

Chan v WRYK Transp. Corp.
2015 NY Slip Op 32594(U)
June 24, 2015
Supreme Court, Queens County
Docket Number: 705346/2013
Judge: Rudolph E. Greco, Jr.
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Hon. Rudolph E. Greco, Jr.
Justice

IAS PART 32

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JIMMY CHAN,

Index. No.: 705346/2013

Plaintiff,

Motion Dated: April 28, 2015

Seq. No. 1

-against-

Cal. No. 27

WRYK TRANSPORTATION CORP. and MOHAMMED
SHAID,

Defendants.

-----X

FILED
JUL -2 2015
COUNTY CLERK
QUEENS COUNTY

The following papers numbered 1 to 8 read on defendants' motion pursuant to CPLR §3212 for summary judgment dismissing plaintiff's complaint on the ground that plaintiff's alleged injuries fail to meet the serious injury threshold requirement of Insurance Law §5102(d).

	<u>Papers Numbered</u>
Notice of Motion, Affirmation, Exhibits, Aff. of Service, Memo. of Law.....	1-5
Opposition, Exhibits.....	6-7
Reply.....	8

Upon the foregoing papers, it is ordered that this motion is determined as follows:

FACTUAL BACKGROUND

This is an action to recover for personal injuries allegedly sustained by plaintiff in a motor vehicle accident that occurred on October 20, 2013 at the intersection of Hoyt Avenue and 24th Street in Queens County, New York. In the verified bill of particulars, plaintiff alleges a disc bulge at C5-C6 and L4-L5 and cervical and lumbar spine sprain/stain.

Defendants argue that the alleged injuries do not meet the threshold requirement of Insurance Law §5102(d), and therefore summary judgment dismissing plaintiff's complaint is warranted.

APPLICABLE LAW

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact, (*see* CPLR §3212[b]; Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986], Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 852 [1985], Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). The question of whether plaintiff sustained a “serious injury” as defined by Insurance Law §5102(d) is one of law that can be disposed of by summary judgment, (*see* Licari v Elliot, 57 NY2d 230, 237-38 [1982]), and defendant in seeking same has the burden to show that plaintiff’s injuries do not rise to the level of those enumerated in such statute, (*see* Gaddy v Eyler, 79 NY2d 955, 956-57 [1992]). This may be accomplished through submission of plaintiff’s deposition testimony and/or affidavits, affirmations or sworn reports of medical experts who examine the plaintiff and conclude that no objective medical findings support the plaintiff’s claim, (*see* Grossman v Wright, 268 AD2d 79, 84 [2nd Dept. 2000]; *see also* Toure v Avis Rent A Car Sys., 98 NY2d 345, 352 [2002], Gaddy at 956, Batista v Olivia, 17 AD3d 494 [2nd Dept. 2005]).

With this established, the burden shifts to the plaintiff to come forward with evidence demonstrating a material issue of fact with respect to their injuries being serious within the meaning of section 5102(d), (*see* Gaddy at 957). What is required of plaintiff in this endeavor is evidence of the injury by quantitative objective findings (*see* Toure at 350, Grossman at 84), free of mere conclusory assertions tailored to meet the statutory requirements, (*see* Lopez v Senatore, 65 NY2d 1017, 1020-21 [1985]; *see also* Powell v Hurdle, 214 AD2d 720 [2nd Dept. 1995]), and based on a recent examination, (*see* Murray v Hartford, 23 AD3d 629 [2nd Dept. 2005], Mohamed v Dhanasar, 273 AD2d 451 [2nd Dept. 2000], Kauderer v Penta, 261 AD2d 365 [2nd Dept. 1999]). Subjective complaints of pain and limitation are insufficient (*see* Gaddy at 957-58, Scheer v Koubek, 70 NY2d 678, 679 [1987], Licari at 239).

As to the categories of injuries, there are nine in total, generally those in dispute are subsections six through nine; more specifically, “6) permanent loss of use of a body organ, member, function or system; 7) permanent consequential limitation of use of a body organ or member; 8) significant limitation of use of a body function or system; and 9) 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 90 days during the 180 days immediately following the occurrence of the injury or impairment”, (Insurance Law §5102[d]). As to subsection six, the injury must be a total loss (*see* Oberly v Bangs Ambulance, Inc., 96 NY2d 295, 299 [2001]), and continue for the duration of the injured person’s life. As to subsections seven and eight, there is much overlap in that the words consequential and significant have been held to mean something more than minor, mild or slight (*see* Gaddy at 957, Scheer at 679, Licari at 236). As opposed to a loss, these sections deal with a limitation, the extent and degree of which must be quantified by objective testing (*see* Barrett v Howland, 202 AD2d 383 [2nd Dept. 1994]; *see also* Micelson v Padang, 237 AD2d 495, 496 [2nd Dept. 1997]), that must be noted within the report, (*see* Mobley

v Riportella, 241 AD2d 443, 444 [2nd Dept. 1997], Lincoln v Johnson, 225 AD2d 593, 593-94 [2nd Dept. 1996]). In the latter there is an element of duration (*see* Partlow v Meehan, 155 AD2d 647, 648 [2nd Dept. 1997]), while the former requires permanency. Mere repetition of the word “permanent” in a report is insufficient to meet this requirement, (*see* Lopez at 1019). Finally, with respect to these two subsections the objective findings must be the result of a recent examination and any lapse in time between the cessation of medical treatment after the accident and the physical examination conducted by plaintiff’s expert must be adequately explained, (*see* Grossman at 84; *see also* Smith v Askew, 264 AD2d 834 [2nd Dept. 1999]). With respect to the final category commonly referred to as 90/180, it must be shown by more than self-serving testimony, (*see* Phillips v Costa, 160 AD2d 855, 856 [2nd Dept. 1990]), that substantially all of the plaintiff’s activities were curtailed to a great extent rather than slightly, (*see* Licari at 236) by a medically determined injury or impairment of a non-permanent nature, (*see* Toure at 357).

