

Betemit v Finnerty

2016 NY Slip Op 31179(U)

June 21, 2016

Supreme Court, New York County

Docket Number: 153250/12

Judge: Leticia M. Ramirez

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 22

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ERNA BETEMIT, E.B., an infant by his mother and
natural guardian, BERENICE DE LOS SANTOS, and
BERENICE DE LOS SANTOS, Individually,

Index #: 153250/12
Mot. Seq: 01

DECISION/ORDER

Plaintiff(s),

HON. LETICIA M. RAMIREZ

-against-

MICHAEL FINNERTY,

Defendant(s).

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Defendant’s motion, pursuant to CPLR §3212, for summary judgment on the basis that plaintiffs did not sustain a “serious injury” within the meaning of Insurance Law §5102(d) is denied.

It is well settled that summary judgment is a drastic remedy and cannot be granted where there is any doubt as to the existence of a triable issue of fact or if there is even arguably such an issue. *Hourigan v McGarry*, 106 A.D.2d 845, appeal dismissed 65 N.Y.2d 637 (1985); *Andre v Pomeroy*, 35 N.Y.2d 361 (1974). The function of the court in deciding a summary judgment motion is to determine whether any issues of fact exist that preclude summary resolution of the dispute between the parties on the merits. *Consolidated Edison Co. v Zebler*, 40 Misc.3d 1230A (Sup. Ct. N.Y. 2013); *Menzel v Plotnick*, 202 A.D.2d 558 (2nd Dept. 1994). In deciding motions for summary judgment, the Court must accept, as true, the non-moving party’s recounting of the facts and must draw all reasonable inferences in favor of the non-moving party. *Warney v Haddad*, 237 A.D.2d 123 (1st Dept. 1997); *Assaf v Ropog Cab Corp.*, 153 A.D.2d 520 (1st Dept. 1989).

An acute sprain or strain that causes a significant physical limitation may constitute a “serious injury” within the meaning of §5102(d) of the New York State Insurance Law. *Licari v Elliot*, 57 N.Y.2d 230 (1982); *Smith-Carter v Valdez*, 2008 NY Slip OP 31231U (Sup. Ct. N.Y. 2008); *Rodriguez v Russell*, 2013 NY Slip Op 33954U, (Sup. Ct. Bronx 2013); *Maenza v Letkajornsook*, 172 A.D.2d 500 (2nd Dept. 1991); *Konco v E.T.C. Leasing Corp.*, 160 A.D.2d

680 (2nd Dept. 1990). Furthermore, a tendon or ligament tear or a bulging or herniated disc may also constitute evidence of a “serious injury” in accordance with the Insurance Law. *Cruz v Lugo*, 29 Misc.3d 1225(A) (Sup. Ct. Bronx 2008); *Shvartsman v Vildman*, 47 A.D.3d 700 (2nd Dept. 2008); *Tobias v Chupenko*, 41 A.D.3d 583 (2nd Dept. 2007); *Lewis v White*, 274 A.D.2d 455 (2nd Dept. 2000). However, such claims must be supported by objective competent medical evidence demonstrating a significant physical limitation resulting therefrom. *Licari v Elliot*, 57 N.Y.2d 230 (1982); *Pommells v Perez*, 4 N.Y.3d 566 (2005).

In this action, plaintiffs have sufficiently raised triable issues of fact to preclude the grant of summary judgment to defendant. *Assaf v Ropog Cab Corp.*, *supra.*; *Zuckerman v City of New York*, 49 N.Y.2d 557 (1980); *Winegrad v New York Univ. Med. Ctr.*, 64 N.Y.2d 851 (1985); *Alvarez v Prospect Hosp.*, 68 N.Y.2d 320 (1986).

More specifically, plaintiff Erna Betemit sufficiently raised triable issues of fact as to whether he sustained right knee partial thickness tears of the anterior and posterior cruciate ligaments and/or a tear of the anterior and posterior tibio-fibular ligaments of the right ankle as a result of the subject accident on March 24, 2011 and whether he sustained a “significant” or “permanent consequential” limitation of his right knee and/or right ankle as a result of the subject accident, with the affirmations of Dr. Jacob Lichy and Dr. David Capiola.

In his affirmation, Dr. Lichy, who interpreted the films of said plaintiff’s right knee and right ankle MRIs conducted on May 22, 2011, affirmed his findings of, *inter alia*, partial thickness tears of the anterior and posterior cruciate ligaments of the right knee; right knee flap tear of the posterior horn of the lateral meniscus; and a tear of the anterior and posterior tibio-fibular ligaments of the right ankle. In his affirmation, Dr. Capiola of Orthopedic Specialists of Greater New York, where plaintiff first treated on April 5, 2011, found a 19% restriction in motion of plaintiff’s right knee with marked suprapatella swelling and a 36%-60% restriction in motion of plaintiff’s right ankle at his most recent examination on September 21, 2015. Dr. Capiola diagnosed plaintiff with, *inter alia*, partial thickness tears of the anterior and posterior cruciate ligaments of the right knee, right knee flap tear of the posterior horn of the lateral meniscus, and a tear of the anterior and posterior tibio-fibular ligaments of the right ankle. He causally related his diagnoses to the subject accident and opined that plaintiff had permanent disabilities of his right knee and right ankle as a result of the subject accident. In contrast, plaintiff’s expert, Dr. Stuart

Hershon, who examined the plaintiff on April 10, 2014, found full ranges of motion of plaintiff's right ankle and right knee without swelling. His diagnoses regarding plaintiff's right knee and ankle were resolved contusions and sprains of the right ankle and right knee and a right knee tear of the lateral meniscus only, with no orthopedic disability.

