

Ahmed v Cannon

2015 NY Slip Op 31654(U)

January 6, 2015

Supreme Court, Bronx County

Docket Number: 303435/12

Judge: Sharon A.M. Aarons

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 24

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MOHAMMED AHMED,
Plaintiff,

Index No. 303435/12

-against-

DECISION and ORDER
Present:
Hon. SHARON A. M. AARONS

DONALD CANNON
Defendants.

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Recitation, as required by CPLR 2219(a), of the papers considered in the review of motion, as indicated below:

Papers Numbered

Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2

Replying Affidavits	3
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Upon the foregoing papers, the foregoing motion is decided as follows:

Defendant moves for summary judgment pursuant to CPLR 32312 dismissing the complaint based upon the absence of a serious injury pursuant to Insurance Law 5102(d). Plaintiff submits written opposition. The motion is granted, and the complaint is dismissed.

The plaintiff was allegedly injured in a rear-end automobile accident which occurred on September 28, 2010, on the Cross Bronx Expressway in Bronx County.¹ The plaintiff was granted summary judgment on liability in a previous order of this Court.² In his verified bill of particulars, plaintiff alleges, inter alia, injuries to his left shoulder and right wrist, which required surgery, and cervical and lumbar herniations and limitations. He seeks recovery under the permanent consequential limitation,

¹ In his examination before trial, immediately after the accident, the plaintiff complained only of pain to his left foot. He was taken to St. Barnabas Hospital and released the same day.

² See Order of Justice Mary Ann Briganti-Hughes dated December 17, 2012.

serious injury, and 90/180 categories of Insurance Law 5102(d).³ Defendant maintains that plaintiff's limitations and injuries, if any, are attributable to pre-existing conditions or a subsequent accident involving the plaintiff.⁴

In support of the motion, defendant submits the pleadings; the plaintiff's verified bill of particulars; the unsworn,⁵ certified deposition testimony of the plaintiff; four affirmed reports by a radiologist, Audrey Eisenstadt, M.D., each dated March 30, 2012; the affirmed report of Menachem Y. Epstein, M.D., dated July 27, 2013, based on an examination of the plaintiff on July 24, 2013, and an addendum to that report dated September 20, 2013; and the affirmed report of Naunihal Sachdev Singh, M.D., dated July 31, 2013. Dr. Eisenstadt performed MRI's of the plaintiff's right wrist, left knee, and cervical and lumbar spine on November 16, 2010 (within two months of the date of the accident). With respect to plaintiff's right wrist,

Dr. Eisenstadt concluded that the MRI showed only degenerative changes, because "[a]ny acute injury...would be surrounded with joint tissue swelling and surrounding joint fluid, a finding not seen in this case." Similarly, with respect to plaintiff's left knee, degenerative changes only were noted, as hypertrophic swelling "could not have developed in the short time between the examination and the injury."

³ The plaintiff, in his bill of particulars, also sought recovery under the "permanent loss of use" category. Plaintiff does not argue on the present motion that he can recover under this category, with good reason, as plaintiff has not established a "total" inability to make any use of a body member or system. *Hock v. Aviles*, 21 A.D.3d 786, 801 N.Y.S.2d 572 (1st Dept. 2005).

⁴ The plaintiff was allegedly involved in a subsequent accident on November 28, 2011, in which plaintiff, while a pedestrian, was struck by a vehicle.

⁵ No objection is raised as to the submission of the unsworn transcript. *See Pevzner v. 1397 E. 2nd, LLC*, 96 A.D.3d 921, 947 N.Y.S.2d 543 (2d Dept. 2012) ("Supreme Court providently reviewed the unsworn deposition transcripts submitted in support of the motion, since they were certified by the reporters and the plaintiffs did not challenge their accuracy.")

Further, with respect to the plaintiff's cervical spine, desiccation and bulging were noted, which again, Dr. Eisenstadt attributed to degenerative processes, and not acute injury. Lastly, with respect to plaintiff's lumbar spine, only a bone cyst was noted, which Dr. Eisenstadt also attributed to degenerative processes.

Dr. Epstein, an orthopedist, examined the plaintiff on July 24, 2013. He found full range of motion in the plaintiff's cervical spine. He noted 72 degrees of flexion in plaintiff's lumbosacral spine, a 20% loss from the normal 90%. He found limitations of motion in the plaintiff's left shoulder and right wrist subsequent to arthroscopic surgery on July 2, 2012, and March 5, 2011. He examined the plaintiff's MRIs from Doshi Diagnostic dated October 3, 2011, December 6, 2011, and January 12, 2012, and determined that plaintiff had suffered soft tissue injuries only, which were resolved.

