Chalmers v Zlatkin
2015 NY Slip Op 31424(U)
July 20, 2015
Supreme Court, Kings County
Docket Number: 505054/13
Judge: Debra Silber

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 9

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DARRYL CHALMERS,

Plaintiff,

-against-

ARKADI ZLATKIN and GREAT AMBULETTE SERVICE, INC.,

Defendants.

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DECISION/ORDER

Index No. 505054/13
Submitted: 6/11/15
Mot. Seq. # 1

HON. DEBRA SILBER, A.J.S.C.:

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendants' motion for summary judgment dismissing the complaint.

Papers	Numbered
Notice of Motion, Affirmation in Support, and Exhibits Annexed	1-6
Affirmation in Opposition and Exhibits Annexed	7-12
Reply	13

Upon the foregoing cited papers, the decision/order on this motion is as follows:

Defendants move for summary judgment dismissing the plaintiff's action on the grounds that he did not suffer a "serious injury" as defined by § 5102(d) of the NYS Insurance Law. Plaintiff opposes the motion. For the reasons set forth herein, the defendants' motion is granted and the complaint is dismissed.

Plaintiff claims he sustained personal injuries as a result of an automobile accident on October 4, 2012 on Atlantic Avenue near its intersection with Ft. Greene Place in Kings County, when he was driving a vehicle which came into contact with a

vehicle owned by defendant Great Ambulette and operated by defendant Zlatkin. Plaintiff was working at the time of the accident. He refused medical treatment at the scene. At the time of the accident, plaintiff was approximately 52 years old. Plaintiff claims (Bill of Particulars) he has suffered injuries to his back and right knee.

Defendants contend the complaint must be dismissed because plaintiff has not sustained a "serious injury" within the meaning of Insurance Law § 5102(d).

Where a motion for summary judgment is predicated on a determination of "serious injury," the moving party has the initial burden of submitting sufficient evidentiary proof in admissible form to warrant a finding that the plaintiff has not suffered a "serious injury." *Lowe v Bennett*, 122 AD2d 728 [1st Dept], *affirmed* 69 NY2d 701 [1986].

Defendants' evidence, consisting of the pleadings, plaintiff's Bill of Particulars, plaintiff's EBT (June 2014) and the affirmations of two medical doctors, makes out a prima facie case that plaintiff did not suffer a serious injury in the category of "a medically determined injury or impairment which prevented the party from performing substantially all of the material acts which constituted his or her customary daily activities for not less than 90 days during the 180 days immediately following the accident."

In his Bill of Particulars, plaintiff alleges that he did not miss any days of work. He does not make any claim for lost earnings. *Morris v Edmond*, 48 AD3d 432 [2nd Dept 2008]; *McIntosh v O'Brien*, 2010 NY Slip Op 115 [2nd Dept]. At his EBT, he states that he was a full time employee of the NYC Fire Department on the date of the accident, a fire protection supervisor, and he was still working full time on the date of his EBT. Thus, defendants have made out a prima facie case as to this category of injury.

Defendants' evidence also supports the conclusion that plaintiff did not sustain

a "serious injury" in the categories of "a permanent consequential limitation of use of a body organ or member" and "a significant limitation of use of a body function or system" and makes out a prima facie case for dismissal of these claims. See, Insurance Law § 5102(d).

The affirmation of Dr. Leon Sultan, defendants' independent orthopedist, states that he examined plaintiff on September 8, 2014, and conducted a full orthopedic examination, including range of motion testing on plaintiff's spine and knee. Dr. Sultan reports that plaintiff's range of motion was completely normal in all planes. Plaintiff informed him that "at times his neck would feel stiff or hurt him at night. There are no complaints in regard to his lower back and on occasion his right knee would twitch." He concludes "today's examination does not confirm any ongoing causally related orthopedic or neurological impairment in regard to the occurrence of 10/4/12. No residual orthopedic permanency is noted, and from a clinical point of view, there are no restrictions on activities of daily living or work activity in his stated occupation."

