

Polanco v Savery

2018 NY Slip Op 31097(U)

April 30, 2018

Supreme Court, Bronx County

Docket Number: 20881/2016E

Judge: Donald A. Miles

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX : PART 8

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LUIS POLANCO,

Plaintiff,

Index No: 20881/2016E

-against-

DECISION/ORDER

LENROY SAVERY AND ELITE SEDAN
SERVICE, LLC.,

Defendants.

-----X

HON. DONALD MILES:

This negligence action arises out of a pedestrian knock-down that occurred on December 10, 2014, on White Plains Road at its intersection with Burke Avenue, in Bronx County, New York. Plaintiff seeks to recover for damages sustained as the result of personal injuries sustained when he was struck, attempting to cross the intersection, by the vehicle owned by defendant Elite Sedan Service, LLC and driven by defendant Lenroy Savery (together, the "Elite defendants"). The Elite defendants seek summary judgment dismissing the complaint on the ground that plaintiff's injuries do not satisfy the serious injury "threshold" requirements as set forth in Insurance Law § 5102(d).

The motion is determined as follows:

Defendants seeking summary judgment in an action governed by Insurance Law § 5102 must demonstrate that the plaintiff did not sustain a "serious injury" or that the plaintiff's injuries were not causally related to the accident at issue (*see Baez v Rahamatali*, 6 NY3d 868 [2006]; *Pommells v Perez*, 4 NY3d 566 [2005]). In the event defendants meet this burden, plaintiff must come forward with evidence demonstrating the existence of a triable issue of fact (*see Gaddy v Eyster*, 79 NY2d 955 [1992]). A plaintiff's subjective claim of pain and limitation of motion must be corroborated by

verified objective medical findings (*see Stevens v Bolton*, 135 AD3d 647 [1st Dept 2016]; *see also Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Bent v Jackson*, 15 AD3d 46 [1st Dept 2005]).

The Elite defendants submit a copy of the pleadings; the verified bills of particulars; plaintiff's deposition transcript; a copy of the police report; uncertified medical records; and the affirmed medical reports of Dr. Nicholas D. Caputo, an emergency medicine specialist, Dr. Regina Hillsman, an orthopedic surgeon, and Dr. Naunihal Sachdev Singh, a neurologist.

Dr. Hillsman reviewed plaintiff's verified bill of particulars and X-Ray report of the left shoulder, and then examined plaintiff using objective means of measurement. Dr. Hillsman found no objective evidence of causally related injury to plaintiff's left shoulder, cervical and thoracic spines. Although specified in plaintiff's bill of particulars, no reference is made as to plaintiff's left shoulder surgery or four surgical procedures involving epidurals to plaintiff's cervical spine. Dr. Hillsman concluded that plaintiff's alleged injuries were unrelated to the subject accident.

Dr. Caputo examined the injured plaintiff's medical records in conjunction with the bill of particulars, police report, ER records, as they relate to the subject accident, and found that the records reviewed were inconsistent with the injuries alleged in the bill of particulars and, further, that none of the claimed injuries are the result of an acute traumatic origin, and could not be attributed to the subject 2014 accident.

Dr. Singh examined plaintiff, finding that the alleged injuries to the left shoulder, cervical, lumbar and thoracic spines had all resolved with no objective neurological findings causally connected to the subject accident. No mention is made of any surgery to the left shoulder. Dr. Singh performed range of motion testing using a goniometer, noting that plaintiff had no restrictions or limitations when compared to normal ranges. He confirmed his quantitative findings with a

qualitative assessment of plaintiff's functionality, finding that plaintiff had not sustained any serious injury that could be causally related to the subject accident.

The Elite defendants have established that, as a matter of law, plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) under the categories of permanent loss, permanent consequential limitation or significant limitation (*see Malupa v Oppong*, 106 AD3d 538 [1st Dept 2013]; *Barry v Arias*, 94 AD3d 499 [1st Dept 2012]; *see also Lowe v Bennett*, 122 AD2d 728 [1st Dept 1986], *aff'd* 69 NY2d 701 [1986]; *Rose v Tall*, 149 AD3d 554 [1st Dept 2017]). The burden now shifts to the plaintiff to come forward with evidence demonstrating the existence of a triable issue of fact (*see Gaddy v Eycler*, *supra*). In opposition, plaintiff raises triable issues of fact as to whether the injuries claimed to his left shoulder and cervical spine are permanent, constitute significant limitation or both (*see Perl v Meher*, 18 NY3d 208 [2011]; *De La Rosa v Okwan*, 146 AD3d 644 [1st Dept 2017]; *Vega v MTA Bus Co.*, 96 AD3d 506 [1st Dept 2012]; *Rosa v Mejia*, 95 AD3d 402 [1st Dept 2012]).