Dr. Singh, who performed a neurological examination of the plaintiff, found no limitations of motion in the cervical and lumbar spine. He diagnosed resolved sprains of the spine. He did find limitations of motion of the left shoulder and right wrist, as to which he stated that he "deferred [opinion] to the appropriate specialist."

In opposition, plaintiff submits the affirmation of Dina Nelson, M.D.; the affirmed reports of Dr. Thomas P. Nipper, M.D. dated December 21, 2010, February 15, 2011; May 10, 2011, July 19, 2011, and March 6, 2012; and the unaffirmed MRI reports of Dina Nelson, M.D. dated November 16, 2010. Dr. Nelson stated that on November 10, 2010 (slightly over one month after the accident), the plaintiff had limitations of motion of the cervical and lumbar spine, ranging from 25% to 33% from normal, and that there were similar limitations on March 28, 2014. Further, she found limitation of movement of the right wrist on December 28, 2010, which was still present on March 28, 2014. Lastly, she found limitation in motion of the left should on March 28, 2104. She also relied upon the unaffirmed MRI reports annexed to the plaintiff's papers, which showed

a herniated disc at C3-C4, a bulging disc at L5-S1, and torn ligaments of the right wrist. The reports of Dr. Nipper similarly report a loss of range of motion of the plaintiff's wrist and shoulder continuing on March 28, 2014. Plaintiff maintains that these reports establish issues of fact as to the existence of a serious injury. Further, in reliance on plaintiff's EBT testimony that he was unable to work for the 95 days immediately following the accident, the plaintiff maintains that he has established a serious injury under the 90/180 days category.

On a motion for summary judgment in a case alleging serious injury, the burden is initially on the defendant to establish prima facie that the plaintiff did not suffer a serious injury. If the defendant meets this burden, the burden then shifts to the plaintiff to raise an issue of fact as to the existence of an injury meeting one of the statutory criteria. (*Farjam v. Paul Michael Management, Inc.*, 253 A.D.2d 535, 676 N.Y.S.2d 512 [2d Dept. 1998].)

The plaintiff maintains that the defendant has not met his prima facie burden because the defendant's experts themselves found that the plaintiff had limitations of motion in his right wrist and left shoulder. Plaintiff maintains that when the defendant's own physicians find limitations of motion, defendant has not met its initial burden. (*Pineda v. Moore*, 111 A.D.3d 577, 975 N.Y.S.2d 622 [1st Dept. 2013]). However, as defendant argues, the affirmed reports by Audrey Eisenstadt, M.D., attribute the plaintiff's limitations to pre-existing conditions. These pre-existing conditions include pre-existing lumbar and cervical conditions, as well as plaintiff's right wrist and shoulder. Thus, where defendant's experts attribute any limitations to pre-existing injuries, a *prima facie* case is established. (*Sutliff v. Qadar*, 122 A.D.3d 452, 2014 N.Y. App. Div. LEXIS 7726 [1st Dept. 2014] [defendant's orthopedist's report showed a lack of causation, as it opined that any significant symptoms were due to a left

shoulder injury that preexisted the subject accident]; *Anamedì v. Anamedì*, 70 A.D.3d 449, 895 N.Y.S.2d 42 [1st Dept. 2010] [“affirmation of defendants’ radiologist, Dr. Eisenstadt -- who stated that dessication along the spine ‘involves a drying out of [d]isc material which is a degenerative process greater than three months in origin. It could not have occurred in the time interval between examination and injury, and it is located at the most common levels in the population for degenerative disc disease to occur’-- was sufficient to establish defendants’ prima facie entitlement to summary judgment.”)]

Although Dr. Epstein noted 72 degrees of flexion in plaintiff’s lumbosacral spine, he also examined the plaintiff’s MRI’s, and determined that plaintiff had suffered only resolved soft tissue injuries. Thus, his finding of a lumbar limitation is consistent with the defendant’s expert reports attributing the plaintiff’s injuries to resolved soft tissue conditions, or to causes other than the accident, such as pre-existing conditions.

