

Paulino v Sarker

2017 NY Slip Op 33533(U)

August 29, 2017

Supreme Court, Kings County

Docket Number: Index No. 503990/2014

Judge: Carl J. Landicino

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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 29th day of August, 2017.

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P R E S E N T:

HON. CARL J. LANDICINO,

Justice.

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HENRY PAULINO

Plaintiff,

Index No.: 503990/2014

DECISION AND ORDER

Motions Sequence #4, #5,

- against -

HOSSAIN ABUL SARKER, BANLADESH AUTO REPAIRS INC. and ISABEL R. RICHMAN,

Defendants.

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Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	<u>Papers Numbered</u>
Notice of Motion/Cross Motion and	
Affidavits (Affirmations) Annexed.....	<u>1/2, 3/4,</u>
Opposing Affidavits (Affirmations).....	<u>5, _____</u>
Reply Affidavits (Affirmations).....	<u>6, _____</u>
Memorandum of Law	<u>7, _____</u>

Upon the foregoing papers, and after oral argument, the Court finds as follows:

This lawsuit arises out of a motor vehicle accident which occurred on September 3, 2013. The Plaintiff Henry Paulino (hereinafter "the Plaintiff") alleges in his Complaint that on that day he suffered personal injuries while operating his motor vehicle after his motor vehicle was in a collision at or near the intersection of 3rd Avenue and 60th Street (Brooklyn, N.Y.) with a motor vehicle operated by Defendant Hossain Abul Sarker which is owned by Defendant Bangladesh Auto Repairs, Inc. (hereinafter the "Sarker Defendants"). By Order dated April 22, 2015, the Plaintiff's motion to Amend the Complaint was granted whereby Isabel R. Richman was added as an additional Defendant (hereinafter "Defendant Richman"). In his Bill of Particulars the Plaintiff alleges that he sustained injuries to his right shoulder (that resulted in surgery), his left shoulder, left knee, and cervical and lumbar spine.

The Sarker Defendants now move (Motion Sequence #4) for an order pursuant to CPLR §3212 granting summary judgment, and dismissing the complaint as against them. The Sarker Defendants argue that none of the injuries allegedly sustained by the Plaintiff meet the “serious injury” threshold requirement of Insurance Law § 5102(d). Specifically, the Sarker Defendants argue that the medical reports of Dr. Jay M. Walshon and Dr. Edward A. Toriello establish their *prima facie* burden that none of the Plaintiff’s injuries satisfy Insurance Law § 5102(d).¹

The Plaintiff opposes these motions (motions sequence #4, #5) and argues that they should be denied as the movants have not met their *prima facie* burden. The Plaintiff also argues that the reports of his treating physicians Dr. Dov Berkowitz, Dr. Steven Winter and Dr. Robert Diamond raise material issues of fact relating to the Plaintiff’s injuries that should lead this Court to deny the motions made by the moving Defendants.

It has long been established that “[s]ummary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it ‘should only be employed when there is no doubt as to the absence of triable issues of material fact.’” *Kolivas v. Kirchoff*, 14 AD3d 493 [2nd Dept, 2005], citing *Andre v. Pomeroy*, 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. See *Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2nd Dept, 2004], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible

¹ Defendant Richman cross-moves (motion sequence #5) for the same relief and for the sake of judicial economy adopts and incorporates the submission made by the Sarker Defendants.

form sufficient to establish the existence of material issues of fact which require a trial of the action”*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2nd Dept, 1989]. Failure to make a *prima facie* showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 A.D.3d 518, 520, 824 N.Y.S.2d 166, 168 [2nd Dept, 2006]; *see Menzel v. Plotnick*, 202 A.D.2d 558, 558–559, 610 N.Y.S.2d 50 [2nd Dept, 1994].

The Sarker Defendants contend that the affirmed reports of Dr. Michael J. Carciente and Dr. Edward A. Toriello support their contention that plaintiff did not suffer a serious injury as defined under Insurance Law § 5102(d). When making a motion for summary judgment on the grounds of threshold a defendant has the initial burden of demonstrating that the plaintiff did not sustain a “serious injury” as that term is defined by Insurance Law § 5102.

Dr. Edward Toriello, an orthopaedic surgeon, conducted an independent medical examination of the Plaintiff on December 21, 2016, more than three years after the alleged incident that occurred on September 3, 2013. In his report, which was duly affirmed that same day, Dr. Toriello detailed his findings based upon his review of, among other things, Plaintiff’s medical and hospital records. Dr. Toriello reports that he conducted a physical examination of the Plaintiff’s cervical spine, right and left shoulders, right and left elbows, right and left wrists and hands, lumbosacral spine, and Plaintiff’s right and left knees. Dr. Toriello reports that there was full resolution in all areas. Dr. Toriello indicates that he used a goniometer to measure range of motion. Dr. Toriello provides details of what he found Plaintiff’s range of motion to be from his exam and does indicate a normal range of motion. Dr. Toriello finds that Plaintiff’s range of motion in all areas is normal and Plaintiff has “full range of motion.” As for his impression, Dr. Toriello opines that the Plaintiff “did not sustain any injury to his right shoulder on September 3, 2013 that would have required surgical intervention.”

The Sarker Defendants also submit the medical report of Michael J. Carciente, a neurologist, who conducted an independent medical examination of Plaintiff on December 23, 2016, more than three years after the alleged incident that occurred on September 3, 2013. In his report, duly affirmed on December 28, 2016, Dr. Carciente detailed his findings based upon his review of Plaintiff's medical and hospital records. Dr. Carciente reports that he, *inter alia*, conducted a neurological examination of the Plaintiff's mental status and cranial nerves and conducted a motor exam, a sensory exam, and a cerebellar exam. Dr. Carciente opines that the Plaintiff has a normal neurological examination and that there was "...no objective evidence of an ongoing neurological injury, disability or permanency."

Turning to the merits of the motion for summary judgment, the Court is of the opinion that based upon the foregoing submissions, the Defendants have met their initial burden of proof. This is primarily because Dr. Toriello's report provided a range of motion and did "compare those findings to the normal range of motion..." *Manceri v. Bowe*, 19 A.D.3d 462, 463, 798 N.Y.S.2d 441, 442 [2nd Dept, 2005]. As the Defendants have met their initial *prima facie* burden, the Plaintiff must prove that there are triable issues of fact as to whether the Plaintiff suffered serious injuries as defined by Insurance Law §5102 in order to prevent the dismissal of the action. *See Jackson v United Parcel Serv.*, 204 AD2d 605 [2nd Dept, 1994]; *Bryan v Brancato*, 213 AD2d 577 [2nd Dept, 1995]. In this regard, the Plaintiff must submit quantitative objective findings, as well as opinions relative to the significance of the Plaintiff's injuries as defined by statute. *See Shamsodeen v. Kibong*, 41 A.D.3d 577, 578, 839 N.Y.S.2d 765, 766 [2nd Dept, 2007]; *Grossman v Wright*, 268 AD2d 79 [2nd Dept, 2000].

In order to prove that the Plaintiff suffered a permanent consequential limitation of use of a body organ or member, and/or a significant limitation of use of a body function or system, the Plaintiff has the burden to show more than "a mild, minor or slight limitation of use." The Plaintiff must provide objective medical evidence in addition to medical opinions of the extent or

degree of the limitation alleged and its duration. See *Oberly v Bangs Ambulance, Inc.*, 96 NY2d 295 [2001]; *Candia v. Omonia Cab Corp.*, 6 A.D.3d 641, 642, 775 N.Y.S.2d 546, 547 [2nd Dept, 2004]; *Burnett v Miller*, 255 AD2d 541 [2nd Dept, 1998]; *Beckett v Conte*, 176 AD2d 774 [2nd Dept, 1991].

