

Pelaez v Rosul

2017 NY Slip Op 32640(U)

December 15, 2017

Supreme Court, New York County

Docket Number: 150708-2015

Judge: Paul A. Goetz

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**SUPREME COURT OF THE STATE OF NY
COUNTY OF NEW YORK: PART 22**

CARLOS PELAEZ,

Index No.: 150708-2015
Motion Seq.: 1

Plaintiff,

-against-

DECISION/ORDER

MD A ROSUL and DOREEN TAXI, INC.,

Defendants.

Recitation, as required by CPLR § 2219(a), the following papers were considered on the motion(s):

<u>papers</u>	<u>number</u>
Defendants Md A Rosul and Doreen Taxi, Inc., notice of motion for summary judgment (serious injury threshold) and attorney affirmation with exhibits	1
Plaintiff's attorney affirmation and exhibits in opposition	2
Defendants' attorney affirmation in Reply	3

PAUL A. GOETZ, J.S.C.

Plaintiff Carlos Pelaez initiated this personal injury action against Defendants alleging serious injuries as defined by Insurance Law § 5102(d) resulting from Defendants' negligent ownership and/or operation of a motor vehicle on October 5, 2014.

Plaintiff's bill of particulars alleges injuries to his left shoulder, left hip, left knee, lumbar spine, and cervical spine.

Plaintiff avers that these injuries meet the following Insurance Law § 5102 (d) criteria: significant disfigurement, fracture, permanent loss of a body organ or member, permanent consequential limitation of use; significant limitation of use; and 90/180 day.

Defendants' radiologist Dr. Mark Decker conducted independent reviews of magnetic resonance image films (MRIs) taken in November 2014 of Plaintiff's left knee, left hip, left shoulder, lumbar spine and cervical spine and found no evidence to suggest acute traumatic injuries were sustained to the allegedly injured body parts, that there was no fracture of the bony pelvis, the hips, the left shoulder, and the lumbar spine, and that Plaintiff's alleged injuries to each of the alleged body parts were the result of longstanding degenerative changes not causally related to the October 5, 2014

accident.

Also annexed to Defendants' motion as an exhibit are Plaintiff's unaffirmed reports of radiological studies of Plaintiff's pelvis, left femur, and left knee conducted on October 5, 2014 and of Plaintiff's left shoulder and cervical spine conducted on October 10, 2014. In relation to Plaintiff's left knee, Plaintiff's unaffirmed October 5, 2014 reports find no fracture or dislocation, no joint effusion, no significant soft tissue swelling, and mild tricompartmental degenerative osteoarthritis of the left knee most prominent in the patellofemoral compartment with joint space narrowing and osteophyte formation and refer to a comparison: correlation with knee radiographs dated June 18, 2014. In relation to Plaintiff's cervical spine, Plaintiff's unaffirmed October 10, 2014 report of the CT scan of Plaintiff's cervical spine finds no displaced fracture, multilevel degenerative discogenic disease, most prominent at C5-C6 with minimal grade 1 retrolisthesis and broad-based osteophyte complex and right unconvertibril osteophyte, but no significant neural foraminal or spinal canal stenosis at C5-C6, and degeneration of the intervertebral disc with no significant neural foraminal or spinal canal stenosis at C6-C7, and severe osteoarthrosis of the left facet at C7-1. In relation to Plaintiff's left shoulder, Plaintiff's unaffirmed October 10, 2014 report of the radiograph of Plaintiff's left shoulder finds normal alignment, normal mineralization, no acute fracture or dislocation, no evidence of glenohumeral dislocation, no significant tissue swelling, fibercystic changes in the greater tuberosity, and degenerative changes in the acromioclavicular joint.

Defendants' orthopedist Dr. Arnold T. Berman conducted an examination of Plaintiff on January 22, 2016 and found normal range of motion and negative objective test results for Plaintiff's left shoulder, left hip left knee, lumbar spine and cervical spine, except for a limitation in range of motion of the internal rotation of Plaintiff's left shoulder, which measured 70 degrees, instead of the normal 80 degrees, a 12.5 percent limitation in the range of motion measurement. Dr. Berman did not review Plaintiff's medical records. Dr. Berman finds that Plaintiff's alleged injuries to his left hip, left knee, lumbar spine, and cervical spine are resolved. In relation to Plaintiff's shoulder and the 12.5 percent limitation (70 degrees instead of the normal 80 degrees) in the range of motion measurement of the internal rotation, Dr. Berman finds the limitation is compatible with the alleged injury and subsequent surgery to the left shoulder, but does not represent a functional loss or interfere with Plaintiff's ability to perform the activities of daily living. Dr. Berman finds that Plaintiff did not sustain a permanent injury and has no functional loss and no disability due to the accident.

