

Gonzalez v Mayorga
2016 NY Slip Op 32633(U)
December 12, 2016
Supreme Court, Bronx County
Docket Number: 301771/13
Judge: Wilma Guzman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

Index No. 301771/13
Motion Calendar No. 14
Motion Date: 8/15/16

-----x
CHARLIE GONZALEZ,

Plaintiff,

-against-

MARCOS V. MAYORGA and MELANY LIMO, INC.

Defendants.
-----x

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion to dismiss the plaintiff's complaint:

DECISION/ ORDER

Present:

Hon. Wilma Guzman

Justice of the Supreme Court

Papers

Numbered

Notice of Motion, Affirmation in Support,

Exhibits Thereto

1

Affirmation in Opposition.....

2

Reply Affirmation.....

3

Motion decided as follows: Upon deliberation of the application duly made by defendants herein, by **NOTICE OF MOTION**, and all the papers in connection therewith, for an Order, pursuant to CPLR §3212, dismissing plaintiff's Summons and Complaint as plaintiff's alleged injuries cannot meet the serious injury threshold requirement, is heretofore denied.

This personal injury action stems from injuries allegedly sustained by plaintiff as a result of a November 8, 2012 motor vehicle accident that allegedly occurred on the Brooklyn-Queens Expressway, southbound, at or near the Kosciuszko Bridge, in the County of Queens, New York. As a result of the accident, plaintiff is claiming injuries to her left shoulder, left knee, neck and back.

Defendant's have made a *prima facie* showing of entitlement to summary judgement. Through the reports of Radiologist, Dr. Audrey Eisenstadt, and Orthopedist, Dr. John Buckner, defendants have tendered sufficient evidence to eliminate any issues of fact from the case. *See Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985). More specifically, Dr. Bruckner examined plaintiff and affirmed that he has no objective limitations or other indications of any residual loss of function. Dr. Eisenstadt's affirmations support Dr. Bruckner's conclusions that found that plaintiff did not demonstrate any post-traumatic abnormalities as a result of November 8, 2012 motor vehicle accident in question. As plaintiff has made a *prima facie* showing of entitlement to summary judgement, the burden then shifts to the plaintiff to demonstrate some issue of fact that would preclude this Court from granting summary judgement.

Plaintiff has set forth sufficient issues of fact to preclude this Court from granting summary judgement at this time. More specifically, plaintiff has set forth a triable issue of fact as to whether he suffered a permanent and consequential limitation of use of a body organ or member, and/or a

significant limitation of a body or system within the meaning of Insurance Law §5102.

Plaintiff was involved in a prior motor vehicle accident on September 11, 2007. He presented to the Bellevue Hospital Emergency Room as a result of same. Plaintiff attached his medical records, including the reports of x-rays of his thoracic spine and lumbar spine and a CT scan. The x-rays indicated a normal examination of plaintiff's spine, while the CT scan demonstrated no evidence of disc herniation, central stenosis, neural foraminal narrowing or intraspinal abnormality. Plaintiff attached the affirmation of radiologist, Dr. Jack Baldasar, who reviewed the results of MRI's done on plaintiff's cervical and lumbar spine on from October 12, 2007. The doctor affirms that the MRI of plaintiff's cervical spine was normal and the MRI of the lumbar spine was normal but for a bulging disc at L5-S1.

As a result of the September 11, 2007 accident, plaintiff came under the care of Orthopedist, Dr. Baum. Dr. Baum treated plaintiff for approximately an eleven (11) month period following the September 11, 2007 accident. The doctor also performed surgery on plaintiff's left shoulder on March 18, 2008. The pre-operative diagnosis was left shoulder impingement, and the post operative diagnosis was left shoulder impingement and bursitis. Dr. Baum performed a left shoulder arthroscopy, acromioplasty, anterior acromionectomy, partial bursectomy, resection of CA ligament, and gave a subacromial postoperative anesthetic injection. Several months following the surgery, plaintiff became asymptomatic. As a result of the shoulder injury plaintiff missed work for approximately eleven (11) months. He thereafter passed a physical examination at his job and returned to work with no complaints of pain.

As previously indicated, the underlying accident at issue took place on November 8, 2012. After the alleged accident occurred, plaintiff was taken via ambulance to Elmhurst Hospital. While at the hospital, plaintiff complained of pain to his neck, back, left shoulder and left knee. Plaintiff was examined and x-rays were taken of his neck and shoulder.

Plaintiff began a course of physical therapy in Corona, Queens approximately one (1) to two (2) weeks following the accident. He presented two (2) to (3) times per week for approximately two (2) months. He also received acupuncture and chiropractic treatment. He was referred for several MRIs in Queens on Junction Boulevard.

On December 14, 2012, plaintiff presented to Dr. Ackerman with complaints of pain to the left shoulder which he described as seven (7) to eight (8) out of ten (10) with zero being no pain and ten (10) being as severe pain as can be. Plaintiff described the pain as intermittent, pinching/sharp pain and indicated that he was unable to lift, push or pull, and could not sleep on the shoulder. Plaintiff also complained of left knee pain, describing it as six (6) to seven (7) out of ten (10) sharp and intermittent. He had difficulty kneeling. Dr. Ackerman conducted a physical examination of plaintiff which demonstrated tenderness in the left shoulder over the AC joint. Nerve impingement sign was positive, and there was limited range of motion. Examination of the left knee revealed tenderness over the medial joint line and lateral joint line. There was also limited range of motion. The doctor's initial assessment was left shoulder pain, rule out labral tear and left knee pain, rule out meniscus tear.

