

Gutierrez v Premier Util. Servs. LLC

2017 NY Slip Op 31757(U)

August 18, 2017

Supreme Court, New York County

Docket Number: 151956/2014

Judge: Paul A. Goetz

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. PAUL A. GOETZ
J.S.C.
Justice

PART 22

IGNACIO GUTIERREZ

INDEX NO. 151956/2014

MOTION DATE

MOTION SEQ. NO. 004

PREMIER UTILITY SERVICES LLC

The following papers, numbered 1 to , were read on this motion to/for
Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s) 1
Answering Affidavits — Exhibits No(s) 2
Replying Affidavits No(s) 3

Upon the foregoing papers, it is ordered that this motion is

Defendant Premier Utility Services LLC's (hereinafter "Defendant") motion for summary judgment on the grounds that the injuries allegedly sustained by Plaintiff Ignacio J. Gutierrez as a result of the December 22, 2013, motor vehicle accident fail to establish serious injury thresholds as defined by Insurance Law § 5102 (d) is decided as follows:

Plaintiff's bill of particulars alleges he sustained injuries to his cervical and lumbar spine. Plaintiff avers that his injuries meet the following Insurance Law § 5102 (d) criteria: Permanent consequential limitation; significant limitation of use; and 90/180-day.

Defendant's orthopedist, Dr. Sean Lager, found during his exam of Plaintiff on April 1, 2016, range of motion in his "spine" "45 degrees (normal 80 - 90) and extend to 5 degrees (normal 30) and a "[p]ositive straight leg raising sign bilaterally" and "some diminished tactile sensation on the right lower extremity." Dr. Lager further notes that "[f]rom the records provided, an MRI of the lumbar spine reportedly showed a disc herniation at L5 - S1 and disc bulge at L4 - 5. The MRI report and films were not provided for my review. The EMG indicated there was right L5 - 6 radiculopathy." Dr. Lager does not give an opinion as to causation and concludes he "cannot determine evidence of permanency or residual effects based upon [his] examination."

Dated: AUG 18 2017

1 of 4

J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

MOTION/CASE IS REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: _____
Justice

PART _____

-v-

INDEX NO. _____
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Defendant’s neurologist, Dr. Elizabeth Ortof, found during her examine of Plaintiff on March 30, 2016, “full range of motion of the neck” and “limited range of motion of the lumbar spine.” Dr. Ortof diagnoses Plaintiff with a resolved cervical sprain and “lumbar sprain, right L5/S1 radiculopathy - per the EMG report.” Regarding Plaintiff’s cervical spine Dr. Ortof “examination was completely normal and [Plaintiff is] neurologically intact. There was no objective evidence of any ongoing neurological impairment to the cervical spine.” Regarding Plaintiff’s lumbar spine Dr. Ortof notes positive findings but she “was not provided with the complete medical file to give a final opinion on the alleged injuries and how they may relate to the accident of record.”

Defendant’s radiologist, Dr. Arthur Fruauff, reviewed an MRI of Plaintiff’s lumbar spine taken on April 7, 2014, and found degenerative disc disease at L5 - S1. Dr. Fruauff notes that he disagrees “with Dr. Lichy’s report as there is no disc herniation at L5 - S1 or bulging disc at L4 - L5.” Further Dr. Fruauff finds “no fracture, dislocation or herniated disc.” Therefore, Dr. Fruauff concludes “there are no findings on this study which are causally related to the accident of 12/22/2013.”

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: _____ 2/8/17 _____, J.S.C.

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SUPREME COURT OF THE STATE OF NEW YORK
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Upon the foregoing papers, it is ordered that this motion is

Defendant's submissions fail to eliminate triable issues of fact as to whether Plaintiff sustained a serious injury to his lumbar spine. Dr. Lager found limited range of motion in Plaintiff's "spine" but did not indicate whether it was Plaintiff's cervical or lumbar spine with the limited range of motion and he does not give an opinion as to causation or permanency. Dr. Ortof found limited range of motion in Plaintiff's lumbar spine and positive objective tests and also does not give an opinion as to causation or permanency. Dr. Fruauff is Defendant's only expert who found that Plaintiff has degenerative disc disease at L5 - S1. Further, Dr. Fruauff states that he disagrees with Dr. Lichy's report but Dr. Lichy's report is not included with Defendant's submission. These contradictory findings concerning Plaintiff's lumbar spine - no opinion as to causation and permanency (Dr.'s Lager and Ortof) versus no causation and degeneration (Dr. Fruauff) - raise triable issues of fact for the jury to resolve (Martinez v Pioneer Transportation Corp., 48 AD3d 306 [1st Dept 2008]). Because there is a triable issue of fact as to whether Plaintiff sustained a serious injury that was causally related to the accident to his lumbar spine, it is unnecessary to address the alleged injury to his cervical spine since he is entitled to seek recovery for all the injuries he allegedly incurred as a result of the accident (Boateng v Yiyan, 119 AD3d 424 [1st Dept 2014]; Caines v Diakite, 105 AD3d 404 [1st Dept 2013]; Delgado v Papert Transit, Inc., 93 AD3d 457 [1st Dept 2012] [holding "[o]nce a serious injury has been established, it is unnecessary to address

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Dated: _____ 394 _____ J.S.C.

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SUPREME COURT OF THE STATE OF NEW YORK
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additional injuries to determine whether the proof is sufficient to withstand defendants' summary
judgment."]; Sin v Singh, 74 AD3d 1320 [2nd Dept 2010] [holding "[s]ince the Supreme Court found
that there were triable issues of fact regarding whether the plaintiff sustained a serious injury to her
right ankle, she is entitled to seek recovery for all injuries allegedly incurred as a result of the
accident."].

Defendant also failed to met its prima facie burden as to Plaintiff's 90/180-day claim.
Without explicitly stating what evidence, Defendant avers that "plaintiff has proffered evidence that
. . . he was not confined to a hospital . . . was only confined to home for two or three days post
accident . . . [and] missed one or two months of work . . ." If this "evidence" is contained in the 52
page deposition transcript annexed to Defendant's moving papers, the Court is unable to make that
determination because Defendant does not attribute the "evidence" to the deposition transcript with
citations to page and line numbers.

Accordingly, based on the foregoing it is hereby

ORDERED that Defendant's summary judgment motion is DENIED in its entirety.

This constitutes the Decision and Order of the Court.

AUG 18 2017

Dated: 8/18/17

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[Signature] J.S.C.

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FOR THE FOLLOWING REASON(S):

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