

Jimenez v New York City Tr. Auth.

2018 NY Slip Op 32382(U)

September 5, 2018

Supreme Court, New York County

Docket Number: 155789/2016

Judge: Lisa A. Sokoloff

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

_____ X

RAUL JIMENEZ,

Index No. 155789/2016

Plaintiff,

Motion Seq. 001

-against-

DECISION AND ORDER

NEW YORK CITY TRANSIT AUTHORITY,
MANHATTAN AND BRONX SURFACE
OPERATING AUTHORITY,

Defendants.

_____ X

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

Papers	Numbered	NYCEF #
Defendant's Summary Judgment Motion/Affirmation	<u>1</u>	12-21
Plaintiff's Opposition to Motion/Exhibits	<u>2</u>	28-33
Defendant's Reply Affirmation	<u>3</u>	34-35

LISA A. SOKOLOFF, J.

Defendants New York City Transit Authority and Manhattan and Bronx Surface operating Authority move for an order pursuant to CPLR §§ 3212 and 3211 granting summary judgment and dismissing the complaint on the ground that Plaintiff Raul Jimenez did not sustain a "serious injury" within the meaning of New York State Insurance Law §5102(d).

This is an action to recover for personal injuries allegedly sustained by Plaintiff as a result of a motor vehicle accident that occurred on February 16, 2016. In his Notice of Claim, Plaintiff alleges that his vehicle was negligently struck by a bus owned and/or operated by Defendants near the intersection of Seventh Avenue and 155th Street in Manhattan.

According to his Bill of Particulars, Plaintiff sustained injury to his cervical spine, lumbar spine, pelvis, left elbow and right knee as a result of the accident. He claims that his injuries fall within the following categories of § 5102(d): significant disfigurement, a fracture, permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents Plaintiff from performing substantially all of the material acts which constitute his 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.

The threshold question of whether the evidence would warrant a jury finding that a plaintiff has suffered a "serious injury" is one for the court (*Licari v Elliott*, 57 NY2d 230 [1982]). To prevail on a motion for summary judgment, where the issue is whether the plaintiff has sustained a serious injury under the No-Fault Law, a defendant must establish by competent evidence, that plaintiff did not suffer a serious injury causally related to the accident (*Wadford v Gruz*, 35 AD3d 258 [1st Dept 2006]). Defendants can do so by submitting affidavits or affirmations of medical experts who examined plaintiff and conclude that no objective medical findings support the plaintiff's claim (*Shinn v Catanzaro*, 1 AD3d 195 [1st Dept 2003] citing *Grossman v Wright*, 268 AD2d 79, 83-84 (2d Dept 2000)).

Once a defendant makes the requisite *prima facie* showing, the burden shifts to the plaintiff to demonstrate a triable issue of fact that a serious injury was sustained (*Shinn v Catanzaro*, at 197). The evidence plaintiff presents must be objective and based on a recent examination of the plaintiff (*Townes v Harlem Group, Inc.*, 82 AD3d 583 [1st Dept 2011]). If a defendant fails to make the *prima facie* showing, summary judgment may be

denied without considering the sufficiency of plaintiff's evidence to raise a triable issue of fact (*Vishevnik v Bouna*, 147 AD3d 657 [1st Dept 2017]).

In the matter before us, Defendants clearly satisfied their initial burden. Initially, Defendants note Plaintiff's inconsistent testimony. In his Bill of Particulars, Plaintiff alleges that he sustained soft tissue injuries, was confined to bed for two weeks and at home for a month. Yet at his statutory hearing on May 3, 2016, Plaintiff testified that he missed only two days of work, using his sick days as compensation.

Defendants submit the sworn report of neurologist Elizabeth Ortof who examined Plaintiff on November 15, 2017. Dr. Ortof observed negative straight leg raising, no range of motion limitation, diagnosed possible left C6 and left L5 radiculopathy and concluded that Plaintiff, who is working in a fulltime, full-duty capacity, is capable of performing all normal activities of daily living from a neurological perspective.

Defendants also submit the sworn report of orthopedic surgeon, Dr. Bradley L. White, who examined Plaintiff on November 7, 2017. Significantly, the report states that Plaintiff was in a prior accident, occurring more than 10 years ago, with sustained back injury. Dr. White observed that Plaintiff ambulates with a normal gait, is able to take off his shoes without difficulty, moves his head, neck and body freely during unguarded conversation, and can turn from side to side or back to front freely.

According to Dr. White's report, Plaintiff's range of motion of his cervical spine, lumbar spine, left elbow and right knee, measured using a hand-held goniometer, are all normal and any strain in those body parts are resolved. As there was no complaint of hip or pelvis pain, those areas were not examined. Upon review of the records of Plaintiff's treating chiropractor, Dr. Todd M. Aordkian, MRI reports and x-rays of Plaintiff's right knee, lumbar spine, cervical spine and pelvis, Dr. White concluded that all sprain/strain

had been resolved and there was no orthopedic disability casually related to the accident. Based on the findings of Drs. White and Ortof, Defendants have established *prima facie* that Plaintiff did not suffer a serious injury within the meaning of Insurance Law §5102(d) as he has no significant limitation (*Toure v Avis Rent-A-Car*, 98 NY2d 345 [2002]; *Ramos v Rodriguez*, 93 AD3d 473 [1st Dept 2012]).

As such, the burden shifts to Plaintiff to establish that he sustained a serious injury. A plaintiff's subjective claims of pain and limitation of motion must be supported by verifiable objective medical findings (*Munoz v Hollingsworth*, 18 AD3d 278 [1st Dept 2005]) and based on a recent examination (*Grossman v Wright*, 268 AD2d 79 [2nd Dept 2000]). In order to prove the extent or degree of physical limitation, an expert may designate a numeric percentage of a plaintiff's loss of range of motion or may make a qualitative assessment of plaintiff's condition, provided that the latter evaluation has an objective basis and compares the plaintiff's limitations to the normal use of the affected body system or function (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 350-351 [2002]; *Shinn v Catanzaro*, 1 AD3d 195 [1st Dept 2003])

Plaintiff has provided the sworn report of Dr. Todd M. Aordkian, a chiropractor who examined Plaintiff on June 6, 2018 and who had treated Plaintiff following the accident. Although Dr. Aordkian found decreased range of motion in Plaintiff's cervical spine, by up to 25 degrees on extension, and slight decreased range of motion in his dorsolumbar spine, up to 15 degrees on flexion, his findings are deficient because he failed to identify the objective tests he employed to measure Plaintiff's range of motion (*Nagbe v Minigreen Hacking Group*, 22 AD3d 326 [1st Dept 2005]).

Additionally, Dr. Aordkian's report refers to MRI results of Plaintiff's right knee obtained on February 8, 2017, noting knee joint effusion, early degenerative joint disease

and no tear in the medial meniscus. Because the MRI report was not included in Plaintiff's submission, it is not clear whether Dr. Aordkian personally viewed the film or relied on an unsworn report and therefore the MRI results may not be considered (*Barner v Shahid*, 73 AD3d 593 [1st Dept 2010]). Nor does Dr. Aordkian address whether any of Plaintiff's claimed limitations are a result of degenerative joint disease in the knee rendering his opinion that they were caused by the accident speculative (*Valentin v Pomilla*, 59 AD3d 184 [1st Dept 2009]). Moreover, even a partial meniscal tear, without evidence of any resulting limitations, is insufficient to establish "serious injury" (*Dembele v Cambisaca*, 59 AD3d 352 [1st Dept 2009]) and here, no tear is reported.

Plaintiff's complaints that he has difficulty performing basic tasks such as tying his shoes, climbing the stairs to his fourth floor apartment or carrying any more than a gallon of milk or gallon of paint at work are similarly insufficient to establish "serious injury" (*Id.*) [complaint that knee hurts when driving or walking up more than four steps did not constitute loss of "substantially all" of usual activities required to make a showing of serious injury]). Accordingly, Plaintiff has failed to raise an issue of fact as to whether he suffered the type of injury from the accident that constituted a permanent consequential limitation of the use of his right knee.

In his May 2016 deposition, Plaintiff testified that he was in a motor vehicle accident approximately 15 years earlier in which he was stopped at a light and hit from behind. His forehead hit the windshield and he injured his back and his neck. Where a plaintiff has sustained injuries in an incident that precedes the accident giving rise to the litigation, the plaintiff's expert must adequately address how the plaintiff's current medical problems are causally related to the subject accident (*Style v Joseph*, 32 AD3d 212 [1st Dept 2006]). Not only does Dr. Aordkian's report fail to mention Plaintiff's prior accident,

neither does it provide an objective medical basis for determining that Plaintiff's current limitations were caused by the subject accident, rather than the earlier incident or degeneration (*Sanchez v Oxcin*, 157 AD3d 561 [1st Dept 2018]).

Moreover, Dr. Aordkian's report states that Plaintiff sustained a "recent exacerbation" of his neck and back injury, without elaboration, and without assessing how the recent injury may have affected the current test results.

As a final diagnosis, Dr. Aordkian reports lumbar disc herniations, thoracic spine sprain and cervical disc herniations, attributes the injuries to the accident and deems them to be permanent. However, proof of a herniated disc, without additional medical evidence establishing that the accident resulted in significant physical limitations, is not sufficient to establish a serious injury (*Pommells v Perez*, 4 NY3d 566, 574 [2005]; *Hospedales v Doe*, 79 AD3d 536 [1st Dept 2010]). Here, Dr. Aordkian's affidavit fails to specify how Plaintiff's injuries manifest in terms of specific, permanent, serious disabilities or limitations (*Beaubrun v New York City Transit Authority*, 9 AD3d 258 [1st Dept 2004]). Instead, he provides a conclusory opinion, that Plaintiff's injuries must be considered permanent in nature. The mere use of the word "permanent" by the Plaintiff's chiropractor is insufficient to defeat summary judgment (*Hall v Gala Trade 2000 Ltd.*, 11 AD3d 362 [1st Dept 2004]).

Lastly, insofar as Plaintiff returned to his job as a painter two days after the accident, he has failed to raise an inference that a medically determined injury or impairment prevented him from performing substantially all his usual and customary daily activities for at least 90 of the first 180 days following the accident (*Farrington v Go On Time Car Service*, 76 AD3d 818 [1st Dept 2010]).

Based on the foregoing, Plaintiff's submissions were insufficient to raise a triable issue of material fact necessary to defeat summary judgment because his experts failed to adequately demonstrate that plaintiff's injuries met the threshold level of "serious injury" within the meaning of Insurance Law § 5102(d) for monetary damages under §5104(a).

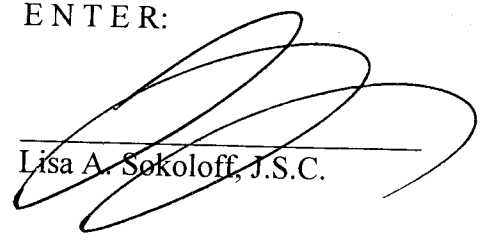
Accordingly, it is

ORDERED, that Defendants' motion for summary judgment on the ground that Plaintiff has not met the "serious injury" threshold within the meaning of Insurance Law § 5102(d) is granted and the complaint is dismissed.

This constitutes the decision and order of the Court. Any other requested relief not expressly granted is denied.

Dated: September 5, 2018
New York, New York

ENTER:



Lisa A. Sokoloff, J.S.C.

CHECK ONE:

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<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

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