The affidavit of Dr. Nelson submitted by plaintiff states that the plaintiff has consistently presented reduced ranges of motion in his lumbar and cervical spine, wrist and shoulder for 3 ½ years as of the start of treatment on November 2, 2010. While she stated, in a conclusory manner, that the plaintiff’s limitations were related to the accident, she failed to address any of the defendant’s medical evidence that the plaintiff’s conditions pre-existed the accident. She did not address Dr. Eisenstadt’s reasoning or deductions based on the plaintiff’s MRI report taken within the two months following the accident. In addition, while Dr. Nipper detailed observed limitations of motion, his final report dated March 6, 2012, concludes that the plaintiff suffered only from sprains, which were resolved. Nor did Dr. Nipper address the evidence of preexisting injury. A plaintiff cannot raise an issue of fact concerning the existence of a serious injury under the No-Fault Law where the plaintiff’s experts fail to address indications from the plaintiff’s own medical records, or in the plaintiff’s own

expert evidence, that the physical deficits in question result from a preexisting degenerative condition rather than the subject accident. (*See Rivera v. Fernandez & Ulloa Auto Group*, 2014 N.Y. App. Div. LEXIS 8664, 2014 NY Slip Op 8735 [1st Dept. Dec. 11, 2014]; *Alvarez v NYLL Mgt. Ltd.*, 120 AD3d 1043, 1044, 993 N.Y.S.2d 1 [1st Dept. 2014] [plaintiff failed to raise issue of fact where, inter alia, his expert failed to address "detailed findings of preexisting degenerative conditions by defendants' experts, which were acknowledged in the reports of plaintiff's own radiologists"]; *Farmer v Ventkate, Inc.*, 117 AD3d 562, 562, 986 N.Y.S.2d 98 [1st Dept. 2014] [plaintiff failed to raise issue of fact where, inter alia, "(h)is orthopedic surgeon concurred that the X rays showed advanced degenerative changes"]; *Mena v White City Car & Limo Inc.*, 117 AD3d 441, 441, 985 N.Y.S.2d 234 [1st Dept. 2014] [plaintiff failed to raise issue of fact where, inter alia, "plaintiff's own radiologists noted degenerative conditions in their MRI reports, but failed to explain why this was not the cause of plaintiff's injuries"]; *Paduani v Rodriguez*, 101 AD3d 470, 470, 471, 955 N.Y.S.2d 48 [1st Dept. 2012] [plaintiff failed to raise issue of fact where, inter alia, defendants submitted "a radiograph report of plaintiff's radiologist finding severe degenerative changes" and, "(w)hile (plaintiff's) expert acknowledged in his own report MRI findings of degenerative changes in the lumbar spine, he did not address or contest such findings, and the MRI report of (plaintiff's) radiologist found herniations but did not address causation"]; *Rosa v Mejia*, 95 AD3d 402, 404, 943 N.Y.S.2d 470 [1st Dept. 2012] [plaintiff failed to raise issue of fact where, inter alia, "plaintiff's own radiologist . . . confirmed degenerative narrowing at the L5-S1 intervertebral disc space' without further comment"]]).

With respect to the plaintiff's claim based on the 90/180-day category, the plaintiff maintains that the plaintiff's alleged inability to work for 90 days post-accident establishes a serious injury. As defendant argues, the plaintiff was self-employed, and

only worked when he bid on jobs, and his bids were accepted. There was no evidence that he had existing bids that had been accepted at the time of the accident. In any event, even assuming that plaintiff was unable to work, absence from work alone is not determinative under the 90/180-day category. (*Anamedi v. Anamedi*, 70 A.D.3d 449, 895 N.Y.S.2d 42 [1st Dept. 2010] [fact that the injured plaintiff may have missed more than 90 days of work is not determinative of this claim].) Here, the plaintiff admitted at his deposition and in his bill of particulars that he was not confined to his home more than a week or two. (*Boone v. Elizabeth Taxi, Inc.*, 120 A.D.3d 1143, 993 N.Y.S.2d 302 [1st Dept. 2014] [defendants met their prima facie burden with respect to plaintiff's 90/180-day claim by submitting plaintiff's deposition testimony in which he claimed that he was only confined to his bed and home for a month after the subject accident].) There is no evidence in the record suggesting that he was prevented from performing substantially all of the material acts that constituted his usual and customary daily activities for 90 of the 180 days following the accident. The plaintiff's testimony does not establish an issue of fact as to the 90/180 day category.

While there is ample evidence that the plaintiff has limitations of motion and other conditions, plaintiff has not rebutted the defendant's *prima facie* case that the plaintiff's conditions were pre-existing.

Accordingly, the motion is granted, and the complaint is dismissed. It is

ORDERED that the defendant is directed to serve a copy of this Order on the plaintiff with notice of entry thereon.

Dated: 1/6/15


 SHARON A. M. AARONS, J.S.C.