Defendant annexes an affirmation from Dr. Jessica Berkowitz, a radiologist, who conducted an evaluation of the MRI films of plaintiff's right knee, as well as his cervical and lumbar spine. Her report, dated July 1, 2014, concludes that the films of the plaintiff's right knee taken 1/15/13[1], show no evidence of joint effusion. Effusion means swelling. She also states that the ligaments and tendons are intact. Dr. Berkowitz further states "there is probably a horizontal oblique tear of the posterior horn of the medial meniscus which is poorly seen on all sequences and extends to the inferior articular surface. There is increased signal that has a horizontal orientation in

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[1]It is noted that the spine MRIs were taken three months earlier.

the anterior horn of the lateral meniscus toward the intercondylar notch. This could represent an intrasubstance tear here." Dr. Berkowitz' impression is "probable tear of the posterior horn of the medial meniscus. Tears in this location are most common degenerative tears of the knee. Probably intrasubstance tear of the anterior horn of the lateral meniscus toward the intercondylar notch. Horizontal orientation suggests a degenerative tear. There is no evidence of acute traumatic injury such as fracture, bone marrow edema or ligamentous tear."

Dr. Berkowitz' impression of the lumbar spine MRI, taken 10/24/12, is "very small, very broad-based disc herniation at L5-S1. The broad-based nature of the herniation is consistent with a degenerative disc herniation. Degenerative changes are noted to involve the L5-S1 facet joints and there is a .09 cm synovial cyst arising posterior to the left facet joint."

Dr. Berkowitz' impression of the cervical spine MRI, taken 10/24/12, is "posterior annular tear, C2-C3. Minimal disc bulges with some midline spondylosis, C3-C4 through C5-C6. These findings are all chronic and degenerative in origin . . . Diffuse disc bulge and associated spondylosis, C6-C7 . . . The disc bulge and spondylosis are chronic and degenerative in origin. There is no evidence of acute traumatic injury to the cervical spine such as vertebral fracture, asymmetry of the disc spaces, spinal cord contusion or epidural hematoma. Evaluation of the MRI examination reveals no causal relationship between the claimant's alleged accident and the findings on the MRI examination."

The Plaintiff then has the burden of overcoming the motion. *Grossman v Wright* 288 AD2d 79 [2nd Dept 2000]. Plaintiff opposes the motion.

Plaintiff submits, in opposition to the motion, his own affidavit, his attorney's

affirmation, an affirmation from a radiologist and an affirmation from a doctor. Plaintiff's submissions do not overcome the motion and raise a triable issue of fact.

Plaintiff provides an affirmation from Dr. Michael Singer, the radiologist who reviewed the MRIs of plaintiff's cervical and lumbar spine. He states in his affirmation "my impression was a [sic] follows: lumbar spine (MR# EOM100957). Cervical spine (MR# EOM 100957). If called at the time of trial of this action I would affirm that the information photographically inscribed upon said MRIs is true and accurate." Attached to this affirmation that says absolutely nothing except that the MRI reports "are incorporated herein" are his MRI reports. As regards the lumbar MRI taken three weeks after the accident, his impression is "At the L5-S1 disc space level there is disc desiccation. L5-S1 left paracentral protruding disc herniation with an annular fissure abuts the thecal sac and abuts the descending left S1 nerve root." As regards the cervical MRI, taken on the same date, "Mild disc bulges at the C3-4 and C4-5 disc space levels . . . C5-6 broad disc herniation effaces the thecal sac and causes bilateral neural foraminal narrowing greater on the right side than the left . . . At the C6-7 disc space level ventral osteophyte formation is present."

