

<b>Almanzar v Capellan</b>
2016 NY Slip Op 32364(U)
November 30, 2016
Supreme Court, New York County
Docket Number: 158312/14
Judge: Leticia M. Ramirez
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 22

-----X  
ENRIQUE ALMANZAR,  
  
Plaintiff(s),

Index #: 158312/14  
Mot. Seq: 01

-against-

DECISION/ORDER  
HON. LETICIA M. RAMIREZ

MARTHA A. CAPELLAN and NELSON VARGAS,

Defendant(s).

-----X

Defendants’ motion, pursuant to CPLR §3212, for summary judgment on the basis that plaintiff did not sustain a “serious injury” within the meaning of Insurance Law §5102(d) is decided as follows:

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 triable issues 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). In deciding summary judgment motions, 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 (1<sup>st</sup> Dept. 1989). While plaintiff has the burden of proof, at trial, of establishing a *prima facie* case of sustaining a “serious injury” in accordance with Insurance Law §5102(d), defendants have the burden, on a summary judgment motion, of making a *prima facie* showing that plaintiff has not sustained a “serious injury” as a matter of law. In doing so, defendants must submit admissible evidence to demonstrate that there are no material issues of fact to require a trial. *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). Defendants’ failure to make such a showing mandates the denial of a summary judgment motion, regardless of the sufficiency of opposing papers. *Winegrad v New York Univ. Med. Ctr.*, *supra*; *Alvarez v Prospect Hosp.*, *supra*.

A tendon tear, a bulging or herniated disc or radiculopathy may 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 (2<sup>nd</sup> Dept. 2008); *Tobias v Chupenko*, 41

*A.D.3d 583 (2<sup>nd</sup> 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)*.

Defendants failed to meet their burden of making a *prima facie* showing that plaintiff did not sustain a "serious injury," as a matter of law. *Zuckerman v City of New York, supra.*; *Winegrad v New York Univ. Med. Ctr., supra; Alvarez v Prospect Hosp., supra.*

According to the plaintiff's Bill of Particulars, plaintiff alleges sustaining, *inter alia*, a left shoulder rotator cuff tear necessitating surgery; a left shoulder labral tear; disc bulges at C4-5, C5-6, C6-7, T1-2, T2-3 and T3-4; and disc herniations at C2-3 and C3-4 as a result of the subject accident of September 25, 2013.

Contrary to plaintiff's claims, defendants' radiologist, Dr. Audrey Eisenstadt, noted in her affirmed reports that her review of the films of plaintiff's left shoulder, cervical spine and thoracic spine MRIs did not reveal a left shoulder labral tear, thoracic spine disc bulging or a disc herniation at C2-3; thereby creating triable issues of fact for jury determination.

In addition, defendants' orthopedic expert, Dr. Shanker Krishnamurthy's affirmed report notes that upon her examination of the plaintiff on March 7, 2016, plaintiff had limited range of motion of the cervical spine, to wit: forward flexion was to 0 to 30 degrees (normal is 0 to 40 to 45), extension was to 0 to 10 degrees (normal is 0 to 25 to 30 degrees) and lateral flexion was to 0 to 15 degrees (normal is to 0 to 30 to 35 degrees). Dr. Krishnamurthy also found limited range of motion of plaintiff's left shoulder, to wit: abduction was to 0 to 100 degrees (normal is 0 to 150 degrees); elevation was to 0 to 120 degrees bilaterally (normal being 0 to 160 degrees) and external rotation was to 0 to 55 degrees bilaterally (normal being 0 to 70 to 80 degrees). Dr. Krishnamurthy noted that, when "unobserved," plaintiff was able to abduct his left shoulder to at least to 130 degrees and elevate his left shoulder to 140 degrees. These findings of limitations raise triable issues of fact as to whether plaintiff sustained a "permanent loss of use," "permanent consequential limitation" or "significant limitation" of his cervical spine and/or left shoulder as a result of the subject accident. In addition, Dr. Krishnamurthy's notations regarding plaintiff's ranges of motion when "unobserved" raises additional triable issues of fact as to whether plaintiff's limitations were subjective or due to actual limitation stemming from injury.

