18, 2012. However, he failed to address the injuries plaintiff admittedly sustained as a result of the two prior motor vehicle accidents.

During his second examination of plaintiff, Dr. Walter performed range of motion testing and reported “moderately severe cervical spasm” and that “[b]ilateral rotation of the neck was 45 degrees with the norm being 90 degrees; extension was 10 percent decreased.” As in his initial assessment, Dr. Walters’ diagnosis, which he again indicated was based in part on the MRI tests, failed to include degenerative disc disease. Dr. Walters diagnosed plaintiff with “Left paracentral C5-C6 disc herniation resulting in mild-moderate central stenosis. Bulging disc/osteophyte complex results in mild bilateral foraminal stenosis. Signs for muscle spasm with straightening of the normal cervical lordosis.” The court also notes that, as in his initial assessment, Dr. Walters concluded that plaintiff’s injuries were caused by the accident of July 18, 2012 but he failed to address the injuries plaintiff sustained as a result of the two prior motor vehicle accidents.

Dr. Wilson examined plaintiff on November 8, 2012 and January 15, 2013. Dr. Wilson also reviewed plaintiff's MRIs and the results of EMG-NCV testing conducted by Dr. Sonali Lal, M.D. Upon his initial examination of plaintiff, Dr. Wilson reported tenderness in the lower cervical region and restricted range of motion measurements of "[f]orward flexion 20, extension 10, limited to side motion." Dr. Wilson diagnosed plaintiff with "Left paracentral C5-C6 disc herniation resulting in mild-moderate central stenosis; Bulging disc/osteophyte complex results in mild bilateral foraminal stenosis; Signs for muscle spasm with straightening of the normal cervical lordosis; Degenerative disease changes affecting the C5-C6 and C6-C7 discs with endplate osteophytes affecting the C5 and C6 endplates; Left C5-C6 cervical radiculopathy; bilateral mild carpal tunnel syndrome." Like Dr. Walters, Dr. Wilson opined that plaintiff's injuries were caused by the accident of July 18, 2012 but he failed to address the injuries plaintiff sustained in the two prior motor vehicle accidents. Nor did Dr. Wilson explain to what extent the degenerative disc disease he diagnosed in plaintiff's cervical spine contributed to his limitations.

Upon his second examination of plaintiff, Dr. Wilson reported that plaintiff's cervical spine "revealed a 25% decrease in the range of motion for both forward flexion and lateral rotation." Dr. Wilson added to his previous diagnosis the following: "Cervical disc disease, cervical facet arthropathy; myofascial pain syndrome; neck pain secondary to bulging disk and HNP." As in his initial assessment, Dr. Wilson opined that plaintiff's injuries were caused by the accident of July 18, 2012 but he failed to address the injuries plaintiff sustained in the two prior motor vehicle accidents. Nor did Dr. Wilson explain to what extent the degenerative disc disease he diagnosed in plaintiff's cervical spine contributed to his limitations.

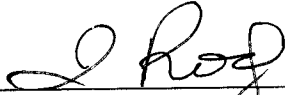
In his affidavit, plaintiff states that he was in a prior motor vehicle accident on January 22, 2008 and, as a result, suffered injuries to his back. While plaintiff alleges that his injuries were fully resolved at the time of the instant accident, plaintiff provided no medical evidence to support this claim. Notably, plaintiff failed to address the prior motor vehicle accident in which he injured his right hand and experienced pain in his neck and back.

After consideration of plaintiff's submissions, in opposition to defendants *prima facie* showing that plaintiff did not suffer a serious injury as a result of the accident, plaintiff failed to raise a triable issue of fact on the issue of causation. While plaintiff has admitted that he was involved in two other accidents before the one at issue, his doctors ignored the effect of those accidents on the purported neck symptoms attributable to the instant accident. *See Bravo v. Martinez*, 105 A.D.3d 458, 963 N.Y.S.2d 82 (1st Dept. 2013); *Mitrotti v. Elia*, 91 A.D.3d 449, 936 N.Y.S.2d 42 (1st Dept. 2012). Nor have plaintiff's doctors addressed the relationship between plaintiff's injuries and the degenerative condition noted by each of them. *See Boone v. Elizabeth Taxi, Inc.*, 120 A.D.3d 1143, 993 N.Y.S.2d 302 (1st Dept. 2014).

For the foregoing reasons, defendant's motion for summary judgment dismissing the complaint is **granted** in its entirety and the complaint is **dismissed**.

Dated: Bronx, New York

~~March~~⁶, 2015
April



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