

Bello v Campbell

2016 NY Slip Op 30699(U)

March 17, 2016

Supreme Court, Bronx County

Docket Number: 310195/2011

Judge: Alison Y. Tuitt

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NEW YORK SUPREME COURT-----COUNTY OF BRONX

PART IA - 5

JORGE BELLO and RUTH MARRERO,

INDEX NUMBER: 310195/2011

Plaintiffs,

-against-

Present:

DEON S. CAMPBELL and EUSTACE R. BROWN,

HON. ALISON Y. TUITT

Justice

Defendants.

The following papers numbered 1 to 4

Read on this Defendants' Motions for Summary Judgment

On Calendar of 7/13/15

Notices of Motion-Exhibits and Affirmation 1, 2

Affirmation in Opposition and Exhibits 3

Reply Affirmation 4

Upon the foregoing papers, defendants' motions for summary judgment are consolidated for purposes of this decision. For the reasons set forth herein, the motions are denied in part and granted in part.

The within action arises from a motor vehicle accident on September 6, 2011 in which plaintiff alleges to have sustained serious injuries to his neck, back, right knee and right shoulder. Defendants move for summary judgment on the grounds that plaintiff fails to prove a serious injury as required by §5102(d) of the Insurance Law.

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 (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 (1978). The movant must come forward with evidentiary proof

in admissible form sufficient to direct judgment in its favor as a matter of law. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). 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, (1960); Sillman v. Twentieth Century Fox Film Corp., *supra*.

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Once that initial burden has been satisfied, the "burden of production" (not the burden of persuasion) shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. The burden of persuasion, however, always remains where it began, i.e., with the proponent of the issue. Thus, if evidence is equally balanced, the movant has failed to meet its burden. 300 East 34th Street Co. v. Habeeb, 683 N.Y.S.2d 175 (1st Dept. 1997).

In the present action, the burden rests on defendants to establish, by the submission of evidentiary proof in admissible form, that plaintiff has not suffered a serious injury. Lowe v. Bennett, 511 N.Y.S.2d 603 (1st Dept. 1986), *aff'd*, 69 N.Y.2d 701 (1986). When a defendant's motion is sufficient to raise the issue of whether a "serious injury" has been sustained, the burden shifts and it is then incumbent upon the plaintiff to produce prima facie evidence in admissible form to support the claim of serious injury. Licari v. Elliot, 57 N.Y.2d 230 (1982); Lopez v. Senatore, 65 N.Y.2d 1017 (1985). When a claim is raised under the "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 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 ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment," in order to prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion is acceptable. Toure v. Avis Rent A Car Systems, Inc., 98 N.Y.2d 345 (2002). In addition, an expert's qualitative assessment of a plaintiff's condition is also probative, provided that: (1) the evaluation has an objective basis and, (2) the evaluation compares the plaintiff's limitations to the normal function, purpose and use of the affected body

organ, member, function or system. Toure, supra.¹

In the instant action, defendants move for summary judgment arguing that plaintiff has not suffered a serious injury pursuant to §5102 of the Insurance Law. Plaintiff alleges to have sustained, in relevant part, injuries as follows: Lumbar spine - lateral bulge at L2-L3, broad based herniated discs at L3-L4, L4-L5 and L5-S1, and radiculopathy; Cervical spine - central disc bulges at C2-C3, C3-C4 and C4-C5, broad based herniation at C5-C6, central and right paracentral herniation at C6-C7, anterior disc bulges at C5-C6 and C6-C7; Right knee - tear of the posterior horn of the medial meniscus and tear of the medial meniscus with partial tear of the anterior cruciate ligament with surgical intervention for partial medial meniscectomy, chondroplasty of the patella, debridement of fibrosis and partial synovectomy; Right Shoulder - tear of the acromio-clavicular ligament, partial tear of the supraspinatus tendon with labral tear, bursitis, fibrosis and synovitis with surgical intervention for subacromial decompression with release of the coracoacromial ligament, debridement of the rotator cuff and bursa, labral debridement, synovectomy and debridement of fibrotic material.

In support of their motion, defendants submit the affirmed report of Dr. John H. Buckner who examined plaintiff on May 19, 2014. Dr. Buckner states that his examination demonstrated mild findings to plaintiff's right knee consistent with osteoarthritis unrelated to the accident, plaintiff's right shoulder's motion was better than his left suggesting successful impingement treatment, and normal range of motion in plaintiff's cervical and lumbar spine. The Court finds that defendants met their prima facie burden of establishing that plaintiff did not sustain a serious injury by submitting the affirmed report of their medical expert who, based upon his examination of the plaintiff, found plaintiff's conditions to be pre-existing due to degeneration and/or osteoarthritis and normal range of range of motion in plaintiff's cervical and lumbar spine.

