Harris v Abdullahi

2016 NY Slip Op 33147(U)

March 30, 2016

Supreme Court, Bronx County

Docket Number: Index No. 21103/2013E

Judge: Lizbeth González

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 10E
---X
Dwayne Harris,

Plaintiff,

-against-

DECISION and ORDER
Index No 21103/2013E

Yahuza P. Abdullahi and Mariam Et Alassane
Car Service,

Defendants.
---X

Recitation pursuant to CPLR § 2219(a) of the papers considered in reviewing the underlying motion for summary judgment:

Notice of Motion and annexed Exhibits and Affirmations..1
Affirmation in Opposition and annexed Exhibits and Affidavits..2
Reply Affirmation..3

Plaintiff Harris claims that the defendants' negligence caused him to sustain serious neck and back injuries. Mr. Harris alleges that on 4/12/10 his vehicle was rear-ended by a taxicab owned by defendant Mariam Et Alassane Car Service and operated by defendant Abdullahi ("Car Service/Abdullahi"). The defendants move for summary judgment on threshold grounds. The plaintiff submits opposition.

DISCUSSION

Summary judgment should only be employed in the absence of triable issues of fact. (*Andre v Pomeroy*, 35 NY 2d 361 [1974].) Insurance Law § 5102(d) defines a serious personal injury, in pertinent part, as one resulting in a medically determined injury or impairment of a nonpermanent nature which prevents the injured person from performing substantially all of the material acts which constitute his or her usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment.

In interpreting the statutory definition of a 90/180 day claim, the words "substantially all" should be construed to mean that the injured person has been prevented from performing his or her usual and customary activities to a great extent. (*Thompson v Abbasi,* 15 AD3d 95 [1st Dept 2005].) The plaintiff must provide objective proof of a medically determined injury which prevents his substantial performance of all of his usual and customary daily activities and his disengagement from

such activities must be under a physician's directive. (*Berete v Ford Motor Credit Co., Company*, 814 NYS2d 559, *affd* 815 NYS2d 505 [1st Dept 2006].)

In support of their motion, defendants Car Service/Abdullahi submit the pleadings, the plaintiff's deposition transcript and the affirmed findings of Dr. Michael Setton, Dr. Naunihal Sachdev Singh, Dr. Jay M. Walshon and Dr. Arkady S. Voloshin.

Dr. Setton, the defendants' radiologist, reviewed the plaintiff's 7/9/11 cervical spine MRI. The doctor found multilevel degenerative disc disease and spondylosis, bulging discs and herniations including mild spinal cord impingement. He opined that the plaintiff's cervical injuries "represent a spectrum of chronic degenerative changes...with no evidence to indicate a recent traumatic injury."

Dr. Singh, the defendants' neurologist, examined the plaintiff on 8/20/14. He complained of worsening symptoms, left hand numbness and weakness, and radiating neck and lower back pain although he underwent three months of physical therapy and chiropractic and acupuncture treatment. Mr. Harris was involved in a car accident in 2004 and 2005 and injured his back. After the examination, Dr. Singh opined that the plaintiff's cervical and lumbar spine had full range of motion, diagnostic tests were negative and his alleged spinal injuries were resolved. The plaintiff presented no neurological disabilities and may perform his normal daily living and working activities.

Dr. Walshon, a board certified emergency physician, reviewed the plaintiff's emergency room records and opined that the plaintiff's complaints in his BP are inconsistent with his own complaints to the police and the ER staff and are unsupported by the attending physician's examination findings. If Mr. Harris sustained a significant cervical spinal injury, disc herniations and an annular tear as described in his BP, Dr. Walshon posits, then the ER staff would have found "vertebral bony tenderness, soft tissue swelling, limitation of movement or range of motion or an abnormal motor/sensory exam" and ordered x-rays or CT scans; he would have been admitted for further evaluation and treatment; and would have received an orthopedic or neurosurgical specialist consultation. Instead, Mr. Harris was discharged and transported himself home. Dr. Walshon opined that the emergency room records reveal no acute traumatic findings causally related to the 4/12/10 accident and claimed injuries.

Dr. Voloshin performed an incident and biomechanical analysis. He reviewed the plaintiff's injuries described in the BP, the spinal, right hand and left ankle MRIs and the doctors' findings, the

deposition testimony of Mr. Harris and Mr. Abdullahi and the police accident report; he also notes that the airbags did not deploy and the seatbelts did not tear. Dr. Voloshin opined that, given the weight of the vehicles, persons and gas and the impact location, the "loads" were distributed over the plaintiff's "head, shoulders, back and legs at the points where they contacted the seat and the seat belt." He concluded the following:

> There were no loading or injury mechanisms to account for the Cervical and Lumbar Spine Pathologies claimed by Dwayne Harris in the subject incident, and consequently no causal link between the incident and the claimed Cervical and Lumbar Spine Pathologies. There was no force or movement from the incident on April 12, 2010 which could cause the [injuries] claimed by Dwayne Harris as stated in the Verified Bill of Particulars.

