

Maura v Best Musical Instrument Rental Servs., Inc.
2016 NY Slip Op 30391(U)
February 10, 2016
Supreme Court, Kings County
Docket Number: 504758/2013
Judge: Edgar G. Walker
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE KINGS

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MARIO MAURA,

Plaintiff,

Hon. Edgar Walker
Part 90

-against-

Index No. 504758/13

BEST MUSICAL INSTRUMENT RENTAL
SERVICES, INC. and ANDERSON C. FRIDAY,

Defendants.
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Defendants' motion for summary judgment dismissing the complaint, pursuant to CPLR 3212, on the ground that plaintiff did not suffer a serious injury within the meaning of Insurance Law §5102(d), is denied.

This is an action for damages for personal injuries allegedly sustained by plaintiff as a result of a motor vehicle accident which occurred on November 29, 2011. Plaintiff alleges injuries to his jaw and temporomandibular joints, his neck, and his lower back.

In support of the motion, defendants submitted copies of the pleadings, the plaintiff's deposition, and the affirmed reports of Dr. Jeffrey Passick, M.D., an orthopedic surgeon, Dr. Naunihal Sachdev Singh, a neurologist, and Donald R. Tanenbaum, D.D.S., a dentist.

After examining the plaintiff and listing the medical records that he reviewed, none of which are annexed for the Court to review, Dr. Passick reported that the plaintiff had normal ranges of motion in his lumbar spine. Upon examination of the plaintiff's cervical spine, Dr. Passick found normal ranges of motion when measuring the plaintiff's cervical extension and cervical right lateral flexion, but found reduced ranges of motion when measuring the plaintiff's

cervical flexion, cervical right and left rotation, and cervical left lateral flexion. Dr. Passick declined to comment on the plaintiff's claim of injury to his jaw and temporomandibular joints. His diagnosis was that the plaintiff has a resolved cervical and lumbar spine strain. The doctor also opined that "there is no objective evidence of sequelae of injury for the accident of record from an orthopedic standpoint. There are no permanent residuals." Finally, Dr. Passick states that "this individual is capable of continuing to work without restrictions" and that his prognosis is "good".

After examining the plaintiff and listing the medical records that he reviewed, none of which are annexed for the Court to review, Dr. Singh reported that the plaintiff had normal ranges of motion in his cervical spine, lumbar spine and shoulder joints and that there was no paravertebral or paraspinal muscle tenderness or spasm. Motor exam revealed no atrophy or fasciculations, and muscle tone was normal in all four extremities. Functional muscle testing revealed muscle strength to be 5/5 in all four extremities, and sensations to light touch, pain, vibration and position sense were also normal in all four extremities. Deep tendon reflexes were symmetrical and 2+ in all four extremities and plantar responses were downgoing bilaterally. Dr. Singh further reported that the plaintiff was alert and oriented to date, place and time, that he had normal speech, that his memory was normal for recent and past events, and that there was no dysarthria or aphasia. The plaintiff was able to follow commands, name body parts and common objects, and there was no agnosia or apraxia. He had a normal gait, required no assistance in getting on or off the examination table, was not using a cane, walker or crutches to ambulate, and was able to walk tandem and on his toes and heels without difficulty. Finger to nose and heel to shin tests were normal bilaterally. Finally, Dr. Singh found that the plaintiff's visual fields were

full to confrontation, extraocular movements were full, there was no nystagmus or diplopia, pupils were equal and reactive to light and accommodation, corneal reflexes were present bilaterally, there was no facial asymmetry, and his hearing was normal.

Dr. Singh's impression and diagnosis was that the plaintiff had a "cervical and lumbar spine sprain and strain", which are "resolved", that the "claimant has a normal neurological examination", that "[t]here is no medical necessity for treatment, diagnostic testing or follow up in my specialty of neurology", and that "[t]his claimant has no neurological disability based upon my examination today and he is not disabled from working or from activities of daily living."

Finally, the defendants offer the narrative report of Donald R. Tanenbaum, a dentist who examined the plaintiff in September of 2014. Dr. Tanenbaum notes that he reviewed records which revealed that the plaintiff "had temporomandibular problems and was receiving care over a period of time" and that the plaintiff's "[s]ymptoms of temporomandibular pain were bilaterally distributed." Dr. Tanenbaum also noted that he reviewed records from an MRI that was taken of the plaintiff's temporomandibular joints post accident, and states that the MRI revealed a "mild disc displacement in both temporomandibular joints." The Court notes that none of the aforementioned records are annexed to the movant's papers for review. Dr. Tanenbaum also states that "[p]ast MRI's revealed internal derangements", but he fails to annex those records, either.

