

Fernandez v Jerome
2018 NY Slip Op 33091(U)
October 2, 2018
Supreme Court, Queens County
Docket Number: 711036/2016
Judge: Cheree A. Buggs
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Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS**
Justice

IAS PART 30

ISRAEL FERNANDEZ,

Index No.:711036/2016

Plaintiff,

Motion

Date: August 15, 2018

-against-

Motion Cal. No.: 20

MARIE JEROME,

Defendant.

Motion Sequence No.: 1

The following efile papers numbered 9-33 submitted and considered on this motion by defendant Marie Jerome seeing an Order granting summary judgment pursuant to CPLR 3212, dismissing the verified complaint of plaintiff Israel Fernandez on the grounds that he failed to sustain a serious injury under the New York State Insurance Law, sections 5102(d) and 5104(a).

	<u>Papers Numbered</u>
Notices of Motion-Affidavits-Exhibits.....	EF 10-23
Affirmation in Opposition-Affidavits-Exhibits....	EF 26-31
Reply Affirmation-Affidavits-Exhibits.....	EF 32-33
Compliance Conference Order of Hon. Joseph J. Esposito	EF 9

As an initial matter, defendant’s motion for summary judgment was filed in violation and contradiction of the Compliance Conference Order of Honorable Joseph J. Esposito dated December 4, 2017. In the Compliance Conference Order Justice Esposito held that “all parties are stayed from moving for summary judgment pending the filing of a note of issue.” The defendant’s motion was filed on May 9, 2018 and the Note of Issue was filed on May 11, 2018, when the case was stayed. With that having been said, however, in the interest of judicial economy, and as this matter is scheduled in the Trial Scheduling Part on October 11, 2018, the Court will consider the merits of defendant’s motion.

This is a personal injury action was initiated by plaintiff Israel Fernandez (hereinafter "Fernandez") with the filing of a summons and verified complaint on September 4, 2016. Defendant Marie Jerome (hereinafter "Jerome") joined issue with the filing of a verified answer with affirmative defenses on February 22, 2017. Now, Jerome makes this application under CPLR 3212 dismissing the verified complaint of Fernandez on the grounds that he failed to sustain a serious injury under the Insurance Law. In support of the motion, in addition to the verified bill of particulars dated May 2, 2017, defendant submissions included plaintiff's deposition transcript dated October 25, 2017; the affirmation of Cary S. Noswitz, Esq., and the independent medical examination reports of Dr. Thomas P. Nipper, Dr. Edward M. Weiland, Dr. Eric L. Cantos, and Dr. Stacey M. Donegan.

Fernandez alleged in his bill of particulars that the accident occurred on July 8, 2016, on Atlantic Avenue at or near its intersection with Lefferts Boulevard, County of Queens, State of New York, due to the carelessness and/or negligence of Jerome in among other things, the ownership and operation of her vehicle. He stated that as a result of the accident he sustained injuries to both knees, his neck and back. He alleged that as a result of the accident that he has been confined to bed and his home from the date of the accident up to the date of his verified bill of particulars, May 2, 2017. He alleged that he sustained a serious injury under the permanent loss of use of body organ, member, function or system; permanent consequential limitation or use of a body organ or member; significant limitation of use of a body function or system; permanent scarring and disfigurement; and the 90/180 day categories of the Insurance Law.

Deposition testimony of plaintiff Israel Fernandez

Plaintiff Israel Fernandez gave sworn testimony in this matter on October 25, 2017. He testified in sum and substance that he was waiting for a parking space when the defendant's vehicle hit his. As a result, of the impact he alleged that his knees hit the dashboard. He stated that he sustained injuries to his knees, neck and back. He did not seek medical care at the scene of the accident, however, he felt pain and went to the hospital that night. The day after he went to see his doctor, Dr. Singh, and he was referred for physical therapy. He underwent physical therapy on his neck, back and knees, and also received chiropractic treatment, and treated for about six months, about three days a week. He testified that he stopped receiving treatment when the insurance stopped paying. He presented to Dr. Diwan who is an orthopedic surgeon, and Dr. Diwan recommended that he undergo bilateral knee surgery due to his complaints of pain. He did have surgery to both knees, and was prescribed a cane. He was not working at the time of the accident. He had been in a previous accident around 2011-2012 and injured his back and underwent surgery. He had not worked since 2011 as a result. He did not work in 2016. He stated that he was still in pain following the accident.

Independent Medical Report of Dr. Thomas P. Nipper

Dr. Thomas P. Nipper performed an independent medical examination of Fernandez on March 6, 2018. The doctor reviewed the verified bill of particulars and various medical records and performed an orthopedic examination. Range of motion testing was tested with the use of a goniometer and was the following:

Cervical Spine- flexion 50 degrees (50 degrees normal); extension 60 degrees (60 degrees normal); right and left rotation 80 degrees (80 degrees normal); right and left bend 45 degrees (45 degrees normal);

Lumbar Spine-flexion 50 degrees (50 degrees normal); extension 25 degrees (25 degrees normal); right and left lateral bending 25 degrees (25 degrees normal). Old posterior scarring was seen.

Knees-flexion 130 degrees (130 degrees normal); extension to 0 degrees bilaterally (0 degrees normal). Portal scarring was seen bilaterally.