Defendants' neurologist Dr. Naunihal Sachdev Singh conducted a neurological examination of the Plaintiff on February 8, 2016 and found normal range of motion of the lumbar spine and cervical spine and negative objective neurological test results and that Plaintiff's alleged injuries were resolved and that Plaintiff is not suffering from a neurological disability. Dr. Sachdev Singh did not review Plaintiff's medical records.

Defendants also attach a copy of the Plaintiff's deposition testimony and argue

that Plaintiff has failed to meet the serious injury threshold under the 90/180-day category because, apart from Plaintiff's deposition testimony that he was confined to bed for 15 days and confined to his home for three weeks, there is no evidence of a medical directive for the Plaintiff to remain confined for the 90/180 day period of time.

Defendants met their prima facie burden of establishing that Plaintiff did not sustain a serious injury to his left shoulder, left hip, left knee, lumbar spine, and cervical spine under the serious injury categories of significant disfigurement, fracture, permanent loss, and permanent consequential limitation of use of a body organ or member through Plaintiff's own medical records immediately following the accident on October 5, 2014 and a few days later on October 10, 2014, which find degeneration of the left shoulder, left hip, left knee, and cervical spine; through Defendant's radiologist, who reviewed the Plaintiff's November 2014 MRI's of the allegedly injured body parts, which also includes and MRI of Plaintiff's lumbar spine and opines that the alleged injuries are degenerative and not causally related to the accident; and through the findings of Defendants' orthopedist and radiologist who conducted independent medical examinations of Plaintiff and found full range of motion and negative objective test results for the allegedly injured body parts.¹

Significant Limitation of Use of a Body Function or System

Defendants did not meet their prima facie burden of establishing that Plaintiff did not sustain a serious injury to his left shoulder, left hip, left knee, lumbar spine, and cervical spine under the category of significant limitation of use of a body function or system because the significant limitation category does not require permanency and because there are contradictory findings among Defendants' experts that raise issues of fact. Defendants' radiologist concludes that Plaintiff's injuries are the result of degeneration. Defendants' orthopedist and neurologist conclude that Plaintiff's alleged injuries they examined were fully resolved. These contradictory findings as to whether Plaintiff sustained a serious injury under the significant limitation category raise triable issues of fact for the jury to resolve (*see Johnson v Salaj*, 130 AD3d 502 [1st Dept 2015]; *Martinez v Pioneer Transportation Corp.*, 48 AD3d 306 [1st Dept 2008])). Moreover, in relation to whether Plaintiff sustained a serious injury to his left shoulder under the significant limitation category, there is conflict between the findings of degeneration by Defendants' radiologist and the findings by Defendants' orthopedist that the minimal limitation in the range of motion measurement of Plaintiff's left shoulder internal rotation is "compatible with the alleged injury and subsequent surgery" that raises a triable issue of fact for the jury to resolve (*Id.*).

¹ With the exception of a minimal 12.5% limitation of the measurement of Plaintiff's range of motion in the internal rotation of his left shoulder (70 degrees instead of the normal 80 degrees), which Defendants' orthopedist found to be "compatible with the alleged injury and surgery."

Thus, the burden does not shift to Plaintiff to submit evidence sufficient to raise an issue of fact on the issue of whether he sustained a serious injury to the alleged body parts under the significant limitation category (see *Jackson v. Leung*, 99 AD3d 489 [1st Dept.2012]).

Because there is a triable issue of fact as to whether Plaintiff sustained a serious injury to the allegedly injured body parts under the significant limitation category, he is entitled to seek recovery for all the injuries he allegedly sustained as a result of the accident (*Karounos v Doulalas*, 153 AD3d 1166 [1st Dept Sept. 26, 2017] [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 Yiyen*, 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."]).

Plaintiff's opposition fails to raise an issue of fact as to whether he sustained a serious injury to the allegedly injured body parts under the serious injury categories of significant disfigurement, permanent loss, fracture, or permanent consequential limitation. Plaintiff's bill of particulars alleges exacerbation of pre-existing conditions in the bill of particulars ("the following injuries were caused, aggravated, accelerated, precipitated, and/or enhanced..."), but fails to specifically address the findings of degeneration in his own medical records.

