

Adler v Degregoris

2017 NY Slip Op 33512(U)

December 21, 2017

Supreme Court, Nassau County

Docket Number: Index No. 605106/15

Judge: Antonio I. Brandveen

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ORIGINAL

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

STEVN D. ADLER,

Plaintiff,

- against -

JOSEPH GERARD DEGREGORIS AND
ROBERT P. DEGREGORIS,

Defendants.

TRIAL / IAS PART 31
NASSAU COUNTY

Index No. 605106/15

Motion Sequence No. 002

The following papers having been read on this motion:

| | |
|--|-------------------|
| Notice of Motion, Affidavits, & Exhibits | <u>1</u> |
| Answering Affidavits | <u>2</u> |
| Replying Affidavits | <u> </u> |
| Briefs: Plaintiff's / Petitioner's | <u> </u> |
| Defendant's / Respondent's | <u>3</u> |

The defendants move for an order pursuant to CPLR 3212(b) granting summary judgment in their favor dismissing the verified complaint in this personal injury action with prejudice. The defense asserts the plaintiff did not sustain a "serious injury" as defined by the Insurance Law § 5102 in the subject motor vehicle accident. The defense contends there is no triable issue of fact regarding "serious injury." The defense points to the plaintiff's deposition testimony that the plaintiff did not miss any time from work following the subject motor vehicle accident on January 6, 2015. The defense avers the plaintiff alleged multiple disc bulges and disc herniations at the lumbar levels, but these injuries predate the subject accident by 15 years according to the records from Western Nassau Orthopaedic Associates.

The plaintiff alleged, in an amended verified bill of particulars, that various soft tissue injuries were sustained to the lumbar spine and thoracic spine, including disc bulges and disc herniations at the lumbar levels as a result of the subject motor vehicle accident on January 6, 2015. The plaintiff did not allege an aggravation or an exacerbation of any preexisting condition to the lumbar spine or thoracic spine.

The plaintiff alleged sustaining a significant limitation of use of a body function or system and a permanent consequential limitation of use of a body organ or member. The plaintiff claimed to sustain a medically determined injury or impairment of a nonpermanent nature which prevents the plaintiff from performing substantially all of the material acts which constitute usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment.

The defendants provide the affirmed report of Scott A. Coyne, M.D., a board-certified radiologist, who performed an independent radiology review of the MRI that was performed on the plaintiff's lumbosacral spine on February 24, 2015 at stand-up MRI of Melville. Dr. Coyne's opined: "The lumbosacral spine MRI exam demonstrates markedly advanced multilevel degenerative and facet joint changes with compromise of the neural foramina and central spinal canal. Advanced degenerative changes also involve all of the visualized lower thoracic levels. All these degenerative changes and other findings are certainly chronic, longstanding, preexistent and are not causally related to the accident which occurred seven weeks earlier on January 6, 2015. Dr. Coyne further states that the lumbosacral MRI demonstrates no evidence of osseous or soft tissue abnormality or other trauma causally related to the accident on January 6, 2015."

The defendants provide the affirmed report of Eric L. Freeman, M.D., a Board-certified orthopedic surgeon, who performed an independent medical examination of the plaintiff. Dr. Freeman stated, on the day of plaintiff's orthopedic evaluation, the plaintiff complained of pain in the neck and back, but denied any pre-existing complaints of neck, thoracic or back pain prior to the January 6, 2015-accident. Dr. Freeman performed a goniometric examination of the plaintiff's cervical spine, and found normal range of motion on dorsiflexion; side to side rotation was 30 degrees to the right and 30 degrees on the left; and normal is 40 degrees. Dr. Freeman performed a goniometric examination of the plaintiff's lumbosacral spine, and found 30 degrees on dorsiflexion; and normal is 40 degrees; Side to side rotation was 25 degrees on the right 34 and 25 degrees on the left; and normal is 40 degrees. Dr. Freeman opined the plaintiff's medical records suggest that the plaintiff had known disc disease in the neck and the back from the records of Dr. Robert Michaels, Western Nassau Orthopedics from 15 years prior to the accident. Dr. Freeman noted there was documentation of severe disc disease on the MRI. Dr. Freeman indicated the plaintiff's examination demonstrated mild limitation of motion with muscle strength that was 5/5 throughout; the plaintiff was performing activities of daily living. Dr. Freeman opined, based on the medical records and the examination, within a reasonable degree of medical certainty that a significant portion of the plaintiff's current orthopedic condition is pre-existing in nature prior to the alleged accident of January 6, 2015.

