

Hillman v Cepeda

2015 NY Slip Op 32986(U)

July 31, 2015

Supreme Court, Bronx County

Docket Number: Index No 21184/2012E

Judge: Lizbeth González

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 10E

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Darios Hillman and Bernadette Hillman,

Plaintiffs,

-against-

DECISION and ORDER
Index No 21184/2012E

Haywood Cepeda and Anthony R. Galante,

Defendants.

-----X

Recitation pursuant to CPLR § 2219(a) of the papers considered in reviewing the underlying motion for summary judgment:

Notice of Motion and annexed Exhibits and Affirmation.....	1
Affirmation in Opposition and annexed Exhibits and Affidavits.....	2
Reply Affirmation.....	3

The plaintiffs claim that on 12/20/11 Darios Hillman sustained serious injuries when their vehicle was rear-ended by a vehicle owned by defendant Galante and operated by defendant Cepeda. Plaintiff Bernadette Hillman seeks damages for loss of consortium. The defendants move for summary judgment on threshold grounds. The plaintiffs oppose the motion.

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 NY2d 361 [1974].) Insurance Law § 5102(d) delineates the serious injury threshold:

a personal injury which results in...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.

Significant limitations of a body function as defined in Insurance Law § 5102(d) are established by identifying objective tests employed to measure ranges of motion, providing the

patient's test results and indicating normal ranges of motion. (*Nagbe v Minigreen Hacking*, 22 AD3d 326 [1st Dept 2005].)

Defendants Cepeda and Galante proffer the affirmed findings of Dr. Martin Barschi, an orthopedic surgeon. Dr. Barschi reviewed Mr. Hillman's medical and emergency room records, his right knee and back x-rays, his brain and cervical spine CAT scans and the reports of his examining chiropractor and orthopedist. During his 11/20/13 examination, plaintiff Hillman informed Dr. Barschi that as a result of the accident, he injured his neck, back and right knee and leg; a piece of metal cut his right shin; and he was dazed but did not lose consciousness. The plaintiff was transported to Bronx Lebanon Hospital by ambulance where he was evaluated, treated and discharged that evening. His current complaints were a stiff neck, mid and upper back and bilateral shoulder pain; a burning sensation and pain in his right upper leg near his knee; he experiences difficulty sleeping; and he cannot exercise which has resulted in significant weight gain. Mr. Hillman claimed that his medical treatment has continued; he undergoes treatment for pain about three times a month. He takes medication daily but could neither recall its name or have it on his person.

Dr. Barschi performed range of motion tests on Mr. Hillman's cervical spine that revealed 25 to 30 degree restrictions during extension and flexion movements. In a standing position, the plaintiff's range of motion of his back and lower extremities revealed 10 degree restrictions and he complained of pain during movement. During a Straight Leg Raising test performed in a supine position, he experienced radiating pain to his neck. Although he demonstrated normal range of motion in both knees while sitting, Mr. Hillman's right knee presented 40 degree restrictions in a supine position during the flexion movement. He presented normal range of motion in both of his shoulders, elbows, wrists and hands. Dr. Barschi opined that Mr. Hillman's restricted ranges of motion were "subjective and voluntary; there were no objective findings...to substantiate the subjective loss of motion." He concluded that plaintiff Hillman exhibited no objective evidence of orthopedic permanency relative to the subject accident.

In opposition to the defendants' motion, the plaintiffs proffer Mr. Hillman's deposition testimony and affidavit, his certified medical records and the affidavits of Richard Duenas, D.C. and Robert M. Shortell, D.C. The plaintiffs also submit findings of Dr. Barschi relative to other patients unrelated to the matter herein to show that his normal range of motion parameters are inconsistent.

On 1/4/12, approximately two weeks after the accident, Mr. Hillman was examined at Westside Chiropractic, LLC by Dr. Richard Duenas who issued an "Impairment Excuse," excusing the plaintiff from work from 12/20/11, the date of the accident, to 3/31/12, approximately 101 days.

On 3/2/12, plaintiff Hillman began treatment at Cromwell Chiropractic Center, LLC under Dr. Shortell's care. Range of motion tests of his cervical and lumbar spine revealed significant restrictions. He was treated and examined at Dr. Shortell's office almost every week thereafter until 3/30/12 and then from 6/6/12 to 6/22/12. On 5/28/14, Dr. Shortell performed his final examination of the plaintiff. Range of motion tests performed on plaintiff Hillman's cervical spine presented a range of 20 to 40 degree restrictions and his lumbar spine revealed 35 to 40 degree restrictions. The Ely's Heel to Buttock and Supine Straight Leg Raise diagnostic tests were positive and Mr. Hillman continued to experience spinal pain on a daily basis. In his 6/17/14 report, Dr. Shortell provided an overview of the plaintiff's medical history and compared his cervical and lumbar spine range of motion findings on 3/2/12 and 5/28/14. Dr. Shortell reported the following conclusion:

It is my opinion, within a reasonable degree of medical/chiropractic certainty that the above objective and quantitative findings as described above have caused permanent and consequential limitations, which are a direct result of the injury caused on December 20 2011.

During his 8/22/13 deposition, plaintiff Hillman testified that his vehicle was fully stopped when rear-ended by the defendants' vehicle. The impact was "very, very heavy" causing his vehicle to rear-end the vehicle before it with "tremendous" impact and his airbags to deploy. Mr. Hillman describes his neck's condition as a result of the accident: a "blockage or there is pain or there is something there that does not allow me to look over my shoulder...my neck gets stiff, it's a stiffness that happens every day..." As it pertains to his back, he experiences "everything from back spasms to a pain that is almost indescribable," a "sharp lower back pain" that compels him to grab onto something or his cane, something he has never had to use prior to the accident. He attests that both his professional and personal life have been significantly impacted; he had to dismantle his consulting business due to his inability to travel via car and airplane; and he can no longer engage in gym activities or perform household chores.

By affidavit dated 6/19/14, Mr. Hillman states that he had undergone more than six months of treatment and his providers informed him that he had reached maximum medical improvement and was given home exercises to perform whenever able.

CONCLUSION

Defendants Cepeda and Galante move for summary judgment on threshold grounds. The Court's function when 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].) The jury's function is to assess conflicting evidence as to whether the plaintiff's injuries are permanent or significant and determine the credibility of the witnesses, the weight to be accorded expert testimony and the issue of proximate cause. (*Noble v Ackerman*, 252 AD2d 392 [1998]; *Windisch v Weiman*, 161 AD2d 433 [1st Dept 1990].)

Here, the defendants submit the findings of Dr. Barschi who found that plaintiff Hillman's significant range of motion restrictions were all subjective. In opposition, Mr. Hillman's chiropractors, Dr. Duenas and Dr. Shortell, like Dr. Barschi, conducted range of motion tests and designated the plaintiff's restrictions by numeric percentages. Dr. Shortell found that these restrictions were objective and permanent in nature. These findings substantiate a claim of serious injury and thus raise a triable issue of fact. (*Ramos v Dekhtyar*, 301 AD2d 428 [1st Dept 2003].)

Based on the foregoing, the Court finds that a jury must determine whether plaintiff Hillman's sustained injuries are a result of the subject accident and meet the threshold criteria. The defendants' motion is denied.

The plaintiffs shall serve a copy of this Decision and Order with notice of entry within 30 days.

This is the Decision and Order of the Court.

Dated: July 31, 2015

So ordered,



Hon. Lizbeth González, JSC