Tejada-Guadalupe v Adelfa Livery Corp.
2016 NY Slip Op 31106(U)
May 13, 2016
Supreme Court, Bronx County
Docket Number: 300362/2012
Judge: Alison Y. Tuitt
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 FILED May 20 2016 Bronx County Clerk

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

PART IA - 5

JOSE TEJADA-GUADALUPE,

Plaintiff,

-against-

ADELFA LIVERY CORP., FRANCISCO HENRIQUEZ JONAN FERNANDEZ, A. TORRES-JABALERA,

Defendants.

INDEX NUMBER: **300362/2012**

Present:
HON. **ALISON Y.TUITT**
Justice

The following papers numbered 1 to 6

Read on this Defendants' Motion and Cross-Motion for Summary Judgment

On Calendar of **5/11/15**

Notices of Motion/Cross-Motion-Exhibits and Affirmations 1, 2

Affirmations in Opposition/Support 3, 4, 5

Reply Affirmation 6

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

The within action arises from a motor vehicle accident on October 22, 2011 in which plaintiff alleges to have sustained serious injuries to his left 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 to his left shoulder as follows: partial rotator cuff tear, tear of the superior aspect of the anterior labram, small joint and bursal effusions requiring surgical intervention on December 6, 2011.

In support of their motion, defendants submit the affirmed report of Dr. Robert Tantleff, a radiologist, who examined plaintiff's MRI films which he states showed chronic wear and tear not inconsistent with the plaintiff's age, exacerbated by plaintiff's body habitus resulting in chronic tendinosis of the supraspinatus tendon with a degenerative tear of the inner band at the footprint in the critical zone on the articular surface of known fissuring and tearing and secondary to chronic wear and tear as demonstrated by the enthesopathic changes at the footprint with degenerative changes of the glenoid laburm, biceps labral complex and longhead of the biceps tendon without evidence of acuity which is consistent with chronic repetitive stress changes to the shoulder and the not result of a single date of incident. Defendants also submit the affirmed report John H. Buckner who examined plaintiff on April 14, 2014. Dr. Buckner states that his examination demonstrated no significant findings, revealed an entirely normal left shoulder and opines that plaintiff did not sustain an injury to the left shoulder as a result of the accident.

In an addendum, Dr. Buckner states an interpretation of an MRI of plaintiff's left shoulder dated December 14, 2009, two years prior to the subject accident, Dr. Robert Scott Schepp noted "... partial tear/tendonitis, Grade-III of the distal supraspinatus tendon... slight bony impingement. Slight joint space narrowing. Slight joint effusion. Slight Hill-Sach's deformity. Dr. Buckner states that the presence of a Hill-Sachs lesion indicates a pre-existing shoulder dislocation. Dr. Buckner further states that having reviewed the above, it is clear that plaintiff had a prior dislocation which occurred prior two years prior to the incident herein. Defendants also submit a copy of a Verified Bill of Particulars regarding plaintiff's accident on November 15, 2009 wherein he claims to have sustained injuries to the left shoulder as follows: partial tear/tendonitis, Grade

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[1]The 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].)

III of the distal supraspinatus tendon, bony impingement, joint space narrowing, joint space effusion, Hill-Sach's deformity, traumatic subacromial tendinopathy with acromioclavicular joint involvement requiring epidural injection. Additionally, defendants submit the affirmed report of Dr. Fernando Jara, Board Certified in Emergency Medicine, who notes that the complaints made by plaintiff to EMS and in the Emergency Room are inconsistent with his claims in the Bill of Particulars. Dr. Jara opines that there is no causation between plaintiff's alleged injuries and his accident, other than for a left shoulder sprain.

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 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 physicians, 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). Moreover, Dr. McMahon's opinion that plaintiff's injuries to his left shoulder are causally related to the accident and that plaintiff has sustained a permanent significant partial disability that precludes summary judgment. Dr. McMahon also adequately addresses defendants' contentions that the injury to plaintiff's left shoulder was pre-existing, resulting from a motor vehicle accident two years prior to the subject accident. The MRI taken in December 2009 did not show a partial tear of the infraspinatus tendon and a tear of the superior aspect of the anterior labram. These findings appeared in the MRI taken after the accident of October 22, 2011. Therefore, these would appear to be injuries sustained in the accident herein. Moreover, plaintiff did not have surgery to the shoulder for the injuries sustained in the November 15, 2009, but his physician claims that surgery was

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 missed " a month and going on two" from work following his accident, and according to his Bill of Particulars, only spent one week confined to bed/home following the accident. 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).

This constitutes the decision and Order of this Court.

Dated: 5/13/16

Hon. Alison Y. Tuitt