

Morawski v Nergiz

2017 NY Slip Op 32266(U)

October 24, 2017

Supreme Court, New York County

Docket Number: 151421-2014

Judge: Paul A. Goetz

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. PAUL A. GOETZ, J.S.C.

PART 22

TOLGA K. MORAWSKI,

INDEX NO. 151421-2014

MOT. DATE

Plaintiff,

MOT. SEQ. NO. 001

- v -

ERDEM NERGIZ, ANTOINE C SEVERE, JOHN DOES
1—10 (individuals whose real names are presently unknown),
And ABC CORP. 1-10 (entities whose real names are presently
unknown),

Defendants.

The following papers were read on this motion for summary judgment (serious injury threshold):

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits

ECFS DOC No(s). 1

Plaintiff's Affirmation in Opposition, Affidavit, Exhibits

ECFS DOC No(s). 2

Replying Affirmation

ECFS DOC No(s). 3

The motion by Defendants Erdem Nergiz and Antoine C. Severe for summary judgment on the grounds that the injuries allegedly sustained by Plaintiff Tolga J. Morawski as a result of the March 20, 2011 accident fail to establish a serious injury threshold as defined by Insurance Law § 5102 (d) is decided as follows:

Plaintiff's bill of particulars alleges injuries to his "right shoulder head and neck;" "right elbow;" "right arm, hand and fingers;" "right knee;" and "right lower leg, ankle, and foot."

Plaintiff avers that these injuries meet the following Insurance Law § 5102 (d) criteria: permanent consequential limitation of use; significant limitation of use; and 90/180-day.

In support of their motion, Defendants' attorney affirmation annexes as exhibits and refers to, among other things, an April 10, 2012 unsworn report of an MRI of Plaintiff's right knee by Dr. Carlos Benitez, unsworn reports of examinations of the Plaintiff by Dr. David J. Mayman on September 10, 2012 and March 26, 2013, Plaintiff's deposition testimony, and affirmed reports of examinations of Plaintiff by Defendants' orthopedist Dr. Arnold T. Berman on September 29, 2016 and neurologist Dr. Naunihal Sachdev Singh on September 26, 2016.

In the April 2012 MRI report on Plaintiff's right knee, Dr. Benitez finds a ganglion cyst posterior to the ACL that "may represent sequela from old injury," no meniscus tear or cartilage defect, and trace joint effusion with a tiny Baker's cyst.

In the September 10, 2012 report of his examination of Plaintiff's right knee, Dr. Mayman finds no difference in the ranges of motion and objective tests results between Plaintiff's left and right knees and reports that Plaintiff had previous arthroscopic surgery for removal of a ganglion cyst, which has recurred, that Plaintiff is a very active individual and notices pain in the knee after long bike rides, and that Plaintiff recognizes that even without injury this cyst can recur.

In the March 26, 2013 report of his examination of Plaintiff's right knee, Dr. Mayman reports Plaintiff has right knee pain with increased physical activity or deep flexion of the knee and finds negative objective test results and that the right knee range of motion in flexion (135 degrees) is ten degrees less than the left knee in flexion (145 degrees), that there is a ganglion cyst on the right knee and that the remainder of the knee is normal.

Defendants' orthopedist, Dr. Arnold T. Berman examined Plaintiff on September 29, 2016. Dr. Berman finds that Plaintiff had normal ranges of motion and negative objective test results for his cervical spine, right shoulder, right knee, and right ankle and foot. Dr. Berman concludes that Plaintiff's alleged injuries to his cervical spine, right shoulder, right leg, right knee and right ankle and foot are resolved and that there is no evidence of permanent injury or disability related to the March 20, 2011 accident.

Defendants' neurologist Dr. Naunihal Sachdev Singh conducted an independent neurological examination of Plaintiff on September 26, 2016. Dr. Singh finds normal range of motion and negative objective test results for Plaintiff's cervical spine, normal sensation to light, touch, pain, vibration and position in all four extremities, and negative Tinel's sign and Phalen's signs bilaterally, no objective neurological findings and that Plaintiff's alleged injuries to his head and cervical spine are resolved.