The issue of whether a serious injury was sustained involves a comparative determination of the degree or qualitative nature of an injury based upon the otherwise normal function, purpose and use of the body part. See *Toure v Avis Rent-a-Car Sys., Inc.*, 98 NY2d 345, 353 [2002]; *Paul v. Allstar Rentals, Inc.*, 22 A.D.3d 476, 476, 802 N.Y.S.2d 185, 186 [2nd Dept, 2005]. In the alternative, the Plaintiff must establish that he sustained a medically-determined injury or impairment which prevented him from conducting substantially all of the material acts which constituted his usual and customary daily activities for 90 out of the 180 days immediately following the accident. See *Licari v Elliott*, 57 NY2d 230 [1982].

Dr. Dov J. Berkowitz, an orthopedic surgeon, provided a Physicians' Affirmation dated May 18, 2017. In his Affirmation, he states that the Plaintiff had been under his care since November 11, 2013, approximately two months after the alleged incident. Dr. Berkowitz states that he conducted a medical examination of Plaintiff that day and indicates that he used a goniometer to judge range of motion. As part of this examination, Dr. Berkowitz reported an examination of the right shoulder that revealed reduced range of motion of forward flexion (110 degrees rather than 180), abducts (100 degrees rather than 180) with severe pain and limitation. Dr. Berkowitz also found reduced range of motion in the left shoulder forward flexion (150 degrees rather than 180), abducts (130 degrees rather than 180) with some rotational pain. Based upon this initial examination, Dr. Berkowitz states in his report that he diagnosed Mr. Paulino with bilateral shoulder derangement.

After ongoing treatment with no significant benefit, Dr. Berkowitz reports that he recommended the Plaintiff for arthroscopic surgery which he himself conducted on the Plaintiff

on November 27, 2013. Dr. Berkowitz again examined the Plaintiff's right shoulder on April 19, 2017 and states in his report that the Plaintiff's injuries have altered his ability to function and that the Plaintiff continues to have limited range of motion as a result of the subject incident.

While the affirmation of Dr. Toriello was sufficient to meet the Defendants' *prima facie* burden, Plaintiff's evidence raises triable issues of fact with regard to his claim that he sustained a serious injury as defined by Insurance Law §5102(d). The affirmed report of Dr. Berkowitz states the degree to which Plaintiff's movement was restricted in his left and right shoulders and quantified those limitations using a goniometer, an objective test instrument. Dr. Berkowitz also stated his findings in comparison to the normal range of motion. What is more, Dr. Berkowitz's review as articulated above supports the Plaintiff's contention, at least to a degree required to raise a triable issue of fact.

The movants' reliance on *Green v. Domino's Pizza, LLC*, 140 A.D.3d 546, 33 N.Y.S.3d 260 [1st Dept, 2016] is mislaid. The Plaintiff's medical evidence, unlike that in the *Green* case, does provide an opinion as to causation and permanent and/or significant limitations of use. Moreover, the Plaintiff, during his EBT testimony explained that he felt better some 8-9 months after surgery and as such sought no further treatment (see Defendant Sarker Motion, Exhibit "D," Pages 50-52). Notwithstanding this his expert Dr. Berkowitz found limited Range of Motion as late as April of 2017.

"An expert's qualitative assessment of a plaintiff's condition also may suffice, 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." *Toure v Avis Rent A Car Systems Inc.*, 98 N.Y.2d 345, 774 N.E.2d 1197 [2002]; see *Dufel v. Green*, 84 N.Y.2d at 798, 622 N.Y.S.2d 900, 647 N.E.2d 105 [1995].

Based on the foregoing, it is hereby ORDERED as follows:

The motion (motion sequence #4) by the Sarker Defendants is denied.

The motion (motion sequence #5) by Defendant Richman is also denied.

This constitutes the Decision and Order of the Court.

Date: August 29, 2017

ENTER:



Carl J. Landicino
J.S.C.

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KINGS COUNTY CLERK
FILED