Plaintiff also submits the affirmation of Dr. Hasan Chughtai, dated 1/28/15. He states that he first examined plaintiff on October 16, 2012. He describes the exam. He states that plaintiff treated at his office for physical therapy, until April 2013, when he reached maximum medical improvement. He does not say how many treatments plaintiff received in that period of time, nor does he indicate how many times he saw plaintiff in that period of time. He does not annex any of his office records. He does not indicate that he told plaintiff to restrict his activities in any way during this time period. Dr. Chughtai then re-examined plaintiff on 1/6/15, after a gap of two and a

half years. At that exam, he found that plaintiff's range of motion was still not normal. He states that the findings as to the patient's range of motion were similar to those from the patient's initial consultation of 10/16/12. He opines that "this patient has objective evidence based upon my physical examinations and testing that evince significant restrictions of motion of the cervical and lumbar spine and right knee. It is my diagnosis with a reasonable degree of medical certainty that Darryl Chalmers has a permanent partial disability of his cervical and lumbar spine due to the cervical and lumbar disc herniations and the confirmed objective range of motion deficits. His right knee also presents as a permanent partial disability based on the confirmed objective range of motion deficits . . . It is my opinion with a reasonable degree of medical certainty that the automobile accident of October 4, 2012 was the competent producing cause of these injuries."

With regard to the opinion of the defendant's radiologist that the findings on the MRIs are degenerative in nature, Dr. Chughtai states that he reviewed the MRI reports, not the films, and "it is my opinion that these are traumatically induced herniated discs at the lumbar and cervical spine which are causally related to the motor vehicle accident. Neither the cervical spine or lumbar spine MRI reports show any evidence of degenerative changes. [emphasis added]" Dr. Chughtai apparently did not read the part of the MRI report that refers to osteophytes and dessication.

Conclusions of Law

As regards the 90/180 category, absent some objective proof of disability to perform the activities of daily living for 90 out of 180 days following an accident, there is no showing of a serious injury from mere allegation. *Rum v Pam Transport, Inc.,*

250 AD2d 751 [2nd Dept 1998]; *Harney v Tombstone Pizza Corp*, 279 AD2d 609 [2nd Dept 2001]. Proof is needed concerning what activities were curtailed and how they were curtailed. See, *Monette v Keller*, 281 AD2d 523 [2nd Dept 2001]; *Candia v Omonia Cab Corp., 6* AD3d 641 [2nd Dept 2004]; *Watt v Eastern Investigative Bureau, Inc.*, 273 AD2d 226 [2nd Dept 2000]. There is no medical evidence of any curtailment of plaintiff's activities. For plaintiff to establish this prong of the statute, his doctor would have had to inform him that he could not return to work or do his other regular activities. This is the prerequisite for a medically determined injury. See *Sainte v Ho,* 274 AD2d 569 [2nd Dept 2000]; *Welcome v Diab,* 273 AD2d 377 [2nd Dept 2000]. As such, plaintiff cannot claim a medically determined injury or impairment which prevented him from performing substantially all of the material acts which constituted his customary daily activities for not less than 90 days during the 180 days immediately following the accident. *Abrahamson v Premier Car Rental of Smithtown,* 261 AD2d 562 [2nd Dept 1999]; *Kaplan v Gak*, 259 AD2d 763 [2nd Dept 1999]. There is nothing in the papers which indicate that plaintiff's activities were curtailed in any way in this time period. He testified at his EBT that he didn't miss any time from work. Thus, he has not overcome the motion as regards this category of injury.

As regards the other applicable categories of injury, a defendant who submits admissible proof that the plaintiff has a full range of motion, and that she or he suffers from no disabilities causally related to the motor vehicle accident, has established a prima facie case that the plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102 (d), despite the existence of an MRI which shows herniated or bulging discs. (*Kearse v New York City Tr. Auth.*, 16 AD3d 45, 49-50, 789 NYS2d 281 [2d Dept 2005]; see also *Servones v Toribio*, 20 AD3d 330, 330, 798 NYS2d 58 [1st

Dept 2005]; Meely v 4 G's Truck Renting Co., Inc., 16 AD3d 26, 30, 789 NYS2d 277 [2d Dept 2005].)