Defendants fail to make a prima facie showing of a lack of serious injury to the right shoulder because Dr. Berman's report does not provide the specific range of motion measurement in flexion of Plaintiff's right shoulder, but instead provides two inconsistent measurements for the range of motion in abduction (*Pupko v Hassan*, 149 AD3d 988 [2nd Dept April 19, 2017]). Since Defendants did not meet their prima facie burden in relation to Plaintiff's right shoulder injury, the burden did not shift to Plaintiff and Defendants' motion for summary judgment is denied as to the right shoulder claims without the need to consider Plaintiff's showing in opposition (*see Johnson v Salaj*, 130 AD3d 502, 503 [1st Dept 2015]).

However, Defendants met their burden by showing a lack of serious injury to the Plaintiff's right knee and right ankle by showing the absence of limitations in range of motion and normal objective test results for the right knee and right ankle and that the injuries to both the right knee and right ankle had resolved (*Karounos v Doulalas*, 2017 NY Slip Op 06602 [1st Dept Sept. 26, 2017]; *Green v Domino's Pizza, LLC*, 140 AD3d 546, 546 [1st Dept 2016]; *Duran v Hoy*, 89 AD3d 541 [1st Dept 2011]). The unsworn reports of Dr. Benitez and Dr. Mayman deal only with Plaintiff's right knee cyst and do not refer to the March 20, 2011 accident or draw any specific causal connection between the accident and the right knee cyst. Dr. Mayman's unsworn March 2013 report explains that Plaintiff had previous arthroscopic surgery to remove a cyst from his right knee and that Plaintiff was made aware that the cyst can recur even without injury.

In opposition, Plaintiff submits, affirmed reports of medical examinations of Plaintiff by orthopedic surgeons J. Turner Vosseller on October 3, 2014 and Leonard R. Harrison, Jr., on April 18, 2015. Also annexed to Plaintiff's opposition papers are the affirmed reports of medical examinations of Plaintiff by Dr. Bleifer on July 12, 2011, and by Dr. Margulies on February 6, 2012 and November 29, 2012 and other unsworn medical reports and records.

Dr. Vosseller's October 2014 examination of Plaintiff's right knee finds "no swelling about the knee, no bruising, no TTP, no VMO atrophy, no effusion, full range of motion about the knee (extension to 0 degrees, flexion to 130 degrees), 5/5 strength in knee flexion and extension, no instability in any plan, negative Anterior drawer, Lachman and Pivot shift." Dr. Harrison's examination of Plaintiff's right knee finds a non-painful popliteal cyst which was also present in the left knee and full range of motion of the right knee from zero degrees of extension to flexion of 135 degrees.

Dr. Harrison's diagnoses of Plaintiff includes "traumatically induced right knee syndrome with sequelae" that includes "chondromalacia" and that "patient probably had activation of pre-existing, quiescent, status post arthroscopic condition treating a probable cyst in or about the knee," but it does not specifically link the recurrence of Plaintiff's right knee cyst with the March 2011 accident or otherwise conclude that Plaintiff suffered a serious injury of the right knee as a result of the accident. Dr. Harrison concludes that Plaintiff has "partial permanent disabilities of the right knee." Dr. Harrison's diagnosis and conclusion are inconsistent with his findings of a normal range of motion in the right knee and with the Dr. Vosseller's 2013 findings that Plaintiff's right knee had a full range of motion and the findings of Dr. Bleifer in July 2011, and Dr. Margulies in February and November 2012 that Plaintiff had a normal range of motion and negative objective test results of the right knee and that Plaintiff's right knee contusion had resolved (*Alvarez v NYLL Management LTD*, 120 AD3d 1043, 1044 [1 Dept 2014]; *Santos v Perez*, 107 AD3d 572, 574 [1st Dept 2013]). Moreover, Plaintiff's opposition also fails to address the explanation offered in Dr. Mayman's March 2013 report that Plaintiff's right knee cyst that was surgically removed prior to the accident can recur even without injury.

