

Gomez v Supergalex, LLC

2015 NY Slip Op 31665(U)

January 22, 2015

Supreme Court, Bronx County

Docket Number: 306791/2008

Judge: Sharon A.M. Aarons

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX Part 24

OSVALDO GOMEZ,

Plaintiff,

-against-

SUPERGALEX, LLC and RAFAEL PENA,

Defendants.

Index No. 306791/2008

DECISION AND ORDER

SUPERGALEX, LLC and RAFAEL PENA,

Third-Party Plaintiffs,

-against-

HERTZ VEHICLES LLC and CAMERON A. FISHER,

Third-Party Defendants.

Index No. 83937/2009

Hon. Sharon A. M. Aarons:

Third-Party defendant Cameron A. Fisher moves for summary judgment pursuant to CPLR 3212 dismissing the complaint and the third-party complaint on the ground of absence of serious injury under Insurance Law 5102 (d). Third-party defendant Hertz Vehicles LLC (Hertz) “joins” in the motion. Defendants Supergalex, LLC (Supergalex) and Rafael Pena (Pena), represented by the same counsel, also “join” in the motion. Plaintiff submits written opposition. The motion is granted in part and denied in part.

In this personal injury action, plaintiff seeks damages for alleged “serious injury” incurred as a result of a multi-vehicle accident which occurred at 4:45 PM on March 2, 2008, on the Southbound Hutchinson River Parkway in Scarsdale, New York. Plaintiff was a passenger in a commercial van owned by defendant Supergalex, and driven by defendant Pena, which allegedly struck the vehicle in

front of it, and then was in turn struck from behind by another vehicle.¹ Plaintiff alleges a serious injury under the consequential limitation, significant limitation, and 90/180 day categories set forth under Insurance Law § 5102(d).

In support of the motion, third-party defendant submits the pleadings and bills of particulars; the signed, certified deposition² testimony of the plaintiff Osvaldo Gomez, the affirmed report of defendant's neurologist Roger A. Bonomo, M.D., and the unaffirmed letter report of Lewis M. Rothman, M.D. In his deposition testimony, the plaintiff indicated that he returned to work a few weeks after the accident, performing the same duties as before the accident, but that he was "laid off" in September, 2009, because he could no longer perform heavy lifting as a result of the accident.

Plaintiff's bill of particulars states that plaintiff's injuries include disc herniations at C3-4, C4-5, and C5-6. The defendant's neurologist Dr. Bonomo examined the plaintiff on February 12, 2013, and found that "[r]ange of motion (ROM) of the neck is full with report of neck pain on full extension. Cranial nerves 2-12 are normal." He found muscle of the right neck and lower back to be tender, but without muscle spasm. Dr. Rothman reviewed plaintiff's MRI scans dated April 25, 2008, and opined that there were "minimal" disc bulges at C5-6 and C6-7, without herniation, consistent with degenerative disc disease.

Third-party defendant Hertz, and defendants Supergalex, LLC and Rafael Pena, who "join" in the motion, submit no additional evidence.

¹In a related action brought by another passenger of the van, this Court (Aarons, J.) dismissed all claims of "serious injury" except for the claim under the "90/180" category. *Rodriguez v. Hertz*, Index No. 308125/2010, Sup. Ct., Bronx County.

²The deposition transcript, albeit not signed, is certified by the reporter, and is not challenged as inaccurate. It may thus be considered in support of the motion. (*Ortiz v. Lynch*, 105 A.D.3d 584, 965 N.Y.S.2d 84 [1st Dept. 2013]; *Bennett v Berger*, 283 AD2d 374, 726 N.Y.S.2d 22 [1st Dept. 2001]).

In opposition, plaintiffs submits the affirmed report of plaintiff's treating physician, Dr. Gautam Khakar, who treated the plaintiff for approximately one year before determining that he had reached maximum medical improvement.

The court's function on this motion for summary judgment is issue finding rather than issue determination. (*Sillman v. Twentieth Century Fox Film Corp.*, 3 N.Y.2d 395, 144 N.E.2d 387, 165 N.Y.S.2d 49 [1957]). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. (*Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223, 385 N.E.2d 1068, 413 N.Y.S.2d 141 [1978].) Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. (*Stone v. Goodson*, 8 N.Y.2d 8, 167 N.E.2d 328, 200 N.Y.S.2d 627 [1960].)

