

Moore v Walker

2018 NY Slip Op 33975(U)

September 5, 2018

Supreme Court, Bronx County

Docket Number: 22776/2015E

Judge: Lizbeth Gonzalez

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 10E

-----X
SANDY MOORE and BEVERLY MOORE,

Plaintiffs,

DECISION and ORDER
Index No 22776/2015E

-against-

MARY E. WALKER and DANNETTE MASON,

Defendants.

-----X
HON. LIZBETH GONZÁLEZ

The Moore plaintiffs commenced the underlying action claiming that the defendants' negligence caused plaintiff Sandy Moore to sustain serious injuries. Defendant Walker moves pursuant to CPLR 3212 for summary judgment on threshold grounds. The plaintiffs oppose the motion.

The parties are reminded that submissions should reference First Department decisions since this action was commenced in Bronx County.

Plaintiff Moore's Alleged Facts

During his deposition and by affidavit, plaintiff Moore states that he was a self-employed truck driver when he was involved in a motor vehicle accident on 1/14/15. He alleges that he was stopped when defendant Mason rear-ended his pick-up truck causing him to rear-end defendant Walker's vehicle. Mr. Moore states that he "slammed backwards into the seatback and then on the rebound thrown forward striking [his] chest on the steering wheel in front of [him]." This happened a second time when his vehicle struck the vehicle before him. He immediately experienced back and head pain after his head struck the rear glass of his truck. Mr. Moore drove himself away from the scene of the accident. He testified that later that evening, his wife, plaintiff Beverly Moore, took him to a clinic where he complained of neck and back pain. By affidavit, he states that he drove himself to Montefiore Hospital's emergency room because he was experiencing severe back pain radiating to his legs and ankles. On 2/3/15, he commenced physical therapy with Dr. Ornela Rehova who informed plaintiff that he demonstrated range of motion deficits in his lumbar spine. He

continued treatment for approximately 7.5 months but ceased because further treatment would prove palliative in nature. He attests that his symptoms have not improved. He experiences difficulty getting dressed, bending over, tying his shoes, sitting and driving his vehicle for more than two hours. His physical therapist suggested that he see a spinal surgeon to discuss surgery but plaintiff is unwilling to undertake the associated risks. He missed no time from work as a result of the accident and is capable of performing all of his activities. He has no future medical appointments scheduled.

DISCUSSION

Summary judgment is a drastic remedy that a court should employ only in the absence of triable issues of fact (*Andre v Pomeroy*, 35 NY2d 361 [1974]). Insurance Law § 5102(d) delineates the serious injury threshold and states in relevant part:

a personal injury which results in...permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a nonpermanent 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.

In support of her motion, defendant Walker proffers the affirmed findings of Dr. Frank D. Oliveto.

Dr. Oliveto, defendant Walker's board-certified orthopedic surgeon, reviewed plaintiff Moore's verified bill of particulars, diagnostic tests (MRIs and x-rays), psychiatric evaluations and physical therapy notes. He examined the plaintiff on 7/17/17. He informed Dr. Oliveto that he injured his lower back and both shoulders. His current complaints were of bilateral shoulder pain with motion and lower back pain with exertion, bending and lifting. He ceased therapy and takes Advil as needed. The doctor performed range of motion tests ("ROM") (*see Nagbe v Minigreen Hacking*, 22 AD 3d 326 [1st Dept 2005]) on Mr. Moore's cervical and lumbar spine and both shoulders. The tests performed on plaintiff's cervical spine and shoulders revealed no restrictions and no abnormalities. During his lumbar spine ROM test, the plaintiff demonstrated "subjective limitation" with 15 to 40 degree restrictions during movement. He expressed subjective complaints of discomfort in the paralumbar area but no spasms or

tenderness was noted. His Straight Leg Raise test was within normal limits. Dr. Oliveto opined that the plaintiff's lumbar sprain/strain and shoulder contusions were "objectively resolved and healed." The doctor explained that the "[l]imited ranges of motion of the low back without accompanying spasm and no neurological deficit is purely a subjective finding and is voluntary." Dr. Oliveto further opined that plaintiff presents no evidence of a disability and is capable of returning to work without restrictions.

In opposition to defendant Walker's motion, the plaintiffs proffer plaintiff Moore's Montefiore Hospital records and the affirmed findings and reports of Dr. David R. Payne, Dr. Nunzio Saulle and Dr. Ornela Rehova.

Plaintiffs proffer the 11/21/15 report of Henry Hall, their chiropractor, who appears to have examined plaintiff Moore but provides no opinion or conclusion relative to plaintiff's condition.

Mr. Moore's hospital records include the 1/14/15 radiology findings of his spine:

Impression: Minimal scoliosis of dorsal spine
Interpretation: AP and lateral views of dorsal spine reveal no fracture or dislocation of the dorsal spine. There is very slight scoliosis of dorsal spine. The spine is thin.

Impression: Normal lumbar spine.
Interpretation: AP and lateral views of the lumbar spine reveal no fracture or arthritic change of the lumbar spine. Pedicles and disc spaces are normal. No degenerative changes are seen.

Dr. Payne, plaintiffs' radiologist, reviewed the plaintiff's 2/28/15 lumbar spine MRI. The doctor opined that the film revealed a bulging disc at L