Next, despite plaintiff's claims of sustaining disc bulging in his thoracic spine, Dr. Krishnamurthy did not conduct range of motion testing on plaintiff's thoracic spine. As such, plaintiff's claiming of sustaining a "permanent loss of use," "permanent consequential limitation" or "significant limitation" of his thoracic spine was not challenged.

Based upon the foregoing, defendants failed to meet their burden of establishing the absence of a "serious injury," as a matter of law. Accordingly, those portions of defendants' motion seeking dismissal of plaintiff's claim of sustaining a "serious injury" based upon the "significant limitation," "permanent consequential limitation" and "permanent loss of use" categories are denied.

This Court need not evaluate the remainder of plaintiff's claimed injuries to determine whether they meet the "serious injury" threshold, since if plaintiff is able to establish a "serious injury" at trial, plaintiff may recover for all injuries sustained in the subject accident. *McClelland v Estevez*, 77 A.D.3d 403 (1st Dept. 2010).

It is also unnecessary for the Court to consider plaintiff's opposing papers, since defendants have not met their burden of demonstrating the absence of a "serious injury," as a matter of law. *Licari v Elliot*, *supra.*; *Winegrad v New York Univ. Med. Ctr.*, *supra.*; *Alvarez v Prospect Hosp.*, *supra.*; *Manceri v Bowe*, 19 A.D.3d 462 (2nd Dept. 2005).

Notwithstanding, plaintiff sufficiently raised triable issues of fact as to whether he exacerbated or sustained a left shoulder rotator cuff tear; a left shoulder labral tear; disc bulges at C4-5, C5-6, C6-7, T1-2, T2-3 and T3-4; or disc herniations at C2-3 and C3-4 and a "permanent loss of use," "permanent consequential limitation" or "significant limitation" of his left shoulder, cervical spine or thoracic spine as a result of the subject accident, with the affirmations and affirmed reports of Dr. Noel Blackman, the affirmed report of Dr. Jerry Lubliner, the affirmation and affirmed reports of Dr. Robert Diamond, the affirmation and affirmed report of Dr. Ronald Wagner and affirmation and affirmed reports of Dr. Andrew Dowd. *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).

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, contrary to defendants' contention, Dr. Noel Blackman, in his affirmed report dated July 13, 2014, adequately explained plaintiff's approximate two-year gap in medical treatment, to wit: that further treatment would have been palliative in nature. *Sung v Mihalios*, 44 A.D.3d 500 (1st Dept. 2007); *Myers v Richardson*, 2010 NY Slip Op 30001U (Sup Ct. NY 2010); *Paz v Wydrzynski*, 41 A.D.3d 453 (2nd Dept. 2007).

Finally, that portion of defendants' motion seeking dismissal of plaintiff's claim of sustaining a "serious injury" based upon the "90/180" category is granted. Plaintiff failed to raise a triable issue of fact as to whether he was prevented from performing substantially all of his usual and customary daily activities for not less than 90 days during the 180 days immediately following the subject accident. Although plaintiff, who was retired during the relevant time period, testified during his deposition that he was confined to home for eight to nine months directly after the subject accident, plaintiff did not submit any competent objective medical evidence to support a claim under the "90/180" category of the Insurance Law. *Elijah v Mahlah*, 58 A.D.3d 434 (1st Dept. 2009); *Springer v Arthurs*, 22 A.D.3d 829 (2nd Dept. 2005); *Bennett v Reed*, 263 A.D.2d 800 (3rd Dept. 1999). As such, plaintiff's claim of sustaining a "serious injury" based upon the "90/180" category is dismissed.

The Court has considered the parties' remaining arguments and finds them to be without merit.

Accordingly, defendants' summary judgment motion is denied in part and granted in part, as explained herein.

All parties are to appear for a DCM Status Conference on February 6, 2017.

Plaintiff is directed to serve a copy of this Decision, with Notice of Entry, upon defendants within 20 days of this Decision.

This constitutes the Decision/Order of the Court.

Dated: November 30, 2016  
New York, New York

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