As plaintiff's doctor has provided a recent exam which indicates that plaintiff has not improved as regards the significant limitations in his range of motion since the date of the first exam he conducted in October 2012, the issue before the court is whether Dr. Chughtai's affirmation, which summarily refutes doctors' claims of pre-existing and degenerative findings which were not caused by the accident, is fatal. The court concludes it is. A plaintiff's doctor cannot refute the finding of a defendant's radiologist that the MRI shows degenerative injuries by reading the original MRI report and in a conclusory fashion stating that the report does not say that the findings are degenerative. This would be the case even if the MRI reports did not make specific reference to dessication and osteophytes, as these do, findings which would not have presented three weeks after an accident, as is stated by defendant's doctor.

There are a number of recent cases which make clear that in order to overcome a defendant's evidence that a condition is degenerative and/or pre-existing, a plaintiff must present evidence which addresses the issue in a non-conclusory manner. In *Henry v Hartley*, 119 AD3d 528 [2nd Dept 2014], the defendants were held to have met their prima facie burden of establishing their entitlement to judgment as a matter of law by submitting sufficient evidence in admissible form to establish that the injuries allegedly sustained by the plaintiff were not causally related to the subject accident, as the affirmed reports of the defendants' retained radiologist established that the alleged injuries to the injured plaintiff's left knee and the lumbar region of his spine were degenerative in nature. The Appellate Division, Second Department found the plaintiff failed to raise a triable issue of fact because the plaintiff's doctor failed to

address, in a non-conclusory fashion, the issue of whether the injuries to the plaintiff's spine and his left knee were entirely the result of pre-existing degenerative changes and, thus, not causally related to the subject accident.

In *Irizarry v Lindor*, 110 AD3d 846 [2nd Dept 2013], the Second Department found that the plaintiff's submissions "failed to address the non-conclusory finding of the appellants' radiologist that the disc bulges and herniations observable" in the MRI scans of plaintiff's spine were degenerative in nature, and that this rendered plaintiff's doctor's conclusion as to the cause of the bulges and herniations speculative and, thus, insufficient to raise a triable issue of fact. See, also *Il Chung Lim v Chrabaszcz*, 95 AD3d 950, 951 [2nd Dept 2012]; *Mensah v Badu*, 68 AD3d 945, 945-946 [2nd Dept 2009].

As the Appellate Division Second Department states in *Il Chung Lim v. Chrabaszcz,* 95 AD3d 950:

> "In any event, the plaintiff's submissions were insufficient to raise a triable issue of fact to rebut the finding of the defendant's radiologist that the injuries depicted in the magnetic resonance imaging (hereinafter MRI) films of his left knee were degenerative in nature and unrelated to the subject accident. Neither the plaintiff's radiologist nor Dr. Chang addressed the findings of the defendant's radiologist pertaining to the degenerative nature of the plaintiff's left knee injuries."

The court notes that recent decisions of the Appellate Division, First Department are also in accord with the holdings of these cases. See, e.g., *Mena v White City Car & Limo Inc.,* 117 AD3d 441 [1st Dept 2014]; *McSweeney v Sang,* 115 AD3d 572 [1st Dept 2014]; *Dawkins v Cartwright,* 111 AD3d 559 [1st Dept 2013].

Plaintiff has failed to overcome the defendants' motion and raise a triable issue of fact. See, *Nisanov v Kiriyenko*, 66 AD3d 655 [2nd Dept 2009]. The

defendants' motion to dismiss plaintiff's complaint for failure to meet the serious injury threshold in Insurance Law § 5102(d) is granted and the complaint is dismissed.

This shall constitute the Decision and Order of the Court.

Dated: Brooklyn, New York
July 20, 2015

Hon. Debra Silber, A.J.S.C.

Hon. Debra Silber
Justice Supreme Court