

Cabrera v Gonell

2017 NY Slip Op 30376(U)

January 5, 2017

Supreme Court, Bronx County

Docket Number: 300300/13

Judge: Howard H. Sherman

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NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 4



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LUCILO CABRERA,

Index No: 300300/13

Plaintiff,

DECISION/ORDER

-against-

Present:

MOISES GONELL and ADLAI LIMO INC.,

Hon. Howard H. Sherman
J.S.C.

Defendants.

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Facts and Procedural Background

Plaintiff Lucilo Cabrera (Cabrera) seeks damages for injuries allegedly sustained on September 1, 2011 in a motor vehicle accident that occurred at or near the intersection of Southern Boulevard and 187 Street, Bronx, New York. At the time, Cabrera was the driver of a livery cab, which while stopped at a red light, was impacted in the rear by a vehicle driven by defendant, Moises Gonell (Gonell).

This action was commenced in January 2013 and issue was joined with the service of the defendants' answer in April 2013.

The Note of Issue was filed on August 20, 2015.

Verified Bill of Particulars

Plaintiff alleges that he sustained accident-related injuries to his cervical an lumbar spine and right knee and shoulder effecting permanent restrictions in the ranges of motion of each of those areas [Verified Bill of Particulars ¶ 11].

Plaintiff alleges that he was confined to bed and/or home for three weeks after the

accident [Id. ¶ 13].

The injuries are asserted to qualify as serious in six of the nine statutory categories [Id. ¶20].

Motion

Defendants move for an award of summary judgment dismissing the complaint on the grounds that plaintiff did not sustain a serious injury in the underlying motor vehicle accident. In support they submit copies of the pleadings [Exhibit A], and the verified bill of particulars [Exhibit B] as well as a copy of the transcript of plaintiff's 9/22/14 examination before trial [Exhibit F], and the affirmed reports of the independent medical evaluations, [Exhibits C, D, E].

Independent Medical Evaluations

1) Defendants submit the report of a November 10, 2014 independent orthopedic evaluation conducted by J. Serge Parisien, M.D. Plaintiff presented for examination with complaints of headaches, and pain in the neck, and back, and right shoulder and knee.

On range of motion testing of the cervical spine with the use of a goniometer, Dr. Parisien found full ranges of motion in every plane as quantified and compared to normal. There was no evidence of tenderness to palpation and negative findings on compression and Spurling, and Soto Hall and cervical distraction and shoulder compression testing.

The lumbosacral spine revealed a normal lordosis without spasm or tenderness, and range of motion testing was normal in all planes as quantified and compared to normal readings. Straight leg raising was negative, as were Laseque's and Waddell's and Kerning's.

Upon these clinical findings, Dr. Parisien concluded that all of the injuries alleged to have been sustained had resolved without evidence of residuals.

2) Naunihal Sachdev Singh, M.D. conducted a neurological examination of plaintiff on

November 19, 2014.

On examination he found full range of motion of the cervical and lumbar spine¹, and no evidence of spasm on palpation of either area. The motor examination was normal and functional muscle testing was 5/5 in all four extremities. After a series of specific objective tests addressed to each spinal area as well as to reflexes, coordination, gait and station, and cranial nerves; and higher medical function, Dr. Singh concluded that the spinal injuries alleged had resolved as had the headaches and dizziness. He opined that plaintiff had no neurological disability and there was no medical necessity for further diagnostic testing in this specialty.

3) March J. Decker, M.D. reviewed the contemporaneous films of plaintiff's lumbar and cervical spine.

With respect to the former, MRI of 10/26/11, he concluded that there was no evidence to suggest a traumatic injury had been sustained. He also found evidence of longstanding degenerative disc disease as L5-S1 with bulge and broad superimposed herniation and mild stenosis and foraminal encroachment.

The cervical spine study of 10/12/11 was found to reveal multilevel bulging with flattening of the cal sac not causally related to the accident, but degenerative in etiology.

Deposition

As pertinent here, plaintiff testified that as a result of the collision's "medium" impact his right knee hit the dashboard and his right shoulder, the seat [1]. He stepped out of the car to assess the damage, and returned to the car [20]. After proceeding another block the rear of plaintiff's was struck again by the same driver [24].

¹ Dr. Singh used a goniometer for the ROM testing and his findings are quantified and compared to the normal ranges in each plane.

