Salvemini v Twinco Supply Corp.
2015 NY Slip Op 32581(U)
March 30, 2015
Supreme Court, Queens County
Docket Number: 14538 2013
Judge: Marguerite A. Grays

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE MARGUERITE A. GRAYS IA Part 4
Justice

X

DOMINICK SALVEMINI,

Plaintiff(s)

-against-

TWINCO SUPPLY CORP. and NICOLAS TERRAN.

Defendant(s)

x

Index Number : 14538 2013

Motion Date: November 24 2014

Motion Cal No.: 151

Motion Seq. No.: 1

FILED
APR 17 2015
COUNTY CLERK
QUEENS COUNTY

The following papers numbered 1 to 11 read on this motion by defendants to dismiss the complaint on the ground that plaintiff did not sustain a "serious injury" causally-related to the subject accident, pursuant to Insurance Law §5102[d].

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	1 - 5
Answering Affidavits - Exhibits	6 - 8
Reply Affidavits	9 - 11

Upon the foregoing papers it is ordered that the motion is granted.

Plaintiff in this negligence action seeks damages for personal injuries allegedly sustained in a motor vehicle accident on April 5, 2013. Nicholas Terran testified on behalf of the defendants as follows: he was driving his vehicle on Lawson Boulevard for approximately two miles when he approached its intersection with Atlantic Avenue. He observed that the traffic light was red. Terran testified that he stopped his vehicle, the light changed and the vehicle in front of him (plaintiff's vehicle) moved and then stopped, causing Terran's vehicle to "tap" plaintiff's vehicle in the rear. Terran estimated that three seconds elapsed from the time the light turned green to the time of the impact. Terran testified that there was no damage to the front of his vehicle after the impact and that he did not observe

any damage to plaintiff's vehicle. Nonetheless, plaintiff alleges that he sustained, inter alia, neck and back injury as a result of the impact. Defendants contend that the alleged injuries are not causally-related to the subject accident. Plaintiff opposes the motion.

It is well settled that the proponent of a motion for summary judgment, where the issue is whether a plaintiff has sustained a serious injury as defined by Insurance Law § 5102[d], has the initial burden of establishing, by competent evidence, that a plaintiff did not sustain a serious injury causally-related to the subject accident (*Franchini v Palmieri*, 1 NY3d 536 [2003]). Once a defendant meets this initial threshold, the burden shifts to plaintiff to offer proof, in admissible form, which creates a material issue of fact requiring a trial (*Id.*). Defendants met their initial burden with, inter alia, the affirmed reports of Dr. Edward A. Toriello, an orthopedic surgeon who examined plaintiff on behalf of defendants, the narrative report of plaintiff's own treating physician who examined plaintiff and observed him to be better on December 3, 2013, and Dr. A. Robert Tantleff, a radiologist who reviewed plaintiff's cervical and lumbar magnetic resonance imaging (MRI) films.

Dr. Toriello examined plaintiff on February 25, 2014, and reviewed plaintiff's medical records on behalf of defendants. On examination, Dr. Toriello found no objective evidence of orthopedic disability or residuals with regards to plaintiff's cervical and lumbar spine. Plaintiff's range of motion in his neck and lower back was limited by 20 degrees, however, Dr. Toriello noted that these were subjective findings done voluntarily by plaintiff.

Dr. Toriello's opinion is corroborated by plaintiff's own treating physician, Dr. A. Sohal. According to Dr. Sohal's narrative report, plaintiff's lumbar and cervical range of motion was examined and observed to be better on December 3, 2013, than it was when tested by Dr. Toriello almost three months later. Specifically, Dr. Sohal's notes dated 12/3/13 state that plaintiff's cervical flexion was 40/50 degrees, extension was 40/60 degrees, side bending was 40/45 and rotation was 70/80 degrees. Further, plaintiff's lumbar flexion was 40/90 degrees, extension was 10/20 degrees, left side rotation was 50/90 and right side rotation was 70/90 degrees. Interestingly, however, when plaintiff's range of motion was examined by Dr. Toriello using a goniometer on February 25, 2014, his cervical flexion was 20/50, extension 20/60, lateral bending 20/45 and rotation was 20/80. Also, the lumbar spine was restricted as follows: flexion 20/60, extension 20/25, lateral bending 20/25 and rotation was 20/70. In light of these inconsistent results, it appears that plaintiff's purported limitations of cervical and lumbar range of motion are completely subjective.

In addition to finding no objective evidence of any orthopedic disability, Dr. Toriello also reviewed the x-rays and MRIs of plaintiff's cervical and lumbar spines. Dr. Toriello found that the studies demonstrate significant pre-existing degenerative changes in the neck

and lower back and there was no evidence of any causally-related traumatic injury in these areas.