Significant Disfigurement and Permanent Loss

Plaintiff's attorney affirmation in opposition claims that Plaintiff sustained serious injuries to his left shoulder ("tear of the rotator cuff, tear of the glenoid labrum, joint effusion, subacromial bursitis, type 2 tear of the superior labrum, impingement resulting in surgery"), left knee ("tears of the medial and lateral meniscui, tracking abnormality of the patellofemoral joint, fracture of the superior posterior pole of the patella, contusion of the lateral tibial plateau and partial tear of the lateral collateral ligament"), lumbar spine ("herniated discs at :L2-3, :3-4, L4-5 and L5-S1, with central bilateral foraminal narrowing"), cervical spine ("disc herniation at C3-4, C4-5, and C5-6 and bilateral C5 cervical radiculopathy"), and left hip ("tear of the interior superior labrum and joint effusion") and that these injuries satisfy the serious injury threshold categories of fracture, permanent consequential limitation, significant limitation, and 90-180 days.

Plaintiff's opposition does not allege or include any mention of Plaintiff sustaining a serious injury under the categories of significant disfigurement or permanent loss and

therefore fails to raise an issue of fact as to those categories.

Fracture

Plaintiff fails to raise an issue of fact under the fracture category of the serious injury threshold under Insurance Law § 5102(d) of the allegedly injured body parts (left shoulder, left hip, left knee, lumbar spine and cervical spine), because Plaintiff's opposition provides no objective medical evidence of any fracture sustained as a result of the accident. Plaintiff's unaffirmed radiologist's report of the November 8, 2014 MRI of the Plaintiff's left knee, which refers to a "suggestion of a hairline fracture" and a "question of a fracture" of the superior posterior pole of the patella, is not admissible (see *Brackenburg v Franklin*, 93AD3d 423 [1st Dept 2012], citing *Glover v Capres Contracting Corporation*, 61 AD3d 549, 550 [1st Dept 2009] [finding unaffirmed xray report was inadmissible and that reference to "healing patellar fracture" in that report was equivocal as to whether or not Plaintiff sustained a fracture as a result of the accident]). Even if the report were admissible, the references therein to, "a suggestion of a hairline fracture" and a, "Question of a fracture" relating to Plaintiff's knee are equivocal and therefore insufficient to raise an issue of fact under the fracture category (*Glover*, 61 AD3d 549, 550)]. Plaintiff submits no affirmed medical evidence of a diagnosis of a fracture to the left knee or any other body part. The August 2016 affirmation of Plaintiff's physiatrist, Dr. Joyce Goldenberg, in which she avers that she personally reviewed the November 2014 MRIs of Plaintiff and that she concurs with the unaffirmed findings, including the finding "Question of a fracture of the superior posterior pole of the patella," Dr. Goldenberg's affirmation does not include an unequivocal diagnosis of a fracture sustained by Plaintiff as a result of the October 5, 2014 accident.

Permanent Consequential Limitation of Use of a Body Organ or Member

To the extent that Plaintiff's opposition relies on the uncertified medical records and unaffirmed medical reports attached as Plaintiff's exhibits A, B, C, D, F, G, H, I, K, and L, Plaintiff fails to raise an issue of fact as to serious injury category of permanent consequential limitation in relation to his alleged injuries to his left shoulder, left hip, left knee, lumbar spine, and cervical spine, because those exhibits are not admissible.

Plaintiff submits the affirmed August 2016 report of Plaintiff's treating physiatrist Dr. Joyce Goldenberg who conducted a follow up examination of Plaintiff in August 2016 and found significant limitations of the range of motion and positive objective test results in relation to Plaintiff's left shoulder, lumbar spine, and cervical spine, normal ranges of motion and negative objective test results in relation to Plaintiff's left knee and left hip, that Plaintiff sustained a permanent consequential limitation of his left shoulder, left hip, left knee, lumbar spine and cervical spine and that Plaintiff's injuries are "the direct result of the accident in question and are causally connected." Dr. Goldenberg's findings are conclusory and insufficient to raise an issue of fact as to whether Plaintiff sustained a serious injury under the permanent consequential limitation category,

because Dr. Goldenberg fails to address the findings of degeneration in Plaintiff's own unaffirmed radiological reports from October and November 2014 (*Rivera v Fernandez & Ulloa Auto Group*, 25 NY3d 1222 [2015]; *Alvarez v NYLL Mgt. Ltd.*, 24 NY3d 1191 [2015] [finding that Plaintiff cannot raise an issue of fact concerning the existence of a serious injury where plaintiff's own experts fail to address indications from plaintiff's own medical records that the physical deficits in question result from a preexisting degenerative condition rather than the subject accident]). Moreover, Dr. Goldenberg's report of her initial evaluation of Plaintiff on October 21, 2014 is not admissible because it is unsigned and unaffirmed. Finally, Dr. Goldenberg's findings of permanent consequential limitation of the left knee and left hip are inconsistent with her findings of normal range of motion and negative objective test results for these areas and are therefore conclusory and fail to raise an issue of fact under the permanent consequential limitation category.

Plaintiff attaches as exhibits two copies of the same October 17, 2016 affirmation of Defendant's orthopedic surgeon Dr. Robert Haar, who performed surgery on Plaintiff's left shoulder, each with a different unaffirmed and uncertified medical records relating to Dr. Haar's treatment of Plaintiff's left shoulder. Dr. Haar's averment in his October 17, 2016 affirmation that Plaintiff's left shoulder injuries are causally related to the October 5, 2014 accident is conclusory because it is made without providing any objective medical basis and because it fails to address the findings of degeneration in the Plaintiff's unaffirmed October 2014 and November 2014 reports of radiological studies of Plaintiff's left shoulder and therefore insufficient to raise an issue of fact as to causation of the alleged injury to Plaintiff's shoulder under the permanent consequential limitation category (*Id.*). Moreover, the unaffirmed reports and uncertified records of Dr. Haar attached to his October 2016 affirmation are not admissible for the content of their medical opinions and diagnosis (*Ricket v Diaz*, 112 AD3d 1451, 452 [1 Dept 2013]).

Cessation of Treatment

Defendants' argument that Plaintiff has not sufficiently explained a gap in or cessation of his treatment is not properly before the court and will not be considered because it was raised for the first time in their reply affirmation (*see Mulligan v City of New York*, 120 AD3d 1155 [1st Dept.2014]).

90/180-Days Claim

Plaintiff alleges in his bill of particulars that he was confined to bed from October 5, 2014 through October 21, 2014 (16 days) and confined to his home from October 21, 2014 through February 1, 2015 (103 days). Plaintiff testified at his deposition that he missed eight months from work immediately after the accident. Defendants have submitted no evidence addressing Plaintiff's claim that he suffered a nonpermanent serious injury preventing him from performing his customary daily activities for at least 90 of the 180 days following the accident (*Vishenik v Bouna*, 147 AD3d 657, 658 [1st Dept Feb 23, 2017]). Since Defendants did not meet their prima facie burden on the

90/180-day claim, the burden did not shift to plaintiff and it is unnecessary to consider the sufficiency of his evidence in opposition (*Id.*). If the trier of fact finds that Plaintiff sustained a serious injury under the 90/180 day claim, it may award damages to compensate him for all injuries proximately caused by the accident, whether or not they meet the serious injury threshold (*Id.*).

Accordingly, based upon the foregoing it is hereby

ORDERED that Defendants' motion for summary judgment on the grounds that Plaintiff has failed to meet the serious injury threshold of Insurance Law § 5102(d) in relation to his injuries under the significant limitation category is **DENIED**; and it is further

ORDERED that Defendants' motion for summary judgment on the grounds that Plaintiff has failed to meet the serious injury threshold of Insurance Law § 5102(d) in relation to his alleged injuries under the fracture, significant disfigurement, permanent loss, and permanent consequential limitation categories is **GRANTED**; and it is further

ORDERED that Defendants' motions for summary judgment on the grounds that Plaintiff has failed to meet the serious injury threshold of Insurance Law § 5102(d) under the 90/180-days category is **DENIED**; and it is further

ORDERED that all parties are directed to appear in Room 136 immediately following the compliance conference scheduled in Part DCM (80 Centre St, Room 103) for February 2, 2018 at 9:30am in order to schedule a settlement conference with the court for a date after February 2, 2018.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
December 15, 2017

ENTER:



Hon. Paul A. Goetz, J. & C.