"On a motion for summary judgment dismissing a complaint that alleges a serious injury under Insurance Law § 5102 (d), the defendant bears the initial 'burden of establishing by competent medical evidence that plaintiff did not sustain a serious injury caused by the accident' " (*Haddadnia v. Saville*, 29 AD3d 1211, 1211, 815 NYS2d 319 [3d Dept. 2006]; *Toure v. Avis Rent A Car Sys.*, 98 NY2d 345, 352, 774 NE2d 1197, 746 NYS2d 865 [2002]). The defendant may satisfy that burden if it presents the affirmation of a doctor which recites that the plaintiff has normal ranges of motion in the affected body parts, and identifies the objective tests performed to arrive at that conclusion. (*See Lamb v Rajinder*, 51 AD3d 430, 859 NYS2d 4 [1st Dept. 2008]). If a defendant satisfies this burden, the plaintiff must present evidence of (1) contemporaneous treatment – qualitative or quantitative – to establish that the plaintiff's injuries were causally related to the accident and (2) recent examination to establish permanency. There is no requirement that "contemporaneous" quantitative measurements be made. (*Perl v. Meher*, 18 N.Y.3d 208, 936 N.Y.S.2d 655, 960 N.E.2d 424 [2011] [permissible to observe and recording a patient's symptoms in qualitative terms shortly after the accident, and later perform more

specific, quantitative measurements in preparation for litigation]; *Rosa v. Mejia*, 95 A.D.3d 402, 943 N.Y.S.2d 470 [1st Dept. 2012] [“Perl did not abrogate the need for at least a qualitative assessment of injuries soon after an accident.”])

The defendant’s experts did not meet their burden of establishing the absence of a serious injury under the under the consequential limitation or significant limitation categories set forth under Insurance Law § 5102(d). Dr. Rothman’s report is not affirmed or sworn, and thus has no evidentiary value. With respect to Dr. Bonomo’s report, while he recited that the plaintiff had normal ranges of motion in his cervical spine, he failed to define “normal” ranges of motion, or identify the objective tests he performed to arrive at his conclusion. Moreover, while he opined that plaintiff’s cranial nerves were normal, he again failed to identify the tests he used to reach this conclusion. (*Prince v. Lovelace*, 115 A.D.3d 424, 981 N.Y.S.2d 410 [1st Dept. 2014] [defendant's expert orthopedist did not measure the range of motion of the knee, and failed to identify any tests that were done to support his conclusion that any injuries had resolved]; *Jackson v. Leung*, 99 A.D.3d 489, 952 N.Y.S.2d 130 [1st Dept. 2012] [defendant’s sole medical expert, a neurologist, did not report the results of any range of motion testing, review the MRI film of plaintiff’s spine, or offer any alternative opinion as to causation].)

Because defendant failed to meet her burden with respect to permanent consequential limitation or significant limitation, her motion must be denied, regardless of the sufficiency of plaintiff’s opposing papers. (*Santos v. New York City Tr. Auth.*, 99 A.D.3d 550, 952 N.Y.S.2d 179 [1st Dept. 2012]; *Escotto v Vallejo*, 95 AD3d 667, 668, 944 NYS2d 550 [1st Dept 2012]).

As to the 90/180 category of serious injury, in order to make a prima facie case, the defendant must either point to evidence that the plaintiff in fact performed usual and customary activities (usually by pointing to plaintiff’s own testimony), or by submitting medical evidence that the plaintiff did not sustain a medically determined injury or impairment of a non-permanent nature. (*Jno-Baptiste v*

Buckley, 82 A.D.3d 578, 919 N.Y.S.2d 22 [1st Dept. 2011]; *Fernandez v Niamou*, 65 A.D.3d 935, 885 N.Y.S.2d 486 [1st Dept 2009]; *Ortiz v Ash Leasing, Inc.*, 63 A.D.3d 556, 883 N.Y.S.2d 180 [1st Dept 2009]; *Reyes v Esquilin*, 54 A.D.3d. 615, 866 NYS2d 4 [1st Dept 2008]; *Nelson v Distant*, 308 A.D.2d 338, 764 N.Y.S.2d 258 [1st Dept 2003]). Plaintiff's deposition testimony indicates that in fact he returned to work within a few weeks of the accident, and remained at the same job for approximately a year and a half. His statement that he was "laid off" because he could not do heavy lifting is not supported by any other evidence of any kind, and is contradicted by his own testimony that he performed the same duties when he returned to work as he had prior to the accident.

With respect to an alleged gap in treatment, as argued by the defendants, the plaintiffs' treating physician's statement that plaintiff had reached maximum medical improvement when treatment stopped, and that further treatment would only have been palliative, is a reasonable explanation sufficient to raise an issue of fact (*Ayala v. Cruz*, 95 A.D.3d 699, 945 N.Y.S.2d 240 [1st Dept. 2012]; *Pommells v Perez*, 4 NY3d 566, 577, 830 NE2d 278, 797 NYS2d 380 [2005]).

Accordingly, the motion is granted only to the extent of dismissing the claim under the "90/180" category. It is hereby,

ORDERED that any claim of serious injury based on the "90/180" category is dismissed. and it is

ORDERED that the third-party defendant Camaeron A. Fisher shall serve on all parties a copy of this Order with Notice of Entry.

Dated: January 22, 2015



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