On January 11, 2013, Dr. Ackerman conducted a follow up examination of plaintiff. Plaintiff continued to complain of pain in his left shoulder and described it as constant and sharp. He also continued to have pain in his left knee. He reported difficulty lifting, pushing or pulling and difficulty sleeping on the shoulder. He also felt popping. Examination of the left shoulder revealed tenderness over the AC join and the nerve impingement sign was positive. He also had limited range of motion. Examination of the left knee revealed tenderness over the medial and lateral joint line of the left knee and limited range of motion. Moreover, the doctor described a January 5, 2013 MRI of plaintiff's left shoulder which demonstrated an anterior labral tear at three (3) o'clock position. Dr. Ackerman notes discussing with plaintiff the fact that he had underwent therapy for over two (2) months without any significant improvement and was still having a great deal of pain. Arthroscopic surgery was discussed. The doctor indicated that plaintiff had completely recovered from his prior surgery and was patient was leaning towards a second surgery because he could not live with the pain.

On March 15, 2013, Dr. Ackerman again examined the plaintiff, who had similar complaints as he did with his last appointment. He also noted that the plaintiff had been out of work due to his injuries since February 1, 2013. Plaintiff again had complaints of pain in his left shoulder and knee and demonstrated limited range of motion in both.

On April 10, 2013, due to pain and limited range of motion in his left shoulder, plaintiff underwent arthroscopic surgery on is left shoulder which was performed by Dr. Ackerman. According to Dr. Ackerman, the pain in plaintiff's shoulder and range of motion improved due to the surgery and subsequent physical therapy. With respect to his shoulder, the doctor cleared him for work on August 2, 2013. Also on that date the doctor indicated that the plaintiff continued to have a limited range of motion and a residual disability of approximately 25 percent.

Dr. Ackerman affirms that the injury to his left shoulder was a direct result of the November 8, 2012 accident in question.

Plaintiff presented to Orthopedist, Dr. Michael Gerling, on April 19, 2013 complaining of multiple musculoskeletal injuries after being involved in a motor vehicle accident on November 8, 2012. Plaintiff stated that he could not return to work and had significant weakness in the left upper extremity along with headaches. Moreover, he could not walk more than three (3) to four (4) blocks due to pain in his legs and weakness emanating from his back . The doctor reviewed MRI films and reports of the plaintiff's cervical spine which were done on December 19, 2012. The doctor noted that the films demonstrated fresh appearing disc herniations at the C5-C6 level with anterior flattening of the spinal cord and stenosis at that level. Adjacent disc herniations and protrusions were appreciated, but less significant.

Plaintiff thereafter underwent surgery on his cervical spine on January 9, 2014 by Dr. Michael Gerling. Although the pain was mostly resolved as a result of the surgery, plaintiff continued to have limited range of motion in his neck. On May 23, 2014, Dr. Gerling noted that plaintiff was still unable to perform the duties of his regular job, was impaired from driving and impaired from any heavy lifting. The doctor noted that the disability was total but temporary and anticipated that plaintiff could return to work in three (3) to four (4) months.

Dr. Gerling thereafter examined the plaintiff on August 27, 2014 and noted that the plaintiff had no substantial improvements in his neck and continued to suffer from pain with limited and painful range of motion. At the time of his Examination Before Trial, plaintiff testified that he continued to experience pain in his neck despite the surgery and was still undergoing physical therapy for his neck.

It should be noted that defendants' expert, Dr. Buckner, also found that plaintiff continued to suffer from limited range of motion in his cervical spine.

The aforementioned medical history demonstrates, at the very least, an issue of fact as to whether plaintiff suffered a permanent and consequential limitation of use of a body organ or member, and/or a significant limitation of a body or system within the meaning of Insurance Law §5102.

Moreover, an issue of fact exists as to whether plaintiff was prevented from performing substantially all of her usual and customary activities for a period of not less than 90 out of the first 180 days immediately following the accident in question. Issues of fact clearly exist as to the amount of time that plaintiff missed as a result of the accident in question. Furthermore, issues of fact exist as to what extent and in what capacity plaintiff was able to work during the time he did return to work. Even further, issues of fact as to the plaintiff's limitations outside of work also exist. Such issues of fact preclude this Court from granting summary judgement at this time.

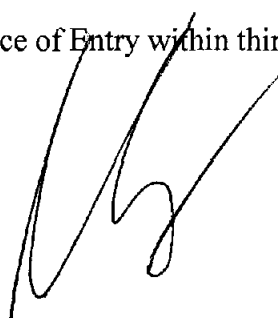
Accordingly, it is:

ORDERED that the Motion by defendants for an Order, pursuant to CPLR §3212, dismissing plaintiff's Summons and Complaint as plaintiff's alleged injuries cannot meet the serious injury threshold requirement, is heretofore denied.

ORDERED that defendants shall serve a copy of this Order with Notice of Entry within thirty (30) days of entry of this Order.

The forgoing constitutes the Decision and Order of the Court.

Dated: 12/12/16



HON. WILMA GUZMAN
J.S.C.