

Quiles v Rojas

2015 NY Slip Op 31664(U)

January 5, 2015


Supreme Court, Bronx County

Docket Number: 306567/11

Judge: Howard H. Sherman

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.


JAN 08 2015

NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 04

-----X
ERIC W. QUILES,

Plaintiff,

Index No. 306567/11

-against-

DECISION/ORDER

JUANA ROJAS, ARIEL REYES and JUAN BAEZ,

Defendants.

Howard H. Sherman
J.S.C.

-----X

The following papers numbered 1 to 3 read on this motion for summary judgment defendant noticed on August 27, 2013 and duly submitted on the Motion Calendar of February 3, 2014.

	<u>PAPERS NUMBERED</u>	
Notice of Motion - Exhibits and Affirmation Annexed	1	
Notice of Cross Motion	2	
Affirmation in Opposition	3	

Upon the foregoing papers this motion and cross-motion are granted to the extent and for the reasons set forth below.

Facts and Procedural Background

Plaintiff seeks damages for injuries allegedly sustained in a motor vehicle accident that occurred on January 6, 2010 at or near the intersection of Elton Avenue and East 157th Street, Bronx County, New York.

Verified Bill of Particulars

It is alleged that plaintiff sustained the following permanent injuries as a result

of the motor vehicle accident: acute sprains/strains of the cervical, thoracic and lumbar spine with cervical and lumbar herniations and radiculopathies, as well as restrictions in ranges of motion and right shoulder injuries requiring surgical repair [¶18].

In addition, it is alleged that as a result of the injuries, plaintiff was confined to bed for 90 out of 180 days post-accident [¶ 10].

The injuries are alleged to qualify as defined as a "fracture," and a significant disfigurement, and as permanent loss of use of a body organ, member, function or system, and 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 a medically determined injury or impairment of a non-permanent nature which prevented plaintiff from performing his usual and customary daily activities for not less than ninety days during the one hundred and eighty days immediately following the occurrence [¶ 21].

Motion/Cross-Motion

1) Defendants Ariel Reyes and Juan Baez move for an order awarding summary judgment dismissal of the complaint on the grounds that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d).

The motion is supported by the affirmed reports of an independent orthopedic examination and of an evaluation of the emergency treatment records of Lincoln Hospital and the certified transcript of plaintiff's 11/16/12 deposition testimony.

2) Defendant Juana Rojas' cross-moves for the same relief incorporating and adopting the arguments and submissions on the co-defendants' motion.

Independent Medical Evaluations

1) On January 24, 2013, plaintiff presented for an independent orthopedic evaluation conducted by Alan M. Crystal, M.D., with complaints of right shoulder pain and occasional neck and back pain. He also complained that his right arm "falls asleep."

For purposes of his evaluation Dr. Crystal reviewed the contemporaneous X-ray, MRI and EMG reports; emergency room records and a pre-surgical report and the operative report all of which are fully incorporated within the affirmed report.

Upon examination, Dr. Crystal found full ranges of motion of the cervical spine, and of both shoulder in all planes as quantified and compared to normal readings. There were negative findings on straight leg raising testing in both the supine position and on the Lasegues test.

Dr. Crystal concluded that plaintiff was fully functional to perform usual daily activities without restriction.

With respect to the spinal injuries asserted, Dr. Crystal opined to a reasonable degree of medical certainty that plaintiff had no objective findings of a symptomatic herniated disc at a lumbar, or thoracic or a cervical level causing nerve root impingement. Due to the "lack of any objective neurological findings, the MRI showing an osteophyte, the x-rays showing arthritis, and the high prevalence of bulging discs in individuals with arthritis of the spine" Dr. Crystal

concluded that "there is no basis to causally relate the alleged injuries of record of the cervical, thoracic, and lumbar spine to the accident of 1/8/10."

Concerning the right shoulder injury alleged, Dr. Crystal notes the lack of any documentation of such injury in either the ambulance report or the ER records, and observes that any traumatic labral tear would have been extremely painful and exhibit evidence of swelling. He further notes that the MRI of the shoulder was not performed until three months after the accident, and that its findings are consistent with tendon wear and tear (tendinosis) and the radiologist interprets the focal increased signal as being consistent with "tendinosis versus a small partial tear of the supraspinatus muscle's tendon'." Dr. Crystal also observes that the surgeon did not note any partial tear and found the rotator cuff to be intact, and he concluded or that there was no basis to causally relate the right shoulder injury of record to the accident.

2) Timothy G. Haydock, M.D. a board certified emergency medicine physician reviewed the bill of particulars as well as the NYPD accident report and the EMS report, in addition to the Lincoln Hospital records.

Dr. Haydock concludes that the medical records are inconsistent with the injuries alleged and demonstrate that those injuries do not have a traumatic origin.