In opposition to the motion, plaintiff submits medical records in admissible form setting forth his medical treatments, including physical examinations and therapy, objective diagnostic testing, including MRIs and the affirmed reports and/or affidavit of all of his treating physicians and medical providers. Plaintiff's submissions raise an issue of fact as to serious injury. Plaintiff was taken by ambulance from the scene of the accident to Montefiore Hospital where he was treated in the emergency room and discharged. The records

¹The Toure decision appears to indicate that claims of neck or back injury resulting from bulging or herniated discs may be considered either under the category of a "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system," as well as the 90/180 day category (Toure v. Avis Rent A Car Systems, Inc., 98 N.Y.2d 345, 352, 774 N.E.2d 1197, 746 N.Y.S.2d 865 [2002].)

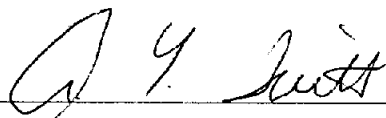
submitted by plaintiff reveal that several days after the accident, plaintiff came under the care of David Kreshover, D.C., and he remained under Dr. Kresholver's care from September 21, 2011 through and including September 18, 2012. The records further indicate that plaintiff received physical therapy from September 22, 2011 through October 17, 2012. Plaintiff submits the affidavits of Dr. Daniel Schlussberg who reviewed and interpreted the MRI films of plaintiff's cervical and lumbar on October 21, 2011, and Dr. Jacob Lichy who reviewed and interpreted the MRI films of plaintiff's right knee and right shoulder on October 2, 2011. Both radiologists affirm the findings of the MRIs as provided *supra*. Additionally, plaintiff submits the affirmed report of Dr. Mark McMahon who performed right shoulder surgery on plaintiff on November 29, 2011 and right knee surgery on December 20, 2011. Due to continued pain, Dr. McMahon performed a second right shoulder surgery on March 19, 2013 and second right knee surgery on April 2, 2013.

Plaintiff's records clearly raise an issue of fact as to whether he sustained a serious injury as he produced objective, contemporaneous and qualitative medical evidence regarding the injury. See, Blackman v. Dinstuhi, 810 N.Y.S.2d 79 (1st Dept. 2006); Jimenez v. Rojas, 810 N.Y.S.2d (1st Dept. 2006). Moreover, plaintiff's submissions address defendants' contention that plaintiff's injuries are not causally related to the accident, but are degenerative in nature. See, Boone v. Elizabeth Taxi, Inc., 993 N.Y.S.2d 302 (1st Dept. 2014). Furthermore, plaintiff has submitted objective medical evidence such as the MRIs which sufficiently establish the existence of a serious injury. Toure, *supra*; Brown v. Achy, 776 N.Y.S.2d 56 (1st Dept. 2004). The affirmations of plaintiff's treating doctors and surgeon, which are based on their personal examinations and observations of the plaintiff, are acceptable methods to provide a doctor's opinion regarding the existence and extent of a plaintiff's serious injury. O'Sullivan v. Atrium Bus Co., 668 N.Y.S.2d 167 (1st Dept. 1998). Dr. McMahon's opinion that plaintiff's injuries to his right knee and shoulder, and cervical and lumbar spine are causally related to the accident and that plaintiff has sustained a permanent loss of use raise an issue of fact that precludes summary judgment.

Defendants make a prima facie showing that plaintiff did not sustain a medically determined injury of a nonpermanent nature that prevented him from performing substantially all of his customary and daily activities for 90 of the 180 days immediately following the accident by submitting plaintiff's deposition testimony showing that following the accident, he only spent three to four days at home; following his first surgery he was confined to home for about one week and following the second surgery about three or four days. See, Uddin v. Cooper, 820 N.Y.S.2d 44 (1st Dept. 2006). Moreover, plaintiff has offered no evidence showing

that he was restricted from performing substantially all of the material acts that constituted his usual and customary daily activities for 90 days during the 180 days following the accident. See, Fernandez v. Niamou, 885 N.Y.S.2d 486 (1st Dept. 2009).

Dated: 3/17/16



Hon. Alison Y. Tuitt