A radiology review of plaintiff's cervical and lumbar x-rays revealed advanced discogenic changes at C5-6, with milder changes at C4-5. Moreover, Dr. Tantleff noted that the cervical x-ray was performed three days following the subject accident without evidence of acute or recent injury. He further noted that the "the findings represent advanced discogenic changes at the physiologic flexure point; the area of greatest stress of the cervical spine and associated with chronic repetitive stress changes secondary to normal everyday motion." Similarly, the MRI of the cervical spine was interpreted as demonstrating long standing chronic degenerative discogenic disc disease and cervicothoracic spondylosis at C3-C4, C4-5 and C5-6. Dr. Tantleff further noted that there is no evidence of recent trauma, herniation or exacerbatory changes; "the findings observed take years to develop and are not causally-related to an event that occurred three months prior to the performance of the MRI."

With regards to the lumbar x-ray, Dr. Tantleff found evidence of advanced discogenic changes and degeneration, calcification, osteophytosis, sclerosis and spondylolisthesis at L5-S1. These findings were also seen three days after the subject accident and represent chronic wear and tear consistent with discongenic disc disease. Similarly, Dr. Tantleff found no evidence of recent trauma or annular edema to suggest a recent herniation or recent acute exacerbatory change. Dr. Tantleff notes that "these findings require years and decades to develop as presented and are consistent with plaintiff's age and are not causally-related to the accident of April 5, 2013, approximately six weeks before the performance of the MRI."

According to plaintiff's own treating physician's narrative report, plaintiff was seen four times between April 23, 2013, and August 27, 2013. Thereafter plaintiff had one appointment on December 3, 2013. Following that visit, plaintiff was seen on June 24, 2014, with complaints of left knee pain, unrelated to this accident. It bears emphasis that Dr. Sohal opines that plaintiff's neck and back symptoms are causally-related to the subject accident, yet he makes no mention of the MRI findings, the x-ray studies or the history given by plaintiff on April 23, 2013, of "pain in the neck long time ago."

Defendants also submitted evidence establishing, prima facie, that the plaintiff did not sustain a serious injury under the 90/180–day category of Insurance Law § 5102(d) (*see Che Hong Kim v Kossoff*, 90 AD3d 969 [2d Dept. 2011]). Plaintiff was not working at the time of the accident and his only limitations, as testified to, were that he was no longer able to go on long nature walks or read or play music for a long period of time.

In opposition, plaintiff's submissions are insufficient to raise a triable issue of fact. It is noted that while the record indicates plaintiff was treated at length for neck and low-

back injury prior to the subject accident, plaintiff does not claim an exacerbation of a pre-existing injury in his bill of particulars. Instead he alleges that his current cervical and lumbar range of motion limitations are causally-related to the subject accident. The conclusion by plaintiff's treating physician, Dr. Spera, that plaintiff's current complaints and limitations are causally-related to the subject accident is conclusory and speculative as Dr. Spera fails to even acknowledge that he was treating plaintiff for neck and low-back injury prior to the subject accident (*see Allyn v Hanley,* 2 AD3d 470 [2d Dept. 2003]; *Ifrach v Neiman,* 306 AD2d 380 [2d Dept. 2003]; *Ginty v MacNamara,* 300 AD2d 624 [2d Dept. 2002]).

The medical reports and the other supporting papers are devoid of evidence supporting the claim that plaintiff was restricted or confined to his residence and that he was unable to substantially perform his daily activities (see *see Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345 [2002]; *Uddin v Cooper,* 32 AD3d 270 [2006], *lv. denied* 8 NY3d 808 [2007]). To prevail on a 90/180 claim, a plaintiff must provide competent, objective medical evidence to support the alleged limitations on his daily activities. (*Id.*). Although plaintiff testified that he could no longer take long walks or read or enjoy his music like he used to, the record lacks any evidence regarding his activities before the accident and any objective proof of any substantial curtailment of these activities after the accident. When construing the statutory definition of a 90/180 claim, the words "substantially all" should be construed to mean that the person has been prevented from performing his usual activities to a great extent rather than some slight curtailment." (*Sands v Stark,* 299 AD2d 642 [2d Dept.2002]).

Plaintiff's self-serving statements regarding his limitations and inability to perform certain tasks, standing alone, are insufficient to raise a triable issue of fact (*Gaddy v Eyler,* 79 NY2d 955, 958 [1992]; *Sherlock v Smith,* 273 AD2d 95 [1st Dept. 2000]; *Covington v Cinnirella,* 146 AD2d 565 [2d Dept. 1989]). In any event, plaintiff's self-serving affidavit indicating that he can no longer perform certain activities *at all* contradicts his examination before trial testimony wherein he testifies that he can no longer walk or play music *for long periods of time*. Where a self-serving affidavit submitted by a plaintiff in opposition clearly contradicts the plaintiff's own deposition testimony and can only be considered to have been tailored to avoid the consequences of earlier testimony, the affidavit is insufficient to raise a triable issue of fact to defeat the defendants' motion for summary judgment (*see Phillips v Bronx Lebanon Hosp.,* 268 AD2d 318 [1st Dept.2000]; *see also Wright v South Nassau Communities Hosp.,* 254 AD2d 277 [2d Dept.1998]).

Accordingly, the motion for summary judgment is granted.

MAR 3 0 2015

Dated:

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