Wigfall v Nicauri Limo, Inc.
2016 NY Slip Op 31107(U)
May 17, 2016
Supreme Court, Bronx County
Docket Number: 300609/2013
Judge: Alison Y. Tuitt
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NEW YORK SUPREME COURT----------COUNTY OF BRONX

PART IA - 5

FLOYD WIGEALL,

INDEX NUMBER: **300609/2013**

Plaintiff,

-against-

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

NICAURI LIMO, INC., CARLOS D. LOPEZ-RAMOS, SUSSEX HONDA, SHARON SURGEON and SHAKURA S. EDWARDS,

Defendants.

The following papers numbered 1 to 5

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

On Calendar of **6/1/15**

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

Affirmations in Opposition 3, 4

Reply Affirmation 5

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 granted for the reasons set forth herein.

The within action arises from a motor vehicle accident on October 12, 2011 in which plaintiff alleges to have sustained serious injuries. 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, the following injuries: C3-4 cervical disc herniation and spinal cord compression requiring plaintiff to undergo anterior cervical diskectomy with allograft fusion and anterior spinal instrumentation and intra-operative neurophysiologic monitoring performed on January 23, 2013; diffuse and left lateral herniated nucleus pulposis at C3-4 compressing on the thecal sac and spinal cord diffusely; diffuse posterior bulging disc at C4-5, C5-6 and C6-7 deforming the thecal sac and spinal cord; trigger point injections into the cervical and thoracic region; Interlaminar Epidural Steroid Injection in C7-T1 region; L3-L4, L4-L5 and L5-S1 medial branch block injections; L4-L5 and L5-S1 medial branch block injections; diffuse and left lateral herniated nucleus pulposis L5-S1 deforming the thecal sac and bilateral S1 nerve roots; diffuse posterior disc bulging at L3-4 and L4-5 deforming the thecal sac and bilateral L4 and L5 nerve roots; L2-3 disc bulge; status post closed head injury; status post cerebral concussion; post traumatic perturbation fo the 3rd ventricular colloid cyst with consequent altered intraventricular cerebralspinal fluid dynamics, necessitating surgical dissection.

The Court finds that the 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 Dr. Michael J. Carciente who, based upon his physical examination of the plaintiff, found that plaintiff had a normal neurological examination with no objective neurological findings. Dr. Carciente states that the cervical spine studies reviewed by Dr. Michael Setton on behalf of defendants noted that the findings were chronic and therefore represented a pre-existing condition and the surgery resulted from findings consistent with slowly, progressive degenerative spine changes as opposed to traumatic etiology. Dr. Setton states in his affirmed report that he reviewed plaintiff's cervical spine MRIs and found multilevel degenerative disc disease, moderate left paracentral dis herniation at C3-4 with spinal cord impingement associated uncovertebral joint hypertrophy at

[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].)

C3-4 with moderate left foraminal stenosis, minimal disc bulge at C4-5 and straightening of the upper cervical lordosis. He further states that the findings predate the accident and reflect degenerative disease. Dr. Setton additionally notes that plaintiff's brain MRI revealed no evidence of traumatic injury or intracranial hemorrhage. Defendants also submit plaintiff's operative report where his surgeon, Dr. Adesh Tandon noted that "[a]n MRI of the cervical spine showed evidence of multilevel cervical spondylosis with noted degenerative disk disease with the worst level seen at C3-C4 where there is evidence of a left-sided paracentral disk herniation with noted spinal cord compression." See, Paduani v. Rodriguez, 955 N.Y.S.2d 48 (1st Dept. 2012)(Defendants met their burden by submitting the affirmed report of an orthopedist who found full range of motion, and their radiologist's MRI report finding diffuse multilevel degenerative disc disease and degenerative changes unrelated to trauma, as well as a radiograph report of plaintiff's radiologist finding severe degenerative changes); Mitrotti v. Elia, 936 N.Y.S.2d 42 (1st Dept. 2012); McArthur v. Act Limo, Inc., 940 N.Y.S.2d 616 (1st Dept. 2012); Torres v. Triboro Servs., Inc., 921 N.Y.S.2d 240 (1st Dept.2011); Spencer v. Golden Eagle, Inc., 920 N.Y.S.2d 24 (1st Dept.2011).

