Johnson v American Transp. Corp.
2015 NY Slip Op 32419(U)
December 17, 2015
Supreme Court, Suffolk County
Docket Number: 21329/13
Judge: Joseph C. Pastoressa
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SHORT FORM ORDER

INDEX No. 21329/13
~~13-5836~~
CAL. No. 14-00851MV

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

Mot. Seq. # 001 - MG
002 - XMG; CASEDISP

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MARCUS JOHNSON,

Plaintiff,

- against -

AMERICAN TRANSPORTATION CORP., SETH E. WAGNER, WILLIAM D. CLYDE and JOANNE E. CLYDE,

Defendants.

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Upon the following papers numbered 1 to 37 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; Notice of Cross Motion and supporting papers 13 - 20; Answering Affidavits and supporting papers 21 - 33; Replying Affidavits and supporting papers 34 - 35; 36 - 37; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the defendants American Transportation Corp. and Seth Wagner seeking summary judgment dismissing the complaint is granted; and it is further

ORDERED that the cross motion by the defendants William Clyde and Joanne Clyde seeking summary judgment dismissing the complaint is granted.

The plaintiff Marcus Johnson commenced this action to recover damages for injuries he allegedly sustained as a result of the a motor vehicle accident that occurred at the intersection of Hospital Road

and Health Science Drive in the Town of Brookhaven on December 13, 2012. By his complaint, the plaintiff alleges that, as the vehicle owned by the defendant American Transportation Corp. and operated by the defendant Seth Wagner made a right turn from the left lane of Hospital Road towards the road leading to the entrance of Stony Brook University Hospital, it was struck on the rear right passenger side by the vehicle owned by the defendant William Clyde and operated by the defendant Joanne Clyde. At the time of the accident, the plaintiff was a backseat passenger in the American Transportation Corp. vehicle. By his bill of particulars, the plaintiff alleges that he sustained various personal injuries as a result of the subject accident, including a herniated disc at level L5/S1; lumbar radiculopathy; disc bulges at levels T12 through S1; lumbar myofascitis; left shoulder derangement; and exacerbation of a pre-existing degenerative disc condition. Plaintiff further alleges that as a result of the injuries he sustained in the subject collision he was confined to his bed and home from December 13, 2012 until April 10, 2013.

The defendants American Transportation Corp. and Seth Wagner (hereinafter referred to as the "Wagner defendants") now move for summary judgment on the basis that the plaintiff's alleged injuries do not meet the serious injury threshold requirement of § 5102(d) of the Insurance Law. In support of the motion, the Wagner defendants submit copies of the pleadings, the plaintiff's deposition transcript, the uncertified medical records of the plaintiff's regarding the injuries at issue, and the sworn medical reports of Dr. Audrey Eisenstadt, Dr. Kumar Reddy and Dr. Edward Weiland. At the request of the Wagner defendants, Dr. Eisenstadt performed an independent radiological review of the magnetic resonance images ("MRI") films of taken the plaintiff's left shoulder and lumbar spine on February 14, 2013 and February 3, 2103, respectively. Also at the request of the Wagner defendants, Dr. Reddy conducted an independent orthopedic examination of the plaintiff on November 4, 2014. Lastly, at the Wagner defendants' request, Dr. Weiland conducted an independent neurological examination of the plaintiff on December 4, 2014. The defendants William Clyde and Joanne Clyde (hereinafter referred to as the "Clyde defendants") cross-move for summary judgment on the basis that the injuries the plaintiff alleges to have sustained as a result of the subject collision do not meet the serious injury threshold requirement of the Insurance Law. The Clyde defendants in support of their cross motion rely on the same evidence submitted by the Wagner defendants in their motion for summary judgment.

The plaintiff opposes the motions on the grounds that the Wagner defendants and the Clyde defendants failed to make a prima case that he did not sustain a serious injury within the meaning of the Insurance Law, and that the evidence submitted in opposition demonstrates that he sustained injuries within the "limitations of use" and the "90/180" categories of the Insurance Law as a result of the subject accident. In opposition to the motion, the plaintiff submits his own affidavit, the sworn medical reports of Dr. Scott Roteman, Dr. Mark Decker, and Dr. Gus Katsigiorgis, an uncertified copy of the police accident report, and the plaintiff's uncertified medical reports regarding the injuries at issue.

It has long been established that the "legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries" (Dufel v Green, 84 NY2d 795, 798; see Toure v Avis Rent A Car Sys., 98 NY2d 345). Therefore, the determination of whether or not a plaintiff has sustained a "serious injury" is to be made by the court in the first instance (see Licari v Elliott, 57 NY2d 230; Porcano v Lehman, 255 AD2d 430; Nolan v Ford, 100 AD2d 579, aff'd 64 NY2d 681).