He notes that the physical examination was remarkable for mild tenderness to the cervical spine without tenderness of the back, or the, chest, and/or extremities and that plaintiff was moving all extremities without difficulty. There were no lacerations, contusions or joint swelling, or numbness or weakness

observed, and plaintiff's gait was found to be normal. A CT scan revealed no fractures nor soft tissue abnormality. The discharge diagnosis was of neck pain.

Specifically, Dr. Haydock concludes that there were no signs or symptoms or findings of a right shoulder injury, and such an injury been sustained in the accident, there would have been complaints of pain, and symptoms observed including decreased range of motion and/or tenderness and/or swelling, and/or bruising no such positive findings were made, nor were imaging studies ordered, or sub-specialty consultations referred.

With respect to the lumbar spine injuries alleged, Dr. Haydock finds that had the herniation and radiculopathy been present plaintiff's emergency treatment records would have reflected complaints of severe radiating back pain, tenderness and difficulty in walking. The report revealed a normal gait, non-tenderness, no radicular pain nor numbness, nor weakness. No x-rays, CT scans or MRIs were ordered, and these studies would have been conducted had there been evidence of a significant back injury.

Deposition Testimony

As pertinent here, plaintiff testified that he was taken by ambulance from the accident scene after advising the emergency technicians that he had a bad headache and his neck and back was hurting him [Quiles EBT 46 - 49]. At the hospital he complained that he was dizzy and he had pains in his neck and back [Id. 49]. Plaintiff was examined, and an x-ray of his neck was performed and he was discharged [Id. 50 - 51].

He was confined to home for a period of one week after the accident [Id. 11 - 12].

About a couple of weeks later, he consulted with a medical facility at 180 Third Avenue about the pain in his neck, back and right shoulder [Id. 52]. He treated there until after his shoulder surgery [Id. 55]. After the surgery, he was confined for an approximately a two month period [Id. 18].

At the time of the deposition plaintiff was employed as a mechanic installing sprinklers for a plumbing company [Id. 27 - 30].

Discussion

It is first noted that a review of the allegations of injuries here, there is no material issue of fact that plaintiff sustained a serious injury in the "permanent loss of use" category asserted (see, Oberly v Bangs Ambulance Inc., 96 NY 2d 295, 751 NE 2d 457 [2001]).¹

It is the further finding of this court that through probative medical evidence of negative findings upon recent examination as well as the findings with respect to the atraumatic origins of injuries alleged and those concerning the injuries assessed by the treating emergency medical physicians, defendants have demonstrated as a matter of law that plaintiff did not sustain a serious injury in the "significant limitation" and/or "permanent consequential" use categories asserted.

With respect to any non-permanent serious injury, evidence consisting of

¹ The injuries asserted also fail to qualify as a "fracture," nor would the healed portal sites qualifying as a "significant disfigurement."

plaintiff's testimony of the periods of confinement as well as the probative medical evidence of the lack of significant traumatic injury, demonstrate as a matter of law the lack of a serious injury in the 90/180 category (see, Frias v Son Tien Liu, 107 AD 3d 589, 590, 967 NYS 2d 382 [1st Dept. 2013]; Batista v Porro, 110 AD 3d 609, 609-610, 973 NYS 2d 213 [1st Dept. 2013]).

Upon this showing, it is incumbent upon plaintiff to come forward with probative medical evidence to raise an issue of fact that he sustained an accident-related serious injury. Plaintiff has met this burden with respect to the "significant" and "permanent consequential" limitations of use categories.

Plaintiff's medical evidence demonstrates that he sought treatment for accident-related injuries inclusive of right shoulder pain, as well as neck and lower back pain, and headaches, four days after the accident, and that upon initial examination, restrictions of the range of motion of both the cervical and lumbar spine, and the right shoulder were clinically assessed and causally related by the treating physician to the trauma of the motor vehicle accident. In addition, plaintiff's evidence reveals that upon examination more than two years later, plaintiff was found to have restrictions in the range of motion in these areas, which, upon the assessment of the examining physician are causally related to the accident. Issues of fact raised by the conflicts in the experts' assessment of findings of range of motion upon recent examination, as well as that of those of the etiology of the right shoulder and lumbar spine injuries raised by defendants' experts, and the attendant issue of whether there was an accident-related basis for surgical

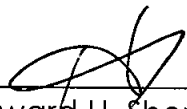
intervention, are more properly reserved for the triers of fact.

It is the further finding of this court that plaintiff has come forward with no probative evidence to raise a triable issue of fact of a 90/180 claim as the admissible contemporaneous medical records fail to incorporate any non-conclusory recommendation for the requisite significant curtailment of daily activities.

Accordingly, for the reasons above-stated the defendants' motion and cross motion are granted to the extent of awarding partial summary judgment dismissing all claims of serious injury with the exception of those in the "permanent consequential" and "significant" limitations of use categories.

This constitutes the decision and order of this court.

Dated: January 5, 2015
Bronx, New York



Howard H. Sherman
J.S.C.