In his report, Dr. Tanenbaum also mentions that the plaintiff informed him that he had surgery performed on his temporomandibular joints as a result of the subject accident, yet Dr. Tanenbaum fails to mention if he ever reviewed the surgical report, and makes no other mention of the surgery in his report and/or in his diagnosis and prognosis. Regardless of this omission,

the plaintiff clearly testified at his deposition that he had surgery on his temporomandibular joints after the subject accident, and Dr. Tanenbaum indicates that the plaintiff's condition is "lingering" and that "it is unlikely that additional nonsurgical interventions will improve this claimant's range of motion and/or pain."

In his examination of the plaintiff's jaw and temporomandibular joints, Dr. Tanenbaum noted that "[m]aximum jaw opening was 20 mm. Lateral motions were 8 mm. There were no overt audible TM joint noises. Palpation pain was marked over both TM joints, the masseter and temporalis muscles. The TM joints were most reactive. The dental occlusion was stable. Midlines were symmetric. At the present time, the claimant's clinical status suggested an ongoing temporomandibular problem. The focus of pain appears to be over the TM joints." In conclusion, Dr. Tanenbaum states that "presently, the claimant has a lingering temporomandibular problem. It is almost 3 years since the event. It is unlikely that additional nonsurgical interventions will improve the claimant's range of motion and/or pain."

Initially, the Court notes that amongst the various medical records listed that both Dr. Passick and Dr. Singh reviewed, were reports from MRIs taken of the plaintiff's spine both before and after the date of the subject accident. However, both Dr. Passick's report and Dr. Singh's report are silent as to the findings from the MRI taken of the plaintiff's cervical spine after the subject accident which shows three disc herniations, and is similarly silent regarding the findings from the MRI reports that predate the subject accident, which show no more than one herniated cervical disc. In addition neither Dr. Passick nor Dr. Singh offer an opinion regarding a casual connection, if any, between the MRI findings, the results of their examinations, and the plaintiff's accident. The Court further notes that Dr. Singh also stated that he reviewed the

results of neurological tests performed after the subject accident, yet his report is silent as to those findings which “revealed evidence of a left C6 radiculopathy”, and he fails to offer an opinion regarding whether a casual connection exists between the positive neurological test results and the plaintiff’s accident.

In addition to the fact that Dr. Passick found reduced ranges of motion in the plaintiff’s cervical spine, which by itself raises a question of fact sufficient to defeat the defendant’s motion, the Court also found that a conflict exists in the range of motion testing performed by Dr. Passick and Dr. Singh. Although they both measured and reported the plaintiff’s ranges of motion in his cervical spine, and then compared those results to what is considered “normal,” they disagree on what they claim is considered the “normal” range of motion for the body part being measured. Dr. Passick found that plaintiff’s cervical extension was normal at 60 degrees, whereas Dr. Singh found that the plaintiff’s cervical extension was normal at 45 degrees, which is a significant restriction when measured against what Dr. Passick considers to be the normal range of motion for cervical extension. As such, defendants’ own papers raise a question of fact as to whether plaintiff suffered a significant restriction of the range of motion in his cervical spine.

Similarly, in listing his measurements of the plaintiff’s range of motion in his jaw, Dr. Tanenbaum fails to mention what the normal ranges of motion are for the jaw, thereby rendering those findings meaningless. To the extent that Dr. Tanenbaum bases his opinion on records which are not attached to the moving papers, defendants have failed to meet their burden with respect to any TMJ injury.

Based upon the foregoing, the Court finds that the defendants have failed to establish

prima facie entitlement to judgment as to whether the plaintiff sustained a permanent consequential limitation of use of a body organ or member or a significant limitation of use of a body function or system. In the absence of a *prima facie* showing by the defendants, the motion must be denied regardless of the sufficiency of the opposition. Alvarez v. Prospect Hospital, 68 NY2d 320. Even if the defendants had made a prima facie showing, plaintiff's papers in opposition are sufficient to raise an issue of fact as to these categories.

With regard to the branch of the defendants' motion addressing plaintiff's claim that he satisfies the 90/180 category, the defendants offer the plaintiff's deposition transcript, wherein he testified that, following the surgery after the accident, he missed approximately two or three days of work. The defendants have submitted sufficient evidence to shift the burden of proof to the plaintiff with regard to the 90/180 category. In opposition to this branch of the defendants' motion, the plaintiff fails to submit any evidence that would show that a question of fact exists as to whether the he can satisfy the 90/180 category. As such, the defendants' motion is granted as to the 90/180 category only, and the remainder of the motion is, in all other respects, denied.

This constitutes the decision and Order of the Court.

Dated : 2-10-16



Hon. Edgar G. Walker, J.S.C.

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