Insurance Law § 5102 (d) defines a "serious injury" as "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 non-permanent 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 ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment."

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a "serious injury" (see Toure v Avis Rent A Car Sys., supra; Gaddy v Eyler, 79 NY2d 955). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, [such as], affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (Pagano v Kingsbury, 182 AD2d 268, 270). A defendant may also establish entitlement to summary judgment using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (see Fragale v Geiger, 288 AD2d 431; Grossman v Wright, 268 AD2d 79; Vignola v Varrichio, 243 AD2d 464; Torres v Micheletti, 208 AD2d 519). Once a defendant has met this burden, the plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard for "serious injury" under New York's No-Fault Insurance Law (see Dufel v Green, supra; Tornabene v Pawlewski, 305 AD2d 1025; Pagano v Kingsbury, supra).

Based upon the adduced evidence, the Wagner defendants and the Clyde defendants, through the submission of the plaintiff's deposition transcript and competent medical evidence, have established prima facie their entitlement to judgment as a matter of law that the plaintiff did not sustain an injury within the meaning of § 5102(d) of the Insurance Law as a result of the subject accident (see Toure v Avis Rent A Car Sys., supra; Gaddy v Eyler, supra, Valera v Singh, 89 AD3d 929). The defendants' examining orthopedist, Dr. Reddy, states in his medical report that an examination of the plaintiff reveals that he has full range of motion in his spine and left shoulder; that there was no tenderness or spasm upon palpitation of the paraspinal muscles; that there is no atrophy, crepitus or tenderness of the acromioclavicular ("AC") joint in the left shoulder; that the muscle strength of the lower and upper extremities is 5/5; and that the straight leg raising test and impingement signs are negative. Although Dr. Reddy does note significant range of motion limitations in the plaintiff's right shoulder, the plaintiff failed to allege any injuries to his right shoulder in his bill of particulars, and, therefore, it cannot be said that the observed limitations in the plaintiff's right shoulder are causally related to the subject accident (cf. Hussein v Empire Paratransit Corp., 124 AD3d 725). Moreover, Dr. Reddy opines that the alleged injuries to the plaintiff's lumbar spine and left shoulder have resolved, and that the plaintiff is capable of performing his normal activities of daily living. Likewise, the defendants' examining neurologist, Dr. Weiland, during his examination of the plaintiff found that he had full range of motion in his spine, that there was no active inflammation or swelling in the left shoulder, that the straight leg raising test was "unlimited at 90 degrees," that there were no myelopathic signs, and that the plaintiff's gait and coordination were within normal limits with no evidence of foot drop or hip tilt. Dr. Weiland states that

the strains the plaintiff sustained to his spine were resolved, that he had a normal neurological examination and does not have a neurologic disability, and that he is capable of performing his normal daily living activities and seeking gainful employment without restriction.

Furthermore, the defendants' examining radiologist, Dr. Eisenstadt, states in her medical report that a review of the MRI studies of the plaintiff's lumbar spine and left shoulder revealed the presence of longstanding degenerative joint disease and disc dessication, which were pre-existing to the subject accident, and that there was no evidence of a recent or acute post-traumatic abnormality or change in either the plaintiff's lumbar spine or left shoulder causally related to the subject accident.

The defendants, having made a prima facie showing that the plaintiff did not sustain a serious injury within the meaning of the statute, shifted the burden to the plaintiff to demonstrate the existence of a triable issue of fact as to whether he sustained a serious injury (see Pommells v Perez, 4 NY3d 566). A plaintiff claiming a significant limitation of use of a body function or system must substantiate his or her complaints with objective medical evidence showing the extent or degree of the limitation caused by the injury and its duration (see Ferraro v Ridge Car Serv., 49 AD3d 498; Mejia v DeRose, 35 AD3d 407; Laruffa v Yui Ming Lau, 32 AD3d 996; Kearse v New York City Tr. Auth., 16 AD3d 45). "Whether a limitation of use or function is 'significant' or 'consequential' (i.e. important . . .), relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (Dufel v Green, supra at 798). To prove the extent or degree of physical limitation with respect to the "limitations of use" categories, either objective evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration based on a recent examination of the plaintiff must be provided or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (see Perl v Meher, 18 NY3d 208; Toure v Avis Rent A Car Systems, Inc., supra at 350; see also Valera v Singh, 89 AD3d 929; Rovelo v Volcy, 83 AD3d 1034. A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (see Licari v Elliott, supra). However, evidence of contemporaneous range of motion limitations is not a prerequisite to recovery (see Perl v Meher, supra; Paulino v Rodriguez, 91 AD3d 559).