In opposition, the plaintiff provides medical records from Long Island Internal Medicine Associates. P.C., Peak Performance Physical Therapy and Wellness, In Motion Physical Therapy, a stand-up MRI of Melville PC, Horowitz Chiropractic, Dr. Morgan Chen and Rockville Anesthesia Group LLP. The plaintiff asserts these records raise triable issues of fact as to whether Mr. Adler sustained "serious injury" in the subject accident. The plaintiff contends the medical reports of Dr. Coyne and Dr. Freeman are insufficient to satisfy Defendants' initial

burden of showing the plaintiff did not sustain a “serious injury,” hence it is unnecessary to consider whether the plaintiff’s papers in opposition are sufficient to raise a triable issue of fact. The plaintiff maintains the defense motion should be denied in its entirety.

The plaintiff presented to Dr. Robert Perimutter, Long Island Internal Medicine Associates, P.C. complaining of pain on the day of the accident, and indicated “an ache” in the back and neck with a mild headache. Dr. Perimutter found a neck spasm and prescribed medication. The records of Long Island Internal Medicine Associates, P.C. show there were numerous follow up visits with the doctor indicating pain and other treatment the plaintiff was undergoing. The plaintiff began a course of treatment with Peak Performance Physical Therapy that spanned a significant period for neck and back injuries. The Peak Performance Physical Therapy records demonstrate physical therapy multiple times a week until March 24, 2015, when Peak Performance Physical Therapy recommended the plaintiff discontinue physical therapy. The records of In Motion Physical Therapy show the plaintiff began treating there in September 2016, complaining of knee pain. The records of In Motion Physical Therapy indicate multiple weekly treatments that continued until December 22, 2016. The plaintiff points to the MRI of the lumbar spine indicating multiple disc bulges, disc herniations and facet hypertrophy; multiple levels with evidence for nerve root impingement. The plaintiff points to the MRI of the cervical spine indicating multiple disc herniations, disc bulges and facet hypertrophy and cord compression. The plaintiff notes the chiropractic treatment records from Dr. Horowitz additionally demonstrate significant injury and treatment which raise questions of fact, and notes the records demonstrated ongoing treatment on an essentially weekly basis up through the end of 2016. The plaintiff asserts Dr. Chen’s records demonstrate additional treatment and corroboration that the plaintiff sustained injuries in the subject accident which raise questions of fact. The plaintiff notes the plaintiff began treating with Dr. Chen on July 21, 2015, for neck and back pain. The plaintiff points out Dr. Chen reviewed the MRI films at that time, and the plaintiff complained of cervical pain and radiating back pain. Dr. Chen opined that the plaintiff sustained a lumbar sprain; lumbar radiculopathy; cervical strain; cervicgia; and cervical spondylosis. The plaintiff maintains there were numerous follow up examinations, and ultimately Dr. Chen recommended an epidural injection at the L4-5 level on July 21, 2015. The plaintiff contends the records from Rockville Anesthesia Group similarly raise questions of fact as to whether the plaintiff was injured in the subject accident. The plaintiff notes the plaintiff consulted with Dr. Pinsky on August 19, 2015, who confirmed that the plaintiff should be scheduled for an epidural injection to the lumbar spine. Dr. Pinsky opined the plaintiff sustained a cervical sprain, cervical disc displacement, cervical radicular pain, myofascial pain, lumbar disc displacement, lumbar sprain and lumbar radicular pain. The plaintiff points out the supplemental bill of particulars added the claim sequel flowing from the plaintiff having to walk with an antalgic gait stemming from the lumbar injuries. The plaintiff notes the defendants failed to address the causality of the hip, and the defendant’s doctor who performed the independent medical examination failed to address the hip injury despite the plaintiff informing the defendant’s doctor of it.