In opposition to the motion, plaintiff fails to raise any issues of fact regarding serious injury. The report of Dr. Lawrence Shields fails to address defendants' physicians' findings that plaintiff's injuries were pre-existing and degenerative in nature. Dr. Shield's report completely ignores plaintiff' preexisting conditions and does not provide any account as to how the preexisting degenerative conditions differed from or exacerbated the injuries allegedly sustained in the accident. Thus, the failure to address the degeneration is fatal to plaintiff's claims of injuries. See, Kamara v. Ajlan, 968 N.Y.S.2d 45 (1st Dept. 2013)(Notwithstanding the uncontroverted evidence of preexisting conditions unrelated to the accident, plaintiff's physicians ignored the effect of those prior conditions, presented no evidence that the claimed injuries were different from the preexisting conditions, and failed to otherwise explain why those preexisting conditions were ruled out as the cause of his current alleged limitations); Spencer v. Golden Eagle, Inc., 920 N.Y.S.2d 24 (1st Dept. 2011) (Plaintiff' expert must address causation where defendant's expert indicates that plaintiff's injury was caused by pre-existing condition); McCree v. Sam Trans Corp., 920 N.Y.S.2d 35 (1st Dept. 2011)(While its medical expert attributed the range of motion restrictions he found in plaintiff's right shoulder and cervical spine to degenerative changes or a pre-existing condition, his opinion lacked a factual basis and was conclusory); Frias v. James, 895 N.Y.S.2d 335 (1st Dept. 2010)(Expert's opinion that plaintiff's restrictions were attributed to

degenerative causes was conclusory as it was advanced without any elaboration and without any reference to degeneration in the MRI reports reviewed); Valentin v. Pomilla, 873 N.Y.S.2d 537 (1st Dept. 2009)(Plaintiff failed to raise an issue of fact by not refuting defendants' evidence of a preexisting degenerative condition. Missing from all of plaintiff's submissions is any mention of the congenital defect and degenerative condition. Here, not only did plaintiff's experts fail to refute defendants' evidence of a preexisting congenital and degenerative condition of the spine, his own doctors reported a degenerative condition. Plaintiff's physician's failure even to mention, let alone explain, why he ruled out degenerative changes as the cause of plaintiff's injuries rendered his opinion that they were caused by the accident speculative. Consequently, there is no objective basis for concluding that the present physical limitations and continuing pain are attributable to the subject accident rather than to the degenerative condition).

Moreover, while Dr. Shield's report provides that he conducted range of motion testing on plaintiff's cervical spine at his examination on January 16, 2015, he fails to any proof showing a loss of range of motion in plaintiff's cervical or lumbar spine as he failed to quantify his findings of restrictions or identify any objective tests and compare his findings to normal ranges. See, Luetto v. Abreu, 963 N.Y.S.2d 112 (1st Dept. 2013)(In opposition, Garcia failed to raise an issue of fact, since the only admissible medical evidence offered was the affirmation of her treating physician who provided no evidence of current range-of-motion deficits or qualitative limitations, and did not address the evidence that the cervical condition was congenital); Mitrotti v. Elia, 936 N.Y.S.2d 42 (1st Dept. 2012); Vega v. MTA Bus Co., 946 N.Y.S.2d 162 (1st Dept. 2012); Townes v. Harlem Group, Inc., 920 N.Y.S.2d 21 (1st Dept. 2011); Antonio v. Gear Trans. Corp., 885 N.Y.S.2d 48 (1st Dept. 2009); Lattan v. Gretz Transit, Inc., 865 N.Y.S.2d 599 (1st Dept. 2008).

Furthermore, plaintiff fails to address his the gap and/or cessation of his treatment and Dr. Shield's does not address it in his report. See, Black v. Regalado, 828 N.Y.S.2d 29 (1st Dept. 2007); Baker v. Elite Ambulette Service, Inc., 843 N.Y.S.2d 588 (1st Dept. 2007).

Plaintiff also fails to raise an issue of fact regarding a medically determined injury of a nonpermanent nature that prevented him from performing substantially all of her customary and daily activities for 90 of the 180 days immediately following the accident. Plaintiff's bill of particulars only alleges that plaintiff was confined to his home for two weeks after the accident. Williams v. Baldor Specialty Foods, Inc., 895 N.Y.S.2d 394 (1st Dept. 2013). That plaintiff subsequently had surgery and was confined for two months

after his surgery in 2013 is not determinative of a 90/180–day injury since it was more than 180 days after the within accident. See, Smith v. Roberts, 13 N.Y.S.3d 896 (1st Dept. 2015); Nicholas v. Cablevision Systems Corp., 984 N.Y.S.2d 332 (1st Dept. 2014).

Accordingly, the motion and cross-motion for summary judgment are granted and the complaint is dismissed.

This constitutes the decision and Order of this Court.

Dated: 5/17/16

Hon. Alison Y. Tuitt