ANALYSIS

Defendants present admissible proof by way of the affirmed medical report of Dr. Naunihal Sachdev Singh who performed a neurological examination on plaintiff on September 19, 2014. Dr. Singh indicates the medical records he reviewed and the means by which certain tests were performed including objective quantified range of motion testing by use of a goniometer. The results of such testing as compared to normal are documented and demonstrate all normal ranges of motion. His impression revealed evidence of resolved cervical and lumbar spine injuries. Dr. Singh concludes that there is no medical necessity for further treatment, diagnostic testing or follow-up and that plaintiff is not disabled from working or from activities of daily living.

Defendants also present the affirmed report of Dr. Lisa Nason who performed an orthopedic examination on plaintiff on September 29, 2014. Dr. Nason also performed range of motion testing by use of a goniometer and found all normal ranges of motion. Her impression revealed evidence of resolved cervical and lumbar spine injuries, bilateral shoulder injury, right wrist injury and bilateral knee injury. Dr. Nason concluded that there is no evidence of residuals or permanency and that plaintiff is able to perform occupational duties and activities of his daily living with no restrictions.

Dr. David A. Fisher reviewed plaintiff’s cervical spine, lumbar spine and right shoulder MRI films that were taken on December 23, 2013. Dr. Fisher’s review revealed no disc herniation or bulge and he concluded that there is no evidence of traumatic or causally related injury to plaintiff’s cervical spine or lumbar spine. Dr. Fisher also concluded that there was no evidence of tendonitis, cuff tear, joint effusion or labral tear to plaintiff’s right shoulder.

Defendants also provided the affirmed report of Dr. Stacey M. Donegan who reviewed plaintiff’s emergency room records. Dr. Donegan found that the records reviewed are inconsistent with the injuries alleged and show that the claimed injuries do not have an acute traumatic origin and could not be causally related to the subject accident.

As to the 90/180 category, defendants present plaintiff's deposition testimony of August 19, 2014, establishing that plaintiff was confined to his bed for two days following the accident.

This showing is sufficient to meet defendants' *prima facie* burden.

In light of the above, plaintiff must come forward to show that his injuries are serious under the law or, that there is, at least a material issue of fact with respect thereto, (*see Grossman* at 84; *see also Toure* at 352, *Gaddy* at 956). Plaintiff has submitted the following: his own affidavit; the affidavit of chiropractor David Hong; and the affidavit of radiologist Thomas P. Boyle.

Dr. Hong initially examined plaintiff on October 23, 2013 and then most recently on February 16, 2015. Dr. Hong affirms that during his examinations of plaintiff, the ranges of motion of plaintiff's cervical spine and thoraco-lumbar spine were severely restricted. Based on his earlier and most recent examinations of plaintiff, as well as, upon his review of the MRI reports, Dr. Hong opines that plaintiff's injuries and observed range-of-motion limitations are permanent in nature, could result in continued pain upon the performance of ordinary functions and were caused by the subject accident, (*see Arias v Janelle Car Service Corp.*, 72 AD3d 848 [2010]; *Bachan v Maggies Paratransit*, 71 AD3d 610 [2010]). Dr. Hong also reviewed plaintiff's medical records from his treatments after a prior motor vehicle accident and found that as a result of his injuries being exacerbated, plaintiff's limitations of motion in his lumbar and cervical spine have become worse. Plaintiff also submits the report of Dr. Boyle who performed the MRI on plaintiff's right shoulder, lumbar spine and cervical spine, finding, *inter alia*, disc bulges.

Plaintiff adequately explained any gap in treatment as he affirmed that he stopped seeking treatment when he was told that his benefits were being stopped and the doctor stated there was nothing else he could do, (*see Domanas v Delgado Travel Agency, Inc.*, 56 AD3d 717 [2d Dept. 2008]; *Jules v Barbecho*, 55 AD3d 548 [2d Dept. 2008]; *Francovig v Senekis Cab Corp.*, 41 AD3d 643 [2d Dept. 2007]).

Accordingly, taken as a whole and viewed in a light most favorable to the non-moving party, (*see Calvaruso v Our Lady of Peace R.C. Church*, 36 AD2d 755 [2nd Dept. 1971]; *see also Escobar v Velez*, 116 AD3d 735 [2nd Dept. 2014], *Mitchell v Fiorini Landscape Inc.*, 253 AD2d 860, 861 [2nd Dept. 1998]), the conflicting medical reports of the parties' respective experts raise triable issues of fact as to whether plaintiffs sustained serious injuries within the meaning of Insurance Law § 5102(d), (*see Garcia v Long Island MTA*, 2 AD3d 675 [2d Dept. 2003]).

CONCLUSION

Defendants' motion to dismiss plaintiff's complaint on the ground that plaintiff's alleged injuries fail to meet the serious injury threshold requirement is denied.

Dated: June 24, 2015



Rudolph E. Greco, Jr., J.S.C.

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