Simon v Arias
2016 NY Slip Op 31150(U)
May 20, 2016
Supreme Court, Bronx County
Docket Number: 306821/2013
Judge: Alison Y. Tuitt
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

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

PART IA - 5

SHAKIEM SIMON,

Plaintiff,

-against-

MARIA D. ARIAS,

Defendant.

INDEX NUMBER: **306821/2013**

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

The following papers numbered 1-3,

Read on this Defendant's Motion for Summary Judgment

On Calendar of **4/13/15**

Notice of Motion-Exhibits and Affirmation 1

Affirmation in Opposition 2

Reply Affirmation 3

Upon the foregoing papers, defendant's motion for summary judgment is denied in part and granted in part for the reasons set forth herein.

The within action arises from a motor vehicle accident on September 10, 2012 as a result of which plaintiff claims to have sustained serious injuries. At the time of the accident, plaintiff, 19 years old, was riding a bicycle when he was struck by defendant's SUV. Defendant moves 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 defendant 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, defendant moves for summary judgment arguing that plaintiff has not suffered a serious injury pursuant to §5102 of the Insurance Law. As a result of the accident, plaintiff claims to have sustained injuries, in relevant part, as follows: mild posterior bulges from C4-5 through C6-7 resulting in a degree of bilateral neural foraminal narrowing at C5-6 and C6-7 and mild posterior bulges from L3-4 through L5-S1 flattening the ventral thecal sac, straightening of the curvature of the lumbar spine which may be due to muscle spasm, confirmed by MRIs performed on October 22, 2012; and, lobulated fluid collection at the medial joint margin, lying deep to the semimembranosus tendon which finding is compatible with a pes anserine bursitis.

The Court finds that the defendant met his prima facie burden of establishing that plaintiff did not sustain a serious injury by submitting the affirmed report of his medical expert Dr. Jacquelin Emmanuel who, based upon his physical examination of the plaintiff, found that his clinical examination demonstrated no significant findings. Dr. Emmanuel states that plaintiff had a normal examination of his cervical, thoracic and lumbar spine, as well as his left knee. Dr. Emmanuel further states that plaintiff was status post cervical, thoracic and lumbar spine strain/sprain and status post left knee sprain/contusion that had all resolved. Defendant also submitted the affirmed report of his expert radiologist who reviewed the plaintiff's MRI films and opines that the cervical and lumbar spine MRI's were normal with no evidence of disc herniations or bulges and that the left knee MRI revealed a probable medial ganglion cyst with no evidence of recent trauma and without any causal relationship with this accident.

In opposition, plaintiff raises triable issues of fact as to the existence of serious injuries. Plaintiff was taken from the scene of the accident to the Lincoln Hospital where he was admitted from treatment and discharged two days later. One week after the accident, plaintiff came under the care of Dr. Bhupinder S. Sawhney with complaints of neck and mid to lower back pain with stiffness and restriction of range of motion.

---

[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].)

Dr. Sawhney performed range of motion testing on plaintiff's cervical and lumbar spine which revealed significant restrictions. Dr. Sawhney referred plaintiff to physical therapy and for MRI testing. On January 14, 2013, Dr. Sawhney outlined the treatment plan was outlined as follows: "Given the extent of the continued symptoms and physical therapy findings, I will advise patient to continue physical therapy at the frequency of 2-3 times per week with goals to decrease muscle spasm/hypertonicity/pain and soft tissue inflammation, and to improve mobility and function." The records submitted by plaintiff shows that plaintiff received physical therapy until February 5, 2013. Plaintiff also submits the affirmed report of Dr. Ida Tetro who examined plaintiff on February 27, 2015 and found 10% restriction of range of motion in his cervical spine, 11 to 33% restrictions of range of motion of his lumbar spine and 10% restriction in his left knee. Dr. Tetro opines that within a reasonable degree of medical certainty plaintiff has sustained permanent injuries and are directly related to the accident on September 10, 2012.

Defendant's motion and for summary judgment on the issue of serious injury must be denied. Plaintiff has presented evidence which raises issues of fact as to whether he sustained a serious injury. Plaintiff shows contemporaneous objective proof of the limitations sustained as a result of the injury. See, Lazarus v. Perez, 901 N.Y.S.2d 39 (1st Dept. 2010) citing Franchini v. Palmieri, 1 N.Y.3d 536 (2003). Plaintiff here submits the records his treating physician and a medical affirmation which is based on a physician's personal examination and observations of the plaintiff which is an acceptable method 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). Thus, plaintiff has raised an issue of fact as to whether he sustained a significant limitation and loss of use of his lumbar spine. The positive findings on the plaintiff's MRI films of his lumbar spine are accompanied by objective evidence in admissible form as to the extent of the limitation. Onishi v. N&B Taxi, Inc., 858 N.Y.S2d 171 (1st Dept. 2008). Thus, plaintiff has produced objective, contemporaneous and qualitative medical evidence regarding his injuries. See, Blackman v. Dinstuhi, 810 N.Y.S.2d 79 (1st Dept. 2006); Jimenez v. Rojas, 810 N.Y.S.2d (1st Dept. 2006). Plaintiff's submissions adequately rebuts defendant's experts' findings and Dr. Tetro opines that plaintiff's injuries are causally related to the accident and not due to a preexisting or degenerative condition. Spencer v. Golden Eagle, Inc., 920 N.Y.S.2d 24 (1st Dept. 2011); Valentin v. Pomilla, 873 N.Y.S.2d 537 (1st Dept. 2009).

Plaintiff fails to raise an issue of fact as to whether he was unable to perform substantially all of

his usual and customary activities for 90 days during the first 180 days following the accident. In order to establish a claim under the 90/180 category, there must be proof that plaintiff's usual and customary activities were impaired in some significant way for 90 out of the first 180 days after the accident. Cruz v. Calabiza, 641 N.Y.S.2d 255 (1st Dept. 1996). The claim must be supported by "competent medical proof that directly substantiated the claim". Cruz v. Aponte, 874 N.Y.S.2d 442 (1st Dept. 2009) quoting Uddin v. Cooper, 820 N.Y.S.2d 44 (1st Dept. 2006)(citations omitted). Even missing three months of work out of the first 180 days is insufficient without a showing of other daily activities that were hindered due to the injury. Uddin, 820 N.Y.S.2d at 45. Here, there is no admissible proof that plaintiff could not perform his usual and customary activities for 90 out of the 180 days. He testified that he was in bed for one week following the accident and missed two months of school.

This constitutes the decision and Order of this Court.

Dated: 5/20/16

A. Y. Tuitt

Hon. Alison Y. Tuitt