In reply, the defendants reiterate the plaintiff has not sustained a “serious injury” as

defined by the Insurance Law, hence there should be no right of recovery under the Insurance Law. The defense asserts there is no causal relationship between the subject accident and the plaintiff's alleged injuries. The defense avers the plaintiff has not sustained a permanent consequential limitation of use of a body organ or member or a significant limitation of use of a body function or system. The defense contends the plaintiff did not sustain a medically determined injury or impairment of a nonpermanent nature which prevents the plaintiff from performing substantially all of the material acts which constitute usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment.

The Court determines the defendants establish a prima facie entitlement to judgment as a matter of law. The defendants provide evidence in admissible form showing the plaintiff did not sustain a significant limitation of use of a body function or system and a permanent consequential limitation of use of a body organ or member. The defendants also provide evidence in admissible form showing the plaintiff did not sustain a medically determined injury or impairment of a nonpermanent nature which prevents the plaintiff from performing substantially all of the material acts which constitute usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment.

In opposition, the plaintiff fails to raise a triable issue of fact regarding the issue of "serious injury." The plaintiff's opposition to defendants' motion for summary judgment is supported by records from medical providers that the plaintiff treated with following the January 6, 2015-accident, as well as MRI reports. However, these records and reports are not admissible or probative because the records are unsworn or not affirmed (*Hernandez v. Taub*, 19 A.D.3d 368, 796 N.Y.S.2d 169 [2d Dept 2005]). Moreover, the plaintiff's alleged injuries preexisted the alleged accident of January 6, 2015, yet the plaintiff fails to carry the burden of establishing that the subject accident was the competent producing cause of the plaintiff's claimed injuries (*Greco v. Jackson*, 287 A.D.2d 539, 731 N.Y.S.2d 481 [2d Dept 2001]); *see also Kosto v. Bonelli*, 255 A.D.2d 557, 681 N.Y.S.2d 293 [2d Dept 1998]). It would be merely speculation to conclude the subject motor vehicle accident was the proximate cause of the plaintiff's injuries under the circumstances of this action involving the plaintiff's denial of any preexisting complaints of neck, thoracic or back pain prior to the January 6, 2015-accident, and medical evidence indicating a significant portion of the plaintiff's current orthopedic condition is pre-existing in nature prior to the alleged accident of January 6, 2015 unaddressed by the plaintiff's experts. Moreover, the plaintiff's treating physician examined the plaintiff on January 21, 2015, approximately two weeks after the subject accident, and the plaintiff did not report any restrictions in the ability to either work or perform activities of daily living. The plaintiff's treating physician noted on March 4, 2015, that the plaintiff's strength was good in the upper extremities with 5/5 strength, and that impressed the doctor as relieved to see the plaintiff was doing fairly well. The notes of the plaintiff's treating physician make no mention of the permanent or characterize the plaintiff's lumbar spine as consequential or show the physician utilizing a goniometer to perform range of motion testing (*see generally Marsh v. Wolfson*, 186 A.D.2d 115, 587 N.Y.S.2d 695 [2d Dept 1992]). The plaintiff fails to provide evidence showing

a medically determined injury or impairment of a nonpermanent nature which prevents the plaintiff from performing substantially all of the material acts which constitute usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment (*see Copeland v. Kasalica*, 6 A.D.3d 253, 775 N.Y.S.2d 276 1st Dept 2004)).

ORDERED, ADJUDGED and DECREED that the motion is GRANTED awarding summary judgment in favor of the defendants dismissing the verified complaint in this personal injury action with prejudice.

This decision will constitute the decision and order of the Court. All applications not specifically addressed are denied.

So ordered.

Dated: December 21, 2017

ENTER:



J. S. C.

NOT FINAL DISPOSITION

ENTERED

DEC 28 2017

NASSAU COUNTY
COUNTY CLERK'S OFFICE