

Groneman v Cigna
2017 NY Slip Op 32199(U)
September 21, 2017
Supreme Court, Queens County
Docket Number: 708574/2015
Judge: Leslie J. Purificacion
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

Part 39

-----X
MICHAEL GRONEMAN,

Index Number 708574/2015

Plaintiff,

DECISION/ORDER

- -against--

Motion Sequence No. 2

AUDREY R. CIGNA,

Defendant.

-----X

The following papers numbered 1 to 9 read on defendant's motion pursuant to CPLR §3212 dismissing the complaint of the plaintiffs on the grounds that plaintiff Michael Groneman's alleged injuries fail to meet the serious injury threshold requirement of Insurance Law §5102(d).

Papers
Numbered

N.M., Aff., Exhibits and Service.....	1-4
Answering Aff., Exhibits and Service.....	5-7
Reply and Service.....	8-9

Upon the foregoing papers, it is ordered that this motion is determined as follows:

In this personal injury action, plaintiff seeks to recover damages for injuries allegedly sustained as a result of a motor vehicle accident that occurred on December 10, 2014, at the intersection of 115th Street and Cohancy Street, Queens County, New York. At the time of the accident, the plaintiff was a pedestrian crossing Cohancy Street, when he was struck by a vehicle owned by defendant. In his verified bill of particulars, plaintiff alleges, inter alia, the following injuries: focal interstitial tears of the supraspinatus tendon of the left and right shoulders; herniations at C3-4, C4-5, C5-6, C6-7. Plaintiff asserts that as a result of the accident he suffered: a fracture; significant

disfigurement; "a permanent loss of use of a body organ, member, function or system"; "a permanent consequential limitation of use of a body organ or member; a significant limitation of use of a body function or system; and "a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment" (Insurance Law §5102[d]). Defendants assert that plaintiff's alleged injuries do not meet the threshold requirement of Insurance Law §5102(d), and therefore summary judgment dismissing plaintiff's complaint is warranted.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact, (see CPLR §3212[b]; Alvarez v Prospect Hosp., 68 N.Y.2d 320; Winegrad v New York Univ. Med. Ctr., 64 N.Y.2d 851; Zuckerman v City of New York, 49 N.Y.2d 557). The question of whether plaintiff sustained a "serious injury" as defined by Insurance Law §5102(d) is one of law that can be disposed of by summary judgment and defendant in seeking same has the burden to show that plaintiff's injuries do not rise to the level of those set forth in the statute (see Gaddy v Eyler, 79 N.Y.2d 955; Licari v Elliot, 57 N.Y.2d 230). This may be accomplished through submission of plaintiff's deposition testimony and/or affidavits, affirmations or sworn reports of medical experts who examine the plaintiff and conclude that no objective medical findings support the plaintiff's claim (see Grossman v Wright, 268 A.D.2d 79; Toure v Avis Rent A Car Sys., 98 N.Y.2d 345).

In support of their application, defendant submit the properly affirmed reports of orthopedist Edward A. Toriello, M.D., radiologist Scott S. Coyne, plaintiff's verified bill of particulars and plaintiff's examination before trial testimony.

On June 3, 2016, Dr. Toriello conducted an orthopedic examination of the plaintiff. In his report, Dr. Toriello indicates the medical records he reviewed and the means by which certain tests were performed including objective quantified range of motion testing by use of a goniometer. Dr. Toriello found that range of motion of the right shoulder was abduction of 90 degrees (180 degrees normal), flexion 105 degrees (180 degrees normal), internal rotation 45 degrees (80 degrees normal), external rotation 45 degrees (90 degrees normal), extension 40 degrees (40 degrees normal), and adduction 30 degrees (30 degrees normal). With respect to the left shoulder, Dr. Toriello found that range of motion was the same as the right shoulder. All other objective tests were negative. Examination of plaintiff's right and left elbows, right and left wrists and hands were all found to be normal. Examination of plaintiff's lumbrosacral spine yielded all normal ranges of motion. Examination of plaintiff's cervical spine found normal ranges of motion, except for extension at 40 degrees (60 degrees normal). All other objective tests were negative. It was Dr. Toriello's impression that plaintiff revealed evidence of resolved cervical sprain, resolved bilateral shoulder tears and resolved bilateral hand sprain. He goes on to state that these resolved injuries are causally related to the accident.

The report of Dr. Coyne dated July 29, 2016, states that review of plaintiff's cervical MRI, taken 6 weeks post-accident, reveals degenerative disc and facet joint changes, which are chronic and long-standing, preexistent and not causally related to

the motor vehicle accident. By report of the same date Dr. Coyne states that his review of MRIs of plaintiff's right and left shoulders, 4 weeks post-accident reveals, no evidence of tears, only degenerative changes that are chronic, long-standing, preexistent and not related to the motor vehicle accident. Dr. Coyne's review dated November 25, 2016, of plaintiff's lumbosacral spine MRI, taken approximately 4 months post-accident, states that it reveals advanced degenerative disc and facet joint changes that are chronic, long-standing, preexistent and not causally related to the motor vehicle accident.

The court finds that the defendant has failed to meet his *prima facie* burden with respect to whether plaintiff suffered a "permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member or a significant limitation of use of a body function or system" (Insurance Law §5102[d]). The defendant's orthopedic surgeon stated in his report that he found limitations in the ranges of motion of the plaintiff's shoulders and cervical spine. Dr. Toriello also stated that he reviewed the plaintiff's MRI reports which indicated that the plaintiff suffered a tear in each shoulder. Dr. Toriello does not address or explain these limitations or shoulder tears but merely concludes that the cervical sprain, bilateral shoulder tears and bilateral hand sprain have resolved. He further states that these resolved injuries are causally related to the accident but then makes a blanket statement that the plaintiff suffers from advanced degeneration in his shoulders and his preexisting condition was not exacerbated by the accident. In the absence of any explanation by Dr. Toriello on how he arrived at his assessment of the plaintiff's injuries, the court cannot conclude that the plaintiff has not suffered a "serious injury".

Since the defendant has only met its burden with respect to the 90/180 category, the burden shifts to the plaintiff to come forward with sufficient evidence that he sustained serious injuries with respect to that category only. As the plaintiff's affidavit has failed to raise a triable issue of fact regarding his 90/180 claim, the defendant's motion for summary judgment is granted to the extent that plaintiff's claim that he suffered "a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment" is dismissed.

This is the decision and order of the court.

Date: September 21, 2017



Leslie J. Purificacion, J.S.C.