Therefore, Plaintiff fails to raise an issue of fact in relation to Plaintiff's alleged serious injury to his right knee.

Dr. Vosseller finds the following restrictions to the range of motion of Plaintiff's right ankle: dorsiflexion 15 degrees (normal 25 degrees), plantar flexion 40 degrees (normal 45 degrees), inversion 15 degrees (normal 25 degrees) and eversion 5 degrees (normal 15 degrees). Dr. Harrison finds restricted range of motion of the right ankle with dorsiflexion 17 degrees (normal 20 degrees), plantar flexion 43 degrees (normal 45 degrees), inversion 15 degrees (normal 30 degrees) and eversion 15 degrees (normal 20 degrees). Dr. Harrison also concludes that "The patient had a significant partial permanent disability of the right ankle," and that "[n]o further improvement is to be expected," that "bruising about the distal tibia with the pain in that region does not appear to be related to this accident," and finally that, "[t]he ankle partial permanent disability is significant."

Dr. Vosseller concludes that Plaintiff's "continued right ankle pain that has been incompletely responsive to multiple rounds of treatment with different modalities," "may improve with further treatment, although at this point, they [sic] should be considered permanent, and that as a result, Plaintiff has a functional disability at the present time, although he is not greatly restricted in terms of activity" and that Plaintiff "can thus continue with activities of daily living, and he can continue working in his current capacity," are too equivocal to raise an issue of fact as to permanent consequential or significant limitation categories. Moreover, Plaintiff's affirmed reports fail to address the inconsistent findings of normal range of motion and negative objective test results in relation to Plaintiff's alleged right ankle injury in Dr. Margulies' prior affirmed reports relating to his examination of Plaintiff in February and November 2012 and therefore also fail to raise an issue of fact in relation to the alleged serious injury to Plaintiff's right ankle (*Id.*).

Nevertheless, because there is a triable issue of fact as to whether Plaintiff sustained a serious injury to her right shoulder, he is entitled to seek recovery for all the injuries he alleged sustained as a result of the accident (*Karounos*, 2017 NY Slip Op 06602 (holding "[i]f plaintiff establishes a serious injury to her cervical or lumbar spine at trial, she will be entitled to recover damages for any other injuries caused by the accident, even those that do not meet the serious injury threshold."); *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 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."])

To the extent that Defendants have shown a gap or cessation in treatment, Plaintiff's testimony that his no fault benefits were stopped is sufficient to raise an issue of fact (*Cf Acosta v Ramos*, 144 AD3d 441 [1st Dept 2016]).

Defendants met their burden of proof as to Plaintiff's 90/180-day claim by relying the Plaintiff's bill of particulars and his deposition testimony which both indicate that Plaintiff returned to work within a week after the accident, refuting Plaintiff's 90/180 day claim (*De La Rosa v Okwuan*, 146 AD3d 644, 645 [1st Dept 2017]; citing *Mena v White City Car & Limo, Inc.*, 117 AD3d 441 [1st Dept 2014]). Moreover, Plaintiff presented no evidence of a medically determined injury that prevented him from performing his customary daily activities within the relevant time period (*Id.*).

Accordingly, based on the foregoing it is hereby

ORDERED that Defendants summary judgment motion is **DENIED** as to Plaintiff's claim of serious injury to his right shoulder under the permanent consequential and significant limitation of use categories of Insurance Law § 5102(d); and it is further

ORDERED that Defendants' summary judgment motion is **GRANTED** as to Plaintiff's claim of serious injury to his right knee and right ankle under the permanent consequential and significant limitation of use categories of Insurance Law § 5102(d); and it is further

ORDERED that Defendants' summary judgment motion is **GRANTED** as to Plaintiff's claim of serious injury under the 90/180-day category of Insurance Law § 5102(d); and it is further

ORDERED that the parties are directed to appear for settlement conference on November 9, 2017, at 9:30 AM at 80 Centre Street, Room 136.

This constitutes the Decision and Order of the Court.

Dated: October 24, 2017


HON. PAUL A. GOETZ, 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
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