

Viruet v American United Transp. Inc.

2017 NY Slip Op 32448(U)

November 16, 2017

Supreme Court, New York County

Docket Number: 152219/2015

Judge: Paul A. Goetz

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 22

-----X
Nelson Viruet,

Plaintiff,

Index
Number:

-against-

152219/2015

American United Transportation
Inc. and Hamady Kome,

Defendants.

-----X
Paul Goetz, J.:

Defendants move, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint for failure to meet the serious injury threshold of Insurance Law § 5102 (the No-Fault Law).

Underlying Allegations

Plaintiff alleges that, on January 6, 2015, at 6:43 a.m., he was driving on 130th Street, entering the intersection of Park Avenue, when a livery car owned by American United Transportation Inc. and driven by Hamady Kome struck the rear side of his car (bill of particulars, items 4-5, 7; plaintiff EBT at 14, 32, 68, 92, 94). He asserts that, as a result of the collision, he suffered a torn right shoulder rotator cuff, a torn left shoulder rotator cuff, right knee medial and lateral meniscus tears, disc herniation to the C-3 to C-4, C-4 to C-5, C-5 to C-6, C-6 to C-7, and L-5 to S-1 discs, and disc bulges to the C-2 to C-3, L-2 to L-3, L-3 to L-4 and L-4 to L-5 discs (bill of particulars, item

1; plaintiff EBT at 38-39, 41, 46, 109-110). He states that the right shoulder rotator cuff was repaired by surgery on February 10, 2015, the left shoulder rotator cuff tear was repaired by surgery on March 10, 2015 and the right knee meniscus tear was surgically repaired on September 30, 2015 (*id.* at 39, 125-126, 130-131, 140-143, 164, 178-179). Plaintiff also states that he was confined to his bed, except for medical appointments for the month after his right shoulder surgery and for three months after his left shoulder surgery (*id.* at 164-166).

Doctor Sanford Wert, who performed arthroscopic surgery on both plaintiff's shoulders examined plaintiff with a variety of tests, including a goniometer, and prepared a report (the Wert Report) that found significant reduction in plaintiff's range of motion of both the right and left shoulders and the right knee. He determined that plaintiff's condition had "improve[d] . . . at least partially . . . [but that plaintiff] has marked defects in range of motion of both shoulders which are obviously permanent" (the Wert Report at 5). He attributed the cause of plaintiff's injuries to his shoulders and right knee to the accident (*id.*).

Defendants have presented the reports of Doctor Robert Tantleff, a radiologist, who examined plaintiff's MRIs and medical records (the Tantleff Reports) and of Doctor Barbara Freeman, who examined plaintiff (the Freeman Report, together Defendants' Medical Reports). The Tantleff Reports attributed

plaintiff's injuries to "chronic wear and tear and overuse consistent with the [plaintiff's] age . . . and not posttraumatic abnormality." The Tantleff Reports also attribute the disc herniations and bulges to degenerative disc disease, normal wear and tear and plaintiff's age of 64. Dr. Freeman found that plaintiff had a normal range of motion and opined that his surgeries were "to address preexisting degenerative changes [and] no evidence of acute traumatic injury from the accident" (Freeman Report at 5).

The Wert Report does not mention degenerative disc disease or the plaintiff's cervical and lumbar spine disc herniations and bulges.

Summary Judgment Standard

A party seeking summary judgment must make a prima facie case showing that it is entitled to judgment as a matter of law by proffering sufficient evidence to demonstrate the absence of any material issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant fails to make this showing, the motion must be denied (*id.*). Once the movant meets its burden, then the opposing party must produce evidentiary proof in admissible form sufficient to raise a triable issue of material fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

In deciding the motion, the court must draw all reasonable inferences in favor of the nonmoving party and deny summary

judgment if there is any doubt as to the existence of a material issue of fact (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]; *Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]). "Where different conclusions can reasonably be drawn from the evidence, the motion should be denied" (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 555 [1992]). "[I]ssues as to witness credibility are not appropriately resolved on a motion for summary judgment" (*Santos v Temco Serv. Indus.*, 295 AD2d 218, 218-219 [1st Dept 2002]; see also *Santana v 3410 Kingsbridge LLC*, 110 AD3d 435, 435 [1st Dept 2013]).

The No-Fault Law

The No-Fault Law provides, in pertinent part:

"'Serious injury' means a personal injury which results in . . . a fracture; . . . permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or 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 ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment."

"[T]he 'legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries' . . . [by] requir[ing] objective proof of a plaintiff's injury in order to satisfy the statutory serious injury

threshold" (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350 [2002] [internal citations omitted]). Objective proof sufficient to sustain a claim is "[a]n expert's designation of a numeric percentage of a plaintiff's loss of range of motion . . . [or] [a]n expert's *qualitative* assessment . . ., provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system" (*id.* at 350 [italics in original]; *Gorden v Tibulcio*, 50 AD3d 460, 463 [1st Dept 2008]). Minor limitations of movement in a plaintiff's neck and back are insufficient to be considered a serious injury (*Gaddy v Eyler*, 79 NY2d 955, 957 [1992]). Rather, plaintiff must present "objective evidence" in the form of tests indicating a significant limitation to satisfy the No-Fault Law (*Toure*, 98 NY2d at 350-351; *Reyes v Esquilin*, 54 AD3d 615, 615-616 [1st Dept 2008]; *Brown v Achy*, 9 AD3d 30, 31-32 [1st Dept 2004]).

When the defendants' medical evidence points to "pre-existing degenerative disease [rather than a traumatic injury], it [is] incumbent upon plaintiff to present proof addressing the lack of causation [to raise an issue of fact as to a serious injury]" (*Turner v Benycol Transp. Corp.*, 78 AD3d 506, 507 [1st Dept 2010]; see also *Walker v Whitney*, 132 AD3d 478, 479 [1st Dept 2015]; *Becerril v Sol Cab Corp.*, 50 AD3d 261, 262 [1st Dept 2008]).

Discussion

Defendants have proffered the Defendants' Medical Reports and "the affirmed reports of medical experts who, upon examination, found that plaintiff had full range of motion in his shoulders and cervical and lumbar spines and that the MRIs . . . showed degenerative changes" meet defendants' burden of establishing a prima facie case that plaintiff did not suffer a serious injury under the No-Fault Law (*Williams v Perez*, 92 AD3d 528, 528 [1st Dept 2012]; *Vega v MTA Bus Co.*, 96 AD3d 506, 507 [1st Dept 2012]; *Tsamou v Diaz*, 81 AD3d 546, 546 [1st Dept 2011]). As noted above, the Wert Report does not address the plaintiff's cervical and lumbar disc herniations and disc bulges and, consequently, plaintiff has not refuted defendants' showing that these injuries do not meet the standard of a serious injury under the No-Fault Law (see *Luetto v Abreu*, 105 AD3d 558, 558 [1st Dept 2013]).

However, with respect to the injuries to plaintiff's shoulder and right knee, the Wert Report constitutes "contrary evidence . . . [and is] sufficient to raise an issue of fact" (*Perl v Meher*, 18 NY3d 208, 218-219 [2011]). The conflict between the findings of plaintiff's expert witness and defendants' expert witnesses as to the degree of limitation of plaintiff's range of motion "is one of credibility" (*id.* at 219; see also *Williams*, 92 AD3d at 529). Put another way, plaintiff's

doctor contests the findings of defendants' doctors and he asserts that plaintiff has suffered a significant injury attributable to his accident. These findings are "entitled to the same weight as defendants' expert[s'] opinion and are sufficient to raise an issue of fact" (*Mulligan v City of New York*, 120 AD3d 1155, 1156 [1st Dept 2014]; see also *Windham v New York City Tr. Auth.*, 115 AD3d 597, 598 [1st Dept 2014]; *Vaughan v Leon*, 94 AD3d 646, 648 [1st Dept 2012]). "Plaintiff's orthopedic surgeon, who performed arthroscopic surgery on him . . . , observed the relevant musculature with his own eyes, and opined that plaintiff suffered from a torn rotator cuff [in each shoulder] and impingement causally related to the accident . . . [and thus, raised an issue of fact as to a] causal connection to the accident" (*Calcano v Rodriguez*, 103 AD3d 490, 490-491 [1st Dept 2013]; see also *Jallow v Siri*, 133 AD3d 1391, 1392 [1st Dept 2015]). The Wert Report "refute[s] the findings of defendant[s'] experts as to the degenerative nature of plaintiff's condition by specifically attributing the injuries to the accident" (*Pinzon v Gonzalez*, 93 AD3d 615, 616 [1st Dept 2012]; see also *Williams*, 92 AD3d at 529). Accordingly, plaintiff has raised an issue of fact as to the serious injury threshold. Plaintiff has also supported his claim of significant impairment for at least ninety of the first one hundred eighty days immediately following the accident by his deposition testimony that he was confined to his bed,

except for medical appointments, for approximately four months from the date of his right shoulder surgery, which was a little more than a month after the accident (plaintiff EBT at 164-166). Consequently, defendants' motion for summary judgment to dismiss plaintiff's complaint, for lack of a serious injury, must be denied.

Order

It is, therefore,

ORDERED that defendants' motion for summary judgment, pursuant to CPLR 3212, based upon the lack of a serious injury under the No-Fault Law, is denied; and it is further

ORDERED that all parties are directed to appear for a settlement conference 80 Centre Street, Room 136 on January 9, 2018, at 9:30 AM.

Dated: November 16, 2017

ENTER:



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