Solomon v Khublal
2015 NY Slip Op 32297(U)
December 4, 2015
Supreme Court, Queens County
Docket Number: 11095/2013
Judge: Robert J. McDonald

Short Form Order

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

- x

DURAN SOLOMON,

Plaintiff,

- against -

RAVINDRA M. KHUBLAL and SHALINI SINGH,

Defendants.

- x

Index No.: 11095/2013

Motion Date: 11/12/15

Motion No.: 144

Motion Seq No.: 2

The following papers numbered 1 to 8 read on this motion by defendants for an order pursuant to CPLR 3212 granting defendants summary judgment and dismissing plaintiff's complaint on the ground that plaintiff fails to meet the serious injury threshold requirement of Insurance Law § 5102(d):

	Papers Numbered
Notice of Motion-Affirmation-Exhibits	1 - 4
Affirmation in Opposition-Exhibits	5 - 6
Reply Affirmation-Exhibits	7 - 8

This is a personal injury action in which plaintiff seeks to recover damages for injuries he allegedly sustained in a motor vehicle accident that occurred on February 16, 2012 on 170th Street at or near its intersection with 89th Avenue, in Queens County, New York. Plaintiff alleges that as a result of the accident he sustained serious injuries to his cervical spine and lumbar spine, including disc herniations.

Plaintiff commenced this action by filing a summons and verified complaint on June 10, 2013. Defendants joined issue by service of an answer dated September 12, 2013. Defendants now move for an order pursuant to CPLR 3212, dismissing the complaint, on the ground that the injuries claimed by plaintiff fail to satisfy the serious injury threshold requirement of Section 5102(d) of the Insurance Law.

In support of the motion, defendants submits an affirmation from counsel, Doris Rinck, Esq.; a copy of the pleadings; a copy of plaintiff's verified bill of particulars; a copy of the transcript of the examination before trial of plaintiff taken on February 23, 2015; a copy of a So-Ordered discovery stipulation; a copy of the emergency room records from Jamaica Hospital and the ambulance call report; a copy of the affirmed medical report of Frank D. Oliveto, M.D.; and a copy of the affirmed medical report of Marianna Golden.

On March 18, 2015, Dr. Oliveto performed an independent orthopedic examination on plaintiff. Plaintiff presented with neck pain which radiates to the arms, low back pain which radiates to the legs, headaches, and pain in his wrists, hands, hips, and feet. Dr. Oliveto identifies the medical records he reviewed and performed range of motion testing using a goniometer. He found normal ranges of motion in plaintiff's cervical spine, lumbar spine, right elbow, left elbow, right wrist, right hand, left wrist, left hand, right hip, left hip, right ankle, right foot, left ankle, and left foot. Dr. Oliveto's diagnosis is cervical and lumbar spine sprains/strains resolved.

Dr. Golden performed an independent neurologic evaluation on plaintiff on March 18, 2015. Dr. Golden lists the records reviewed and also performed range of motion testing with a goniometer. Dr. Golden found normal range of motion in plaintiff's cervical spine and lumbar spine. Dr. Golden's diagnosis was cervical and lumbar spine strains/sprains resolved. She states that plaintiff had a normal neurological examination.

At his examination before trial, plaintiff testified that immediately after the accident he felt pain in his neck and lower back. He was taken by ambulance to Jamaica Hospital Emergency Room where x-rays were taken of his neck. He stated that he had a history of L4-L5-S1 herniated discs and that his lower back pain was made worse by the accident. He sought treatment from the chiropractor and orthopedist hat had been treating him prior to his back injury. Prior to the accident he saw his chiropractor, Dr. Martin Gillman, twice a week for his lower back. He had no injections or surgery as a result of this accident. He has no future scheduled doctor appointments regarding any injuries allegedly sustained as a result of this accident. He was last treated for this accident sometime in 2013. He returned to work on May 15, 2012 and resumed his normal work duties. Due to the accident, he can no longer play basketball, football or soccer and running causes pain. Plaintiff also testified that he was injured in a work-related accident on December 5, 2011 which caused lower back pain.

Defendants' counsel contends that the evidence submitted is sufficient to establish, prima facie, that plaintiff has not sustained a permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; or significant limitation of use of a body function or system. Counsel also contends that plaintiff, who returned to work less than three months after the accident and was only confined to bed for the first two weeks following the accident, did not sustain a medically determined injury or impairment of a nonpermanent nature which prevented him, for not less than 90 days during the immediate 180 days following the occurrence, from performing substantially all of his usual daily activities.

In opposition, plaintiff submits an affirmation from counsel, Guy R. Vitacco, Jr., Esq. and an affirmed medical report of Dr. Martin Gillman.

Plaintiff first sought treatment with Dr. Gillman a few days following the accident and treated with Dr. Gillman for approximately one year. Most recently, on October 29, 2015, Dr. Gillman examined plaintiff and found reduced range of motion in plaintiff's cervical spine. He states that the injuries resulted from the subject accident and that the restrictions of motion have resulted in permanent partial disability.

On a motion for summary judgment, where the issue is whether the plaintiff has sustained a serious injury under the no-fault law, the defendant bears the initial burden of presenting competent evidence that there is no cause of action (Wadford v. Gruz, 35 AD3d 258 [1st Dept. 2006]). "A defendant can establish that plaintiff's injuries are not serious within the meaning of Insurance Law § 5102 (d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (Grossman v Wright, 268 AD2d 79 [1st Dept. 2000]). Whether a plaintiff has sustained a serious injury is initially a question of law for the court (Licari v Elliott, 57 NY2d 230 [1982]). Where a defendant's motion for summary judgment properly raises an issue as to whether a serious injury has been sustained, it is incumbent upon the plaintiff to produce evidentiary proof in admissible form in support of his or her allegations. The burden, in other words, shifts to the plaintiff to come forward with sufficient evidence to demonstrate the existence of an issue of fact as to whether he or she suffered a serious injury (see Gaddy v Eyler, 79 NY2d 955 [1992]; Zuckerman v City of New York, 49 NY2d 557 [1980]; Grossman v Wright, 268 AD2d 79 [2d Dept. 2000]).

Here, the proof submitted by defendants, including the affirmed medical reports of Drs. Oliveto and Golden as well as plaintiff's deposition testimony, is sufficient to meet defendants' prima facie burden by demonstrating that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler,79 NY2d 955 [1992]).

In opposition, plaintiff failed to raise a triable issue of fact (see Zuckerman v City of New York, 49 NY2d 557, [1980]; Cohen v A One Prods., Inc., 34 AD3d 517 [2d Dept. 2006]). To prove the extent or degree of an alleged physical limitation by a plaintiff, an expert must provide that the evaluation has an objective basis and the expert must compare the plaintiff's limitations to the normal function (see Toure v Avis Rent a Car Systems, Inc., 98 NY2d 345 [2002]). Dr. Gillman fails to indicate what authoritative guideline or objective measurement he utilized for obtaining the range of motion measurements. Additionally, evidence of a disc herniation is insufficient to raise a triable issue of fact under the permanent consequential limitation of use and the significant limitation of use categories of Insurance Law § 5102(d) absent objective proof of the extent and duration of the alleged physical limitations resulting from the injury (see Simanovskiy v Barbaro, 72 AD3d 930 [2d Dept. 2010]; Piperis v Wan, 49 AD3d 840 [2d Dept. 2008]; Yakubov v CG Trans Corp., 30 AD3d 509 [2d Dept. 2006]).

Furthermore, while a quantitative assessment or numerical assessment of range of motion of injury is not required on an initial or contemporaneous examination, the courts still require a contemporaneous qualitative assessment of injuries from an examination close to the time of the accident. "[A] contemporaneous doctor's report is important to proof of causation" (Perl v Meher, 18 NY3d 208[2011]). The absence of a contemporaneous medical report invites speculation as to causation (see Griffiths v Munoz, 98 AD3d 997 [2d Dept. 2012]). "[W]hile the Court of Appeals in Perl rejected a rule that would make contemporaneous quantitative assessments a prerequisite to recovery. . . Perl did not abrogate the need for at least a qualitative assessment of injuries soon after the accident (see Rosa v Mejia, 95 AD3d 402 [1st Dept. 2012]). Thus, Perl "confirmed the necessity of some type of contemporaneous treatment to establish that a plaintiff's injuries were causally related to the incident in question" (id.).

Although Dr. Gillman concludes that the injuries indicated in his report were sustained in the subject accident, Dr. Gillman's report does not include a quantitative assessment contemporaneous to the injury. Moreover, Dr. Gillman does not address plaintiff's prior injury to his lower back. As such, Dr. Gillman's opinion that plaintiff's injuries were sustained in the subject accident is speculative (see Perl v. Meher, 18 N.Y.3d 308 [2011]; Griffiths v. Munoz, 98 A.D.3d 997 [2d Dept. 2012]; Singh v. City of New York, 71 A.D.3d 1121 [2d Dept. 2010]).

Plaintiff also failed to submit competent medical evidence that the injuries allegedly sustained by him as a result of the subject accident rendered him unable to perform substantially all of his daily activities for not less than 90 days of the first 180 days following the accident. Plaintiff himself testified that he returned to work less than three months after the accident and he was only confined to bed for the first two weeks following the subject accident (see Ayotte v Gervasio, 81 NY2d 1062 [1993]; Valera v Singh, 89 ADd 929 [2d Dept. 2011]; Lewars v Transit Facility Mgt. Corp., 84 AD3d 1176 [2d Dept. 2011]; Nieves v Michael, 73 AD3d 716 [2d Dept. 2010]; Joseph v A & H Livery, 58 AD3d 688 [2d Dept. 2009]).

Accordingly, because the evidence relied upon by plaintiff is insufficient to create a triable issue of fact with respect to any of the statutory categories of serious injury, and for the reasons set forth above, it is hereby,

ORDERED, that defendants' motion for summary judgment is granted and plaintiff's complaint is dismissed; and it is further

ORDERED, that the Clerk of Court is directed to enter judgment accordingly.

Dated: December 4, 2015
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C.