The defendants also submit the police accident report to show that no injuries were reported at the accident scene and the plaintiff refused medical attention.

Plaintiff Harris testified during his deposition that he was wearing a seatbelt at the time of the accident; he neither loss consciousness nor bled. The impact caused minimal damage to his vehicle and he drove it from the scene of the accident. He drove himself to the emergency room where he was treated but received no brace. Mr. Harris states that his prior drug use affects his memory but recalls that he was involved in a prior car accident and injured his back and leg and underwent epidural treatment; he had a 2004 slip and fall accident and two car accidents subsequent to the underlying 2010 accident. He states that he was feeling "all right" when he was involved in a 2013 accident where he injured his neck and back and underwent physical therapy and epidural treatment. He states that the subject 2010 accident resulted in neck pain and he had no future scheduled medical appointments for treatment.

In opposition to the defendants' motion for summary judgment, plaintiff Harris submits his deposition transcript; a letter dated 5/5/10 from Ninett Jorawar, his employer's Sr. Personnel Administrator, confirming the plaintiff's placement on sick leave with half pay from 4/12/10, the accident date, to 5/20/10; unsworn cervical and lumbar spine MRI findings and emergency room records; a voluminous amount of unsworn and non-descriptive medical reports; and medical notes and affirmed reports from Dr. Bernard Osei-Tutu.

Mr. Harris testified that, at the time of the accident, he was employed as a food service worker and as a result of the accident, he was physically unable to perform his duties and was out of work for four months. He experienced difficulty standing for more than an hour, lifting and bending and was unable to drive for long periods of time.

The plaintiff's 5/9/10 lumbar spine MRI and 7/9/11 cervical spine MRI reveal strains and disc bulges and herniations which do not constitute serious injury. (*Toure v Avis Rent-a-Car Systems, Inc.*, 98 NY2d 345 [2002]; *Cruz v Lugo*, 67AD3d 495 [1st Dept 2009].)

The plaintiff was under the care of Dr. Osei-Tutu from April 2010 to July 2010. Submitted are reports signed by the doctor that are applicable to therapy rendered to the plaintiff and letters dated 4/27/10, 5/18/10, 5/11/10, 6/1/10, 7/1/10 and 7/22/10. The gist of these letters state that the plaintiff's diagnosis includes cervical and lumbar sprains and strains and disc herniations and that he sustained multiple injuries and cannot perform strenuous work. The doctor describes Mr. Harris' prognosis as "fair." By letter dated 7/22/10, Dr. Osei-Tutu permits the plaintiff to return to work on 7/29/10, approximately 107 days after the accident.

CONCLUSION

Defendants Mariam Et Alassane Car Service and Abdullahi move for summary judgment on threshold grounds. Here, after a careful review of the evidence, the Court finds that the defendants met their burden of proof. While the plaintiff may have sustained injuries as a result of the accident as delineated in the emergency room records, the findings of the defendants' physicians establish that his injuries were of a non-permanent nature.

In opposition, the plaintiff proffers a voluminous amount of unsworn, untabbed and non-descriptive medical reports from varying medical treating professionals. Plaintiff Harris, however, submits and heavily relies upon the unsworn findings and letters of Dr. Osei-Tutu, whose area of specialty is undisclosed, to establish that he meets the 90/180 day criteria pursuant to Insurance Law § 5102[d]. Significantly, none of Dr. Tutu's reports explain how plaintiff Harris was prevented from performing "substantially all" of his customary daily activities during the 90/180 day period. It is well settled that missing more than 90 days from work is not determinative. (*Nieves v Bus Maintenance Corp.*, 129 AD3d 539 [1st Dept 2015]; *Bailey v Islam*, 99 AD3d 633 [1st Dept 2012].) The doctor's preceding letters (4/27/10, 5/18/10, 5/11/10, 6/1/10, 7/1/10) indicating that the plaintiff

sustained strains, sprains and herniations and an inability to perform strenuous work do not constitute serious injury and lacks explanation as to how he has been prevented from performing his usual and customary activities to a great extent. (*Thompson v Abbasi,* 15 AD3d 95, *supra.*)

Based on the foregoing, the defendants' motion is granted.

Service of a copy of this Decision and Order with Notice of Entry shall be effected within 30 days.

Dated: March 30, 2016

So ordered,

Hon. Lizbeth González, JSC