

Hunt v Tampus

2015 NY Slip Op 32151(U)

October 14, 2015

Supreme Court, Bronx County

Docket Number: 307569/2012

Judge: Ben R. Barbato

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
PRESENT: Honorable Ben R. Barbato

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Ivory L. Hunt,

Plaintiff,

DECISION and ORDER
Index No. 307569/2012

-against-

Eugene R. Tampus,

Defendant.

-----X

Recitation of the papers considered in reviewing the underlying motion for summary judgment as required by CPLR § 2219(a):

Notice of Motion and annexed Exhibits and Affidavits.....	1, 2, 3
Affirmation in Opposition and annexed Exhibits.....	4, 5
Reply Affirmation.....	6

Plaintiff alleges that he sustained a serious injury as a result of a motor vehicle accident that occurred on November 22, 2010 when defendant's vehicle collided with plaintiff's vehicle. Defendant moves for summary judgment pursuant to CPLR 3212 on threshold grounds pursuant to Insurance Law § 5102(d).

DISCUSSION

Summary judgment is a drastic remedy that a court should employ only in the absence of triable issues of fact. (*Andre v Pomeroy*, 35 NY 2d 361 [1974].) Insurance Law § 5102(d) sets forth the serious injury threshold:

a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent

loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a nonpermanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment.

The proponent of a motion for summary judgment must present evidence sufficient to show that no material issues of fact exist with regard to the threshold issue. (*Bray v Rosas*, 29 AD3d 422 [1st Dept 2006]; *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Medical Center*, 64 NY2d 851 [1985].) Here, the burden rests on the defendant to establish by the submission of proof in admissible form that plaintiff did not suffer a serious injury. When a defendant's motion is sufficient to raise the issue as to whether a serious injury has been sustained by the plaintiff, the burden shifts to the plaintiff to produce prima facie evidence in admissible form to support the claim of serious injury. (*Perez v Rodriguez*, 25 AD3d 506 [1st Dept 2006]; *Licari v Elliot*, 57 NY2d 230 [1982]; *Espinal v Senatore*, 65 NY2d 1017[1985].)

The bill of particulars sets forth the plaintiff's injuries as follows:

Left knee tear of the posterior horn of the medial meniscus; joint effusion of the left knee with internal derangement; Cervical disc herniations at C4-C5 and C5-C6 with impingement; cervical radiculitis; Lumbar disc bulges at L3-L5 and L5-S1; sprains and strains of the spine.

Defendant contends that plaintiff's injuries do not meet the statutory mandate of a

serious injury. In support of his motion, defendant proffers the medical finding of Dr. Jaqueline Emmanuel, the pleadings, the bill of particulars and plaintiff's deposition testimony.

Dr. Emmanuel, the defendant's orthopedist, examined the plaintiff on November 18, 2013. She reviewed the plaintiff's bill of particulars, the unsworn medical records of plaintiff's physical therapy and treatment from various facilities, and the unsworn MRI reports of plaintiff's knee, cervical and lumbar spine. During her examination, plaintiff complained of pain to his neck, back and left knee. Dr. Emmanuel performed range of motion tests using a goniometer on the plaintiff's cervical, thoracic and lumbar spine and left knee that revealed no restrictions. There was no tenderness or spasm noted. She opined that the plaintiff's cervical and lumbar sprain/strain that were casually related to the accident had resolved. Dr. Emmanuel concludes that plaintiff demonstrates no objective evidence of disability and that there is no medical necessity for further treatment as maximum medical improvement has been achieved. Defendant also points to plaintiff's deposition where plaintiff testified that he stopped getting treatment in August of 2013 and that he was confined to home and bed for approximately three (3) days. He was not employed at the time of the accident.

Based on the foregoing, the defendant has established prima facie that plaintiff did not suffer a serious injury (*Clemmer v Drah Cab Corp.*, 74 A.D.3d 660, 667 [1st Dept 2010]). Consequently, it is incumbent upon plaintiff to come forward and present proof of a serious

injury in admissible form. (See, *Grasso v Angerami*, 79 NY2d 814 [1991]).

In opposition plaintiff submits plaintiff's affidavit, the affirmation of Dr. Eva Gateva, the affirmation of Dr. Frida Goldin, and the unsworn records from plaintiff's various medical providers including unsworn MRI reports.

Dr. Eva Gateva initially examined the plaintiff on November 24, 2010 and during his visit, plaintiff complained of pain to his neck, lower back, and left knee. Dr. Gateva's examination indicated restricted range of motion in plaintiff's cervical and lumbar spine. Straight leg raising was positive. She referred the plaintiff for physical therapy three to four times a week and diagnostic exams including an MRI of the neck, back and left knee.

In her report, Dr. Gateva makes reference to plaintiff's unsworn records from Dr. Hadassah Orenstein, Dr. D. Kroopnick, and Dr. Mohamed K. Nour who examined the plaintiff and found limitation in his spine and left knee. Physical therapy was recommended. They also described other orthopedic tests that they performed, and reported that the results were positive. Dr. Gateva opined that his overall prognosis is guarded and plaintiff will continue to have episodes of remission and exacerbation. She stated that plaintiff sustained a permanent disability with permanent consequential limitation and significant loss of use to the parts of the body injured in the accident. Plaintiff was instructed to continue physical therapy and exercise for maintenance and preclude exacerbation. She attributes plaintiff's condition solely to the subject accident.

Plaintiff has submitted the unworn medical reports of Dr. Mohamed K. Nour who

examined the plaintiff on December 1, 2010 and on February 25, 2011 in which he noted restrictions on plaintiff's left knee, cervical and lumbar spine. He stated that the injuries are related to the subject accident and that plaintiff is partially disabled. He recommended physical therapy 2-3 times a week for six weeks. Plaintiff also submits the unsworn MRI reports of Dr. Robert D. Solomom who conducted the MRI exams of plaintiff's left knee, cervical and lumbar spine on December of 2010. The MRI of the left knee revealed joint effusion with a tear of the posterior horn of the medial meniscus. The MRI of the lumbar spine revealed disc bulges at L3-L4, L4-L5 and L5-S1 with thecal sac compression. The MRI of plaintiff's cervical spine found herniations at C4-5 and C5-6 with cord impingement and flattening.

On November 24, 2014, plaintiff was examined by Dr. Frida Goldin whose affirmed report indicates that during his visit, plaintiff complained of neck, lower back, and left knee pain. Dr. Goldin noted restricted range of motion of plaintiff's left knee 130 degrees where normal range is 150 degrees. She also found restrictive range of motion in plaintiff's lumbar and cervical spine with tenderness and spasm in the lumbar region. Her diagnosis was cervical and lumbar spine sprain/strain with derangement and left knee sprain with meniscal derangement which were causally related to the accident at issue and that these injuries are permanent.

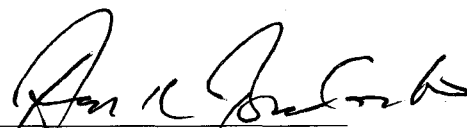
Plaintiff in his affidavit dated February 4, 2015 states that he has continued to exhibit pain on his left knee, back and neck. He also states that he had to stop treatment because his

no-fault benefits expired and he was unable to afford continued treatment.

The Court's function in deciding a motion for summary judgment is issue finding rather than issue determination. (*Sanchez v National Railroad Passenger Corp.*, 92 AD3d 600 [1st Dept 2012].) After a careful review of the evidence, the Court finds that the examinations performed on the plaintiff and the evidence relied upon by Dr. Gateva, Dr. Nour, Dr. Solomom, Dr. Goldin and Dr. Emmanuel, the defendant's examining physician, create a triable issue of fact. With respect to plaintiff's reliance on unsworn records or reports, plaintiff could rely on them since defendant-movant's orthopedist referred to said records in her examination report. See, *Mitchell v Calle*, 90 AD3d 584 [1st Dept 2011]; *Ayzen v Melendez*, 299 AD2d 381. The dispute between the parties' expert as to whether there is a tear in the left knee and herniations and bulges in the cervical and lumbar spine that were resolved and casually related to the subject accident, raise issues of fact (*Aviles v Villapando*, 112 AD3d 534 [1st Dept 2013]). A jury must determine the physicians' credibility and the weight to be accorded to their expert testimony. (*Windisch v Weiman*, 161 AD2d 433 [1st Dept 1990].) Defendants' motion for summary judgment is accordingly denied.

This constitutes the decision and order of this Court.

Dated: Bronx, New York
October 14, 2015



Hon. Ben R. Barbato
A.J.S.C.