

McCray v Kitt

2018 NY Slip Op 33585(U)

October 31, 2018

Supreme Court, Queens County

Docket Number: 702901/2016

Judge: Leslie J. Purificacion

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

Part 39

-----X
RICHARD McCRAY,

Index Number 702901/2016

Plaintiff,

DECISION/ORDER

--against--

Motion Sequence No. 8

VERA L. KITT,

Defendants,

-----X

The following papers numbered 1 to 9 read on defendant's motion pursuant to CPLR §3212 dismissing the complaint of the plaintiff on the grounds that plaintiff's alleged injuries fail to meet the serious injury threshold requirement of Insurance Law §5102(d).

	<u>Papers Numbered</u>
N.M., Aff., Exhibits and Service.....	1-4
Answering Aff., Exhibits and Service.....	5-7
Reply and Service.....	8-9

Upon the foregoing papers, it is ordered that this motion is determined as follows:

In this personal injury action, plaintiff Richard McCray seeks to recover damages for injuries allegedly sustained as a result of a motor vehicle accident that occurred on November 11, 2014, in the parking lot of Green Acres mall located around the intersection of Green Acres Road and Sunrise Highway in Nassau County, New York. At the time of the accident, the plaintiff was a pedestrian walking through the parking lot when a vehicle, operated by defendant Vera L. Kitt, attempted to reverse out of a parking space and struck him.

In his verified bill of particulars, plaintiff alleges injuries to his right shoulder, cervical spine and lumbar spine. Plaintiff asserts that as a result of the accident he suffered: "a permanent loss of use of a body organ, member, function or system"; "a permanent consequential limitation of use of a body organ or member; a significant limitation of use of a body function or system; and "a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment" (Insurance Law §5102[d]). Defendant asserts that plaintiff's alleged injuries do not meet the threshold requirement of Insurance Law §5102(d), and therefore summary judgment dismissing plaintiff's complaint is warranted.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact, (see CPLR §3212[b]; Alvarez v Prospect Hosp., 68 N.Y.2d 320; Winegrad v New York Univ. Med. Ctr., 64 N.Y.2d 851; Zuckerman v City of New York, 49 N.Y.2d 557). The question of whether plaintiff sustained a "serious injury" as defined by Insurance Law §5102(d) is one of law that can be disposed of by summary judgment and defendant in seeking same has the burden to show that plaintiff's injuries do not rise to the level of those set forth in the statute (see Gaddy v Eyler, 79 N.Y.2d 955; Licari v Elliot, 57 N.Y.2d 230). This may be accomplished through submission of plaintiff's deposition testimony and/or affidavits, affirmations or sworn reports of medical experts who examine the plaintiff and conclude that no objective medical findings

support the plaintiff's claim (see Grossman v Wright, 268 A.D.2d 79; Toure v Avis Rent A Car Sys., 98 N.Y.2d 345).

In support of the motion, defendant submits the properly affirmed report of neurologist Marianna Golden, M.D., the properly affirmed report of orthopedist Edward Toriello, M.D., the properly affirmed reports of radiologist Jonathan Lerner, M.D., plaintiff's verified bill of particulars, and plaintiff's examination before trial testimony.

On January 3, 2018, Dr. Marianna Golden conducted a neurological examination of the plaintiff. In her report, Dr. Golden indicates the medical records she reviewed and the means by which certain tests were performed including objective quantified range of motion testing by use of a goniometer. Dr. Golden found that range of motion of the plaintiff's cervical and lumbar spine were all within normal ranges. Dr. Golden also tested the plaintiff's cranial nerves, motor skills, reflexes, senses and cerebellar functions. All testing results were normal. Dr. Golden opined that the cervical, thoracic and lumbar sprain/strains have resolved. Dr. Golden stated that there was no evidence of a neurological disability.

On January 16, 2018, Dr. Edward Toriello performed an orthopedic examination of the plaintiff. In his report, Dr. Toriello indicates the medical records he reviewed and the means by which certain tests were performed including objective quantified range of motion testing by use of a goniometer. Dr. Toriello found that range of motion of the lumbar spine, right shoulder, left shoulder, right elbow, left elbow, right wrist/hand, left wrist/hand, right knee and left knee were all within normal ranges. Dr. Toriello also performed range of motion testing on the cervical spine and found plaintiff exhibited normal range of motion with the exception of extension of 30 degree (60 degrees

normal). All objective testing was negative. Dr. Toriello opined that plaintiff's cervical spine strain, lumbar spine strain, right knee contusion and right shoulder contusion were resolved. He further stated that the plaintiff has fully recovered from his arthroscopic surgery. Dr. Toriello found no objective evidence of continued disability.

In his reports, dated January 31, 2018, Dr. Jonathan Lerner reviewed the MRI of plaintiff's lumbar spine, cervical spine and right shoulder. With respect to the lumbar spine, Dr. Lerner found that the plaintiff had a disc bulge at his L4-L5, which he opined had no causal relationship to the alleged accident. The MRI of plaintiff's cervical spine showed disc bulges at C4-C5 and C6- C7, which Dr. Lerner opined were not causally related to the accident. Finally, with regard to plaintiff's right shoulder, Dr. Lerner found that plaintiff had a supraspinatus tendinosis with a partial thickness bursal surface insertional tear; flat (type I) acromion, moderate acromioclavicular joint artosis with capsular hypertrophy and subchondral irregularity with a marked decrease in the acromiohumeral interval; and 3 x 5 osteochondral fragment adjacent to the extracapsular component of the biceps tendon. Dr. Lerner opined that these findings were not causally related to the accident.

The defendant's radiologist found significant injuries to the plaintiff's lumbar spine, cervical spine and right shoulder. While Dr. Lerner attempts to dismiss these injuries by claiming that they are not causally related to the accident, Dr. Lerner fails to substantiate his opinion with any specificity or definiteness. Instead, with respect to the lumbar and cervical, Dr. Lerner makes blanket statements about the general population having similar injuries. In addition, Dr. Lerner states that one of the injuries to plaintiff's right shoulder could have been caused by playing sports or by other alternative means.

He also states that another injury to his shoulder was "likely" caused by degenerative changes. As such, the court cannot conclude that the serious injuries observed by Dr. Lerner were not a result of the subject accident. With respect to plaintiff's 90/180, the plaintiff testified that he remained confined to his home for over a year following the accident.

The court finds that the defendant has failed to meet her prima face burden of eliminating all triable issues of fact. It is therefore unnecessary to consider the sufficiency of the opposition papers.

Accordingly, the defendant's motion is denied.

This is the decision and order of the court.

Date: October 31, 2018



Hon. Leslie J. Purificacion, J.S.C.

FILED
NOV 16 2018
COUNTY CLERK
QUEENS COUNTY