The affirmed reports of plaintiff's orthopedic surgeon, Dr. Steven Touliopoulos, and treating physician, Dr. Susan DiStasio, explicitly contradict the findings of defendants' medical reports. Moreover, Dr. DiStasio's conclusions are based on her own physical examinations taken shortly after the date of the accident, surgical intervention reports and follow-up examinations after the date of the accident (*see Shapiro v Spain Taxi, Inc.*, 146 AD3d 451 [1st Dept 2017]; *Francis v Nelson*, 140 AD3d 467 [1st Dept 2016]). Dr. Touliopoulos performed left shoulder arthroscopy to repair a SLAP lesion; arthroscopic stabilization via anteroinferior labral repair with anterior capsulorrhaphy; arthroscopic extensive debridement with debridement of grade 4 chondral injury of inferior glenoid and debridement of posterior labral fraying/tearing; arthroscopic distal clavicle excision; and

arthroscopic subacromial decompression approximately four months after the date of the subject accident and after conservative therapy failed to alleviate plaintiff's symptoms. To the extent plaintiff's medical experts rely upon unsworn records such as MRI films of plaintiff's left shoulder and cervical spine, they are admissible, as they were reviewed and incorporated into their respective affirmed reports (*see Duran v Kabir*, 93 AD3d 566 [1st Dept 2012]; *Peluso v Janice Taxi Co., Inc.*, 77 AD3d 491 [1st Dept 2010]; *Rice v Moses*, 300 AD2d 213 [1st Dept 2002]).

As to defendants' contention that plaintiff had an unexplained gap in treatment, plaintiff's medical experts each state that plaintiff had received maximum benefits from treatments and that further therapy would be palliative in nature (*see Ramkumar v Grand Style Transp. Enterprises Inc.*, 22 NY3d 905 [2013]; *Pommells v Perez*, *supra*). There is no requirement that plaintiff continue to seek treatment beyond that which is medically efficacious (*see Ramkumar v Grand Style Transp. Enterprises, Inc.*, *supra*; *Pommells v Perez*, *supra*).

However, the plaintiff failed to raise a triable issue of fact regarding his claim under the 90/180 day-category (*see Stevens v Bolton*, *supra*; *Sougstad v Meyer*, 40 AD3d 839 [2d Dept 2007]; *Blackmon v Dinstuhl*, 27 AD3d 241 [1st Dept 2006]). Plaintiff's subjective complaints as to limitations are insufficient to satisfy this provision. Plaintiff's own testimony (*see, Dziuma v Jet Taxi, Inc.*, 148 AD3d 573 [1st Dept 2017]; *Stevens v Bolton*, *supra*; *Sougstad v Meyer*, *supra*; *Blackmon v Dinstuhl*, *supra*), demonstrates that he was not restricted to home or bed for any significant length of time, and further, that he returned to work within 90 days of the accident (*see Dziuma v Jet Taxi, Inc.*, *supra*; *Stevens v Bolton*, *supra*). Notably, plaintiff has not shown that any medical provider advised him not to engage in work or other activities following the accident (*see Long v Taida Orchids, Inc.*, 117 AD3d 624 [1st Dept 2014]; *Pinkhasov v Weaver*, 57 AD3d 334 [1st

Dept 2008)).

For the foregoing reasons, it is hereby

ORDERED that the aspects of the Elite defendants' motion seeking summary judgment dismissing the plaintiff's claim of serious injury under the 90/180-day category is granted and that claim is dismissed; and it is further,

ORDERED that the motion is otherwise denied.

This constitutes the decision and order of the court.

Dated: April **APR 30 2018**



DONALD MILES, J.S.C.