In opposition to the defendants' prima facie showing, the plaintiff has failed to raise a triable issue of fact as to whether he sustained an injury within the meaning of the serious injury threshold requirement of § 5102(d) of the Insurance Law (see Tinyanoff v Kuna, 98 AD3d 501; Kreimerman v Stunis, 74 AD3d 753; Dantini v Cuffie, 59 AD3d 490). A plaintiff is required to present nonconclusory expert evidence sufficient to support a finding not only that the alleged injury is within the serious injury threshold of Insurance Law § 5102(d), but also that the injury was casually related to the subject accident in order to recover for noneconomic loss related to personal injury sustained in a motor vehicle accident (see Valentin v Pomilla, 59 AD3d 184). The plaintiff, in this instance, has proffered insufficient medical evidence to demonstrate that he sustained an injury within the limitations of use categories (see Licari v Elliott, supra; Ali v Khan, 50 AD3d 454), or within the 90/180 category (see Jack v Acapulco Car Serv., Inc., 72 AD3d 646, Blesczc v Hiscock, 69 AD3d 890). The plaintiff's subjective complaints of pain were insufficient to establish the existence of a serious injury (see Rudas v Petschauer, 10 AD3d 357; Coloquhoun v 5 Towns Ambulette, Inc. 280 AD2d 512). Moreover, the plaintiff's self-serving affidavit

is insufficient to raise a triable issue of fact as to whether he sustained a serious injury that was causally related to the subject accident (see Strenk v Rodas, 111 AD3d 920; Smeja v Fuentes, 54 AD3d 326; Shvartsman v Vildman, 47 AD3d 700).

Although the plaintiff has submitted the affirmed medical report of Dr. Scott Roteman, his treating physician, showing that he sustained range of motion limitations in his spine and left shoulder contemporaneous with the subject accident, he failed to submit any objective admissible medical proof demonstrating the existence of such limitations based upon a recent examination (see Estrella v GEICO Ins. Co., 102 AD3d 730; Nesci v Romanelli, 74 AD3d 765; Blasse v Laub, 65 AD3d 509). Despite the fact that there is a report dated March 7, 2015, which alleges that the plaintiff underwent a re-evaluation by Dr. Roteman on March 2, 2015, the Court is unable to discern whether the report is an affirmation or just correspondence written to the plaintiff's attorney. However, even assuming arguendo, that the report is an affirmation, it still fails to raise a triable issue of fact as to whether the plaintiff sustained a serious injury as a result of the subject accident (see Gavin v Sati, 29 AD3d 734). Dr. Roteman's report impermissibly relies upon other doctors' unaffirmed reports in reaching his conclusions, and, thus, it is without probative value as to whether the plaintiff sustained a serious injury within the meaning of the Insurance Law due to the subject collision (see Gonzales v Fiallo, 47 AD3d 760; Marziotto v Striano, 38 AD3d 623; Moore v Sarwar, 29 AD3d 752). In any event, the Court notes that the unsworn report of Dr. Jeffrey Muhlrad, the plaintiff's treating orthopedist, dated February 21, 2013, states that an examination of the plaintiff revealed he had full range of motion in his left shoulder and lumbar spine, that there was no tenderness or crepitation upon palpation of the soft tissues of his left shoulder or the paraspinal muscles of the lumbar region of his spine, and that the straight leg raising test was negative, bilaterally. Furthermore, the affirmed medical report of Dr. Mark Decker, the plaintiff's treating radiologist, merely established that the plaintiff had a disc herniation at level L5/S1 and that there was diffuse degenerative disc disease with multilevel bulging and facet arthropathy in the plaintiff's lumbar spine. "The mere existence of a herniated or bulging disc is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the disc injury and its duration (Casimir v Bailey, 70 AD3d 994, 994; see Ferber v Madorran, 60 AD3d 725; Sealy v Riteway-1, Inc. 54 AD3d 1018; Kilakos v Mascera, 53 AD3d 527). More importantly, Dr. Decker failed to opine as to the cause of the findings of the MRI study (see John v Linden, 124 AD3d 598; Knox v Lennihan, 65 AD3d 615; Garcia v Lopez, 59 AD3d 593).

Finally, the plaintiff's submissions are insufficient to raise a triable issue of fact as to whether he was substantially curtailed from all of his usual and customary activities for 90 of the first 180 days following the accident (see Eldrainy v Hassain, 56 AD3d 419; Casas v Montero , 43 AD3d 728; Roman v Fast Lane Car Serv., Inc., 46 AD3d 535; Nociforo v Penna, 42 AD3d 514). Accordingly, the Wagner defendants' motion and the Clyde defendants' cross motion for summary judgment are granted.

Dated: December 17, 2015

HON. JOSEPH C. PASTORESSA, J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION