Castillo v Togo Express Shipping & Transp.
2016 NY Slip Op 30696(U)
March 24, 2016
Supreme Court, Bronx County
Docket Number: 309711/2010
Judge: Sharon A.M. Aarons
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX Part 24

GREGORIO CASTILLO,
Plaintiff, **Index No. 309711/2010**
-against-
TOGO EXPRESS SHIPPING & TRANSPORTATION and FOUSSENI-SAHM TRAORE, **DECISION AND ORDER**
Defendants.

Hon. Sharon A. M. Aarons:

Defendants Togo Express Shipping & Transportation and Fousseni-Sahm Traore move for summary judgment pursuant to CPLR 3212 dismissing the complaint of plaintiff Gregorio Castillo on the ground of an absence of serious injury under Insurance Law § 5102 (d). Plaintiff submits written opposition. The motion is granted in part and denied in part.

In this personal injury action, plaintiff seeks damages for an alleged "serious injury" as a result of a multi-vehicle accident which occurred on December 24, 2009. Plaintiff was the driver in a vehicle struck in the rear by a tractor-type truck owned and operated by the defendants. Plaintiff did not seek medical attention until a week after the accident with complaints of, among other things, neck, back, and left knee pain. Plaintiff continued to work post-accident. Plaintiff alleges a serious injury under the permanent loss of use, permanent consequential limitation, significant limitation, and 90/180 day categories set forth under Insurance Law § 5102(d).

In support of the motion, defendants submit the pleadings and bills of particulars; the deposition testimony of the plaintiff with a notice to execute transcript dated February 2, 2015; and the affirmed report of defendants' expert orthopedic surgeon, Dr. Arnold T. Berman, M.D., dated February 26, 2015. Dr. Berman examined plaintiff and found normal results as to the plaintiff's cervical and lumbar spine and left knee, and concluded that plaintiff's sprains/strain of the cervical

and lumbar spine had resolved with no residuals and that the injury to plaintiff's left knee had resolved.

In opposition, plaintiff submits his own affidavit; the affidavit of Michael Minick, D.C., a chiropractor, along with medical records from Complete Spinal Physical Therapy & Chiropractic, PLLC certified by Dr. Minick; a physician's affirmation and narrative report from Dr. Randall V. Ehrlich, M.D., along with the records of Medalliance Medical Health Services, certified by Dr. Ehrlich; and the certified MRI reports of plaintiff's cervical and lumbar spine and left knee.

Dr. Minick found that plaintiff sustained cervical and lumbar radiculitis and left knee internal derangement related to trauma and said injuries were causally related to the motor-vehicle accident of December 24, 2009. Dr. Ehrlich found restrictions of plaintiff's left knee and suspected patellofemoral chondral injury that was not apparent on the MRI of the knee. Since the strength and range of motion of the left knee with non-operative modalities did not relieve plaintiff from discomfort and mechanic symptoms, surgical intervention was used. The pre-operative diagnosis was that the left knee traumatic internal derangement was causally related to the accident of December 24, 2009. The surgery on May 13, 2010, revealed a mid-body complex tear of the white-zone lateral meniscus. A partial lateral meniscectomy was performed. Dr. Ehrlich also found cervical and lumbar range of motion limitations of plaintiff's spine with a diagnosis of chronic paravertebral traumatic myo-fasciitis with MRI evidence of disc protrusion all causally related to the motor-vehicle accident of December 24, 2009.

The court's function on this motion for summary judgment is issue finding rather than issue determination (*Sillman v. Twentieth Century Fox Film Corp.*, 3 N.Y.2d 395, 144 N.E.2d 387, 165 N.Y.S.2d 49 [1957]). Since summary judgment is a drastic remedy, it should not be granted where

there is any doubt as to the existence of a triable issue. (*Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223, 385 N.E.2d 1068, 413 N.Y.S.2d 141 [1978]). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. (*Stone v. Goodson*, 8 N.Y.2d 8, 167 N.E.2d 328, 200 N.Y.S.2d 627 [1960]).

"On a motion for summary judgment dismissing a complaint that alleges a serious injury under Insurance Law § 5102 (d), the defendant bears the initial 'burden of establishing by competent medical evidence that plaintiff did not sustain a serious injury caused by the accident' " (*Haddadnia v. Saville*, 29 A.D.3d 1211, 1211, 815 N.Y.S.2d 319 [3d Dept. 2006]; *Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d 345, 352, 774 N.E.2d 1197, 746 N.Y.S.2d 865 [2002]). The defendant may satisfy that burden if it presents the affirmation of a doctor which recites that the plaintiff has normal ranges of motion in the affected body parts, and identifies the objective tests performed to arrive at that conclusion. (*See Lamb v Rajinder*, 51 A.D.3d 430, 859 N.Y.S.2d 4 [1st Dept. 2008]). If a defendant satisfies this burden, the plaintiff must present evidence of: (1) contemporaneous treatment – qualitative or quantitative – to establish that the plaintiff's injuries were causally related to the accident and (2) recent examination to establish permanency. There is no requirement that "contemporaneous" quantitative measurements be made. (*Perl v. Meher*, 18 N.Y.3d 208, 936 N.Y.S.2d 655, 960 N.E.2d 424 [2011] [permissible to observe and recording a patient's symptoms in qualitative terms shortly after the accident, and later perform more specific, quantitative measurements in preparation for litigation]; *Rosa v. Mejia*, 95 A.D.3d 402, 943 N.Y.S.2d 470 [1st Dept. 2012] ["Perl did not abrogate the need for at least a qualitative assessment of injuries soon after an accident."]).

Dr. Berman's report finding that plaintiff had a full range of motion, as compared to specified

normal ranges, and an absence of any deficits established a prima facie case of the absence of a serious injury. (*Orellana v Roboris Cab Corp.*, 135 A.D.3d 607, 23 N.Y.S.3d 234 [1st Dept. 2016]; *Malupa v Oppong*, 106 A.D.3d 538, 966 N.Y.S.2d 9 [1st Dept. 2013]). Furthermore, Dr. Berman specifically reviewed the MRIs of the cervical spine and left knee, confirmed findings of degenerative menisci, and concluded that the cervical spine bulging, narrowing, and stenosis found at C5-6 pre-existed the subject accident and did not correlate with his clinical examination.

In opposition, plaintiff raised an issue of fact as to serious injury. Plaintiff submitted evidence of a recent examination to establish permanency by Dr. Ehrlich's affirmed report of July 1, 2015, five years post-accident of his neck, back, and left knee. Also, plaintiff's experts, Dr. Minick, (who conducted an examination two weeks post-accident), and Dr. Ehrlich, (whose examinations occurred four months and then five years post-accident), both identified the manner in which they performed tests, so that it was possible to determine if the tests were based on objective findings, or merely subjective complaints. (*Grimaldi v. Newman & Okun, P.C.*, 105 A.D.3d 580, 963 N.Y.S.2d 220 [1st Dept. 2013] [early range-of-motion flexion tests findings, as to restrictions, were improperly premised upon subjective complaints of pain]). There were objective findings of injury. There were qualitative findings of limitations by Michael Minick, D.C., made on January 11, 2010, approximately two weeks after the accident, and thus contemporaneous treatment is established. Dr. Ehrlich's report provided the quantitative analysis and a comparison of plaintiff's range of motion to the normal range. Thus, plaintiff's submissions satisfied both the qualitative contemporaneous examination requirement and the quantitative analysis requirement to establish a triable issue of fact (*Macdelinne F. v Jimenez*, 126 A.D.3d 549, 6 N.Y.S.3d 40 [1st Dept 2015]; *Rosa v Mejia,* 95 AD3d at 404).

However, plaintiff failed to submit any evidence as to sustaining permanent loss of use of a body organ, member, function or system, or as to the 90/180 category of serious injury. As to the 90/180 category of serious injury, in order to make a prima facie case, the defendant must either point to evidence that the plaintiff in fact performed usual and customary activities (usually by pointing to plaintiff's own testimony), or by submitting medical evidence that the plaintiff did not sustain a medically determined injury or impairment of a non-permanent nature (*Jno-Baptiste v Buckley*, 82 A.D.3d 578, 919 N.Y.S.2d 22 [1st Dept. 2011]; *Fernandez v Niamou*, 65 A.D.3d 935, 885 N.Y.S.2d 486 [1st Dept. 2009]; *Ortiz v Ash Leasing, Inc.*, 63 A.D.3d 556, 883 N.Y.S.2d 180 [1st Dept. 2009]; *Reyes v Esquilin*, 54 A.D.3d. 615, 866 N.Y.S.2d 4 [1st Dept. 2008]; *Nelson v Distant*, 308 A.D.2d 338, 764 N.Y.S.2d 258 [1st Dept. 2003]).

Plaintiff testified in his deposition that he was self-employed and only missed a few days from work as a barber, which does not meet the requirements of the statute. At the cell phone store, of which he was a part owner, there were days he missed for a doctor's appointment. No doctor ever told him to stay home from work (*compare Lopez v Abayev Transit Corp.*, 104 A.D.3d 473 [1st Dept 2013]). Also, there is nothing he is totally unable to do now that he was able to do before the accident. Defendant met his prima facie burden by relying on plaintiff's bill of particulars and deposition testimony. (*See Komina v Gil*, 107 A.D.3d 596, 968 N.Y.S.2d 457 [1st Dept. 2013]). Plaintiff's testimony that he returned to work, and the absence of proof of a medically-determined injury undercuts any claim that he was disabled from performing substantially all his usual and customary daily activities during the relevant period (*See Vasquez v Almanzar*, 107 A.D.3d 538, 541, 967 N.Y.S.2d 361 [1st Dept. 2013]). As such, plaintiff's claim under the 90/180 category of serious injury is dismissed.

As the record does not reflect a total loss of use of plaintiff's cervical and lumbar spine and left knee, plainitff's claim under the permanent loss of use category should also be dismissed. (*See Oberly v Bangs Ambulance*, 96 N.Y.2d 295, 299, 751 N.E.2d 457, 727 N.Y.S.2d 378 [2001]).

Accordingly, the motion is granted only to the extent of dismissing the claims for permanent loss of use and "90/180" categories, and is otherwise denied. It is hereby,

ORDERED that the defendant shall serve on the plaintiff a copy of this Order with Notice of Entry.

Dated: March 24, 2016

SHARON A.M. AARONS. J.S.C.