In Dr. Nipper's opinion, the plaintiff's injuries had all resolved. In his medical opinion, "the speeds and forces experienced by the claimant were sufficient to have resulted in sprain injuries to the affected areas and the plaintiff did not sustain any significant or permanent injury as the result of the motor vehicle accident."

Independent Medical Report of Dr. Edward M. Weiland

Dr. Edward M. Weiland performed an independent medical examination of Fernandez on December 12, 2017. The doctor reviewed the verified bill of particulars and various medical records and performed a neurologic examination. Range of motion testing was tested with the use of a goniometer and was the following:

Cervical Spine- flexion 50 degrees (50 degrees normal); extension 60 degrees (60 degrees normal); right and left rotation 80 degrees (80 degrees normal); right and left lateral flexion 45 degrees (45 degrees normal);

Lumbar Spine-flexion 60 degrees (60 degrees normal); extension 25 degrees (25 degrees normal); right and left lateral bending 25 degrees (25 degrees normal); right and left lateral flexion to 25 degrees (25 degrees normal).

Thoracic Spine-flexion 45 degrees (45 degrees normal); right and left rotation 30 degrees (30 degree normal); right and left lateral bending 45 degrees (45 degrees normal).

Well-healed portal scars were see in the region of both knees which was consistent with prior arthroscopic surgery. Dr. Weiland stated that he could not find an evidence of "lateralizing neurological deficits" on examination. He did not find any neurologic disability.

Independent Medical Report of Dr. Eric L. Cantos

On August 12, 2017, Dr. Eric L. Cantos performed an independent radiologic review of a MRI of plaintiff's right knee taken on August 1, 2016. In his opinion, the film revealed small joint effusion; intrasubstance degeneration within the menisci, predominately medially and no definitive meniscal tear or ligamentous disruption, no fracture or bone contusion.

He also reviewed a MRI of plaintiff's left knee which was taken on August 1, 2016. In his opinion the film revealed small joint effusion; a small tear along the undersurface of the lateral meniscus in the region of the posterior horn and intrasubstance degeneration within the medial meniscus. He did not see a fracture of ligamentous disruption which could be attributed to the accident.

Independent Medical Report of Dr. Stacey M. Donegan

Dr. Stacey M. Donegan, a Board Certified Physician in Emergency Medicine reviewed plaintiff's bill of particulars, emergency room records and the police report and issued a peer review. In her opinion, plaintiff's bill of particulars alleged injuries which were not supported by his own claims to Emergency Room staff or EMS. In her opinion the injuries that plaintiff alleged were not related to the accident.

ANALYSIS

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law by tendering admissible evidence to eliminate any material issues of fact from the case. (*Winegrad v New York Univeristy Medical Center*, 64 NY2d 851 [1985].) "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party. Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact and then only if, upon the moving party's meeting of this burden, the non-moving party fails to establish the existence of material issues of fact which require a trial of the action. The moving party's failure to make a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." (*See Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks omitted]).

The Court finds that the defendant failed to demonstrate a *prima facie* case entitlement to judgment as a matter of law. Jerome has the burden of establishing, *prima facie*, that plaintiff did not sustain a "serious injury" within the meaning of the Insurance Law (*see Gaddy v Eycler*, 79 NY2d 955 [1992]; *Licari v Elliott*, 57 NY2d 230, 235 [1982]; *Grossman v Wright*, 268 AD2d 79, 83-84 [2d Dept 2000]). The Court finds that defendant failed to establish as a matter of law that the

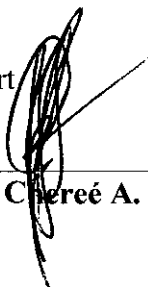
plaintiff did not sustain a serious injury under the 90/180 day category (see generally *Pomells v Perez*, 4 NY3d 566 [2005]; *Khan v Finchler*, 33 AD3d 966 [2d Dept 2006]); or that the scarring seen on both his knees do not constitute a significant disfigurement under the Insurance Law (see *Borquist v Hyde Park Cent. School District*, 107 AD3d 926 [2d Dept 2013]; *O'Brien v Bainbridge*, 89 AD3d 1511 [4th Dept 2011]; *Onder v Kaminski*, 3030 AD2d 665 [2d Dept 2003]; *Waldron v Wild*, 96 AD2d 190 [4th Dept 1983]).

Moreover, assuming defendant had established her prima facie entitlement to judgment as a matter of law, in opposition, plaintiff submitted medical records and reports of his doctor, Laxmidhar Diwan, M.D., which showed both contemporaneous and recent range of motion testing on plaintiff's neck, back and knees, revealing range of motion deficits and raising triable issues of fact as to whether plaintiff sustained a serious injury as a result of the accident under the Insurance Law (see generally *Perl v Meher*, 18 NY3d 208 [2011]; *Patisso v Brady*, 152 AD3d 782 [2d Dept 2017]).

Therefore, the defendant's motion is denied.

This constitutes the decision and Order of the Court

Dated: October 2, 2018



Hon. Chereé A. Buggs, JSC

FILED
OCT 17 2018
COUNTY CLERK
QUEENS COUNTY