Similarly, plaintiff Erna Betemit, Jr. sufficiently raised triable issues of fact as to whether he sustained an acute cervical sprain and/or an acute lumbar sprain as a result of the subject accident and whether he sustained a "significant" or "permanent consequential" limitation of his cervical and/or lumbar spine as a result of the subject accident, with the affirmation of orthopedist Dr. David Capiola. In his affirmation, Dr. Capiola of Orthopedic Specialists of Greater New York, where plaintiff first treated on April 5, 2011, found muscles spasms upon palpation of his cervical and lumbar spine as well as a 8%-22% cervical spine range of motion restriction and a 6%-40% lumbar spine range of motion restriction. [Detection of spasm on palpation is objective medical evidence of a "serious injury." *Toure v Avis Rent-A-Car Systems, Inc.*, 98 N.Y.2d 345 (2002); *Vidal v Maldonado*, 23 Mic.3d 186 (Sup. Ct. Bronx 2008); *Martin v Fitzpatrick*, 19 A.D.3d 954 (3rd Dept. 2005); *Pugh v DeSantis*, 37 A.D.3d 1026 (3rd Dept. 2007)]. Dr. Capiola diagnosed plaintiff with, *inter alia*, post-traumatic cervical and lumbar sprains. He causally related his diagnoses to the subject accident and opined that plaintiff had permanent disabilities of the cervical and lumbar spine as a result of the subject accident. In contrast, plaintiff's expert, Dr. Stuart Hershon, who examined the plaintiff on April 10, 2014, found full ranges of motion of plaintiff's cervical and lumbar spine without muscle spasms. His diagnoses regarding plaintiff's cervical and lumbar spine were resolved sprains with no orthopedic disability.

Lastly, plaintiff Berenice De Los Santos also sufficiently raised triable issues of fact as to whether she sustained disc herniations at L4-5, L4-5 and/or L5-S1 and/or a bulging disc at C5-6 as a result of the subject accident and whether she sustained a "significant" or "permanent consequential" limitation of her cervical and/or lumbar spine as a result of the subject accident, with the affirmations of radiologist Dr. Jacob Lichy and orthopedist Dr. David Capiola.

In his affirmation, Dr. Lichy, who interpreted the films of said plaintiff's cervical and lumbar spine MRIs conducted on May 26, 2011, affirmed his findings of, *inter alia*, straightening and reversal of the normal cervical lordosis above a small midline bulge of the C5-6 disc and disc herniations at L3-4, L4-5 and L5-S1. In his affirmation, Dr. Capiola of Orthopedic Specialists of

Greater New York, where plaintiff first treated on March 30, 2011, found a 25%-30% restriction of her cervical spine and a 17%-41% restriction of her lumbar spine at her most recent examination on September 21, 2015. Dr. Capiola diagnosed plaintiff with, *inter alia*, disc herniations at L3-4, L4-5 and L5-S1 and straightening and reversal of the normal cervical lordosis above a small midline bulge of the C5-6 disc. He causally related his diagnoses to the subject accident and opined that plaintiff had permanent disabilities of her cervical and lumbar spine as a result of the subject accident. In contrast, plaintiff's expert, Dr. Stuart Hershon, who examined the plaintiff on April 10, 2014, found full ranges of motion of plaintiff's cervical and lumbar spine. His diagnoses regarding plaintiff's cervical and lumbar spine were resolved sprains with no orthopedic disability.

Given the conflicting findings and opinions of the parties' experts, that portion of defendant's motion based upon the "significant limitation" and "permanent consequential limitation" categories of the Insurance Law must be denied. It is well settled that the finder of fact must resolve conflicts in expert medical opinions. *Ugarriza v Schmider*, 46 N.Y.2d 471 (1979); *Andre v Pomeroy*, 35 N.Y.2d 361 (1974); *Moreno v Chemtob*, 706 N.Y.S.2d 150 (2nd Dept. 2000).

Next, that portion of defendant's motion seeking summary judgment based upon the 90/180 category of the Insurance Law is also denied, as plaintiffs sufficiently raise triable issues of fact with their deposition testimonies, affidavits and concurrent competent objective medical evidence, namely the affirmations of Dr. Capiola. *Sante-Aime v Ho*, 274 A.D.2d 569 (2nd Dept. 2000).

Finally, since defendant improperly raised the issue of a gap in medical treatment for the first time in his reply papers, that issue is not properly before this Court, and, thus, was not considered. *McNair v Lee*, 24 A.D.3d 159 (1st Dept. 2005); *Ritt v Lenox Hill Hospital*, 182 A.D.2d 560 (1st Dept. 1992).

In light of the foregoing, defendant's summary judgment motion is denied, in its entirety.

This constitutes the Decision/Order of the Court.

Dated: June 21, 2016
New York, New York


HON. LETICIA M. RAMIREZ, J.S.C.