He refused medical treatment at the scene of the accident, and drove to the precinct to make out the police report [44-45]. After that he went to Montefiore Hospital where he was treated and discharged after four hours [50]. He walked home, and on the following day, he consulted with his primary care physician [Id.]. He was referred for and received physical therapy for five months post-accident [53] until his insurance would no longer pay for it [54]. He was unable to work as a livery cab driver for two weeks after the accident [53].

Discussion and Conclusions

It is clear that this record does not support plaintiff's contention that he suffered a permanent loss of use of his cervical and/or lumbar spine and/or right shoulder or knee (see, Oberly v Bangs Ambulance, 96 NY 2d 295, 299, 751 NE 2d 457, 727 NYS 2d 378 [2001]). Moreover, plaintiff has not made any specific allegation of scarring or of disfigurement in the Bill of Particulars (see, Torres v Dwyer, 84 AD 3d 626, 923 NYS2d 512 [1st Dept. 2011]), and the contemporaneous medical reports do not support a claim of any accident related significant disfigurement. Nor is there any allegation or evidence to raise an issue of fact that plaintiff sustained a fracture as a consequence of the collision.

With respect to the remaining categories asserted, upon review of the findings by objective testing upon recent examinations revealing a complete resolution of the injuries asserted, including findings of full ranges of motion in all planes of the cervical and lumbar spine, and of the right shoulder and knee and the lack of evidence of orthopedic or neurological disability, it is the finding of this court that defendants have met their initial burden to prove as a matter of law that plaintiff did not sustain a serious injury in the "significant limitation" and "permanent consequential" categories asserted.

Moreover, the radiologist's findings of the lack of trauma related injury in the diagnostic films and the Bill of Particulars allegation of a two-week confinement post-accident and

plaintiff's testimony confirming this and his ability to return to work as a driver after this minimal period, the court finds that defendants have met their initial burden with respect to the 90/180.

Upon this showing, it is incumbent upon the plaintiff to come forward "with an objective medical basis supporting the conclusion that he sustained a serious injury (see, Toure v Avis Rent A Car Sys., 98 NY 2d 345, 350-351, 774 NE 2d 1197, 746 NYS 2d 865 [2002])." Baez v Rahamatali, 6 NY 3d 868, 869; 850 NE 2d 19 [2006].

Upon review of the submission in opposition as afforded all favorable inferences, it is submitted that plaintiff has failed to do so.

Plaintiff has come forward with the affirmation of his treating orthopedist [Exhibit A] who attests to his findings on two examinations, the first, five days post-accident, and the other, one month later. The contemporaneous reports are annexed as part of the exhibits certified by a custodian of the treating facility. These records reflect that Dr. Pearl conducted no examination of plaintiff more recent than December 1, 2011, and indeed he only references the first two examinations for purposes of his affirmed letter to plaintiff's counsel of June 17, 2015. To the extent that plaintiff comes forward with no other proof of a recent evaluation, he raises no issue of fact to rebut the findings of defendants' experts that he did not sustain accident-related permanent injuries.

It is also submitted that certain infirmities in Dr. Pearl's affirmation and report diminish their probative value and as a consequence plaintiff fails to raise an issue of fact with respect to the "significant limitation of use" category. Notably, while he opines that plaintiff will require future treatment for his cervical spine injuries, Dr. Pearl fails to reconcile this assessment with his clinical findings of full range of motion five days post-accident. Notably, the two subsequent examinations incorporated no clinical findings with respect to the cervical spine. Nor does he

specifically address the issue of an alternative etiology of the pathology found in the contemporaneous films raised by the defendants' expert's findings of longstanding degenerative disc disease.

Dr. Pearl acknowledges that the MRI(s) of the right shoulder and knee revealed no abnormal findings and his report of his 12/13/11 examination reveals that there was full range of motion in both, and concludes that prognosis is "fair" with respect to these areas, and concerning the lumbosacral spine.

With respect to the 90/180 claim, plaintiff offers no probative proof to raise an issue of fact that any significant curtailment in his daily activities was medically recommended in connection with his five-month post-accident treatment.


Accordingly, it is

ORDERED that the motion be and hereby is granted , and it is further

ORDERED that summary judgment be entered in favor of defendants as against plaintiff dismissing the complaint.

This constitutes the decision and order of this court.

Dated: January 5, 2017
Bronx, New York



Hon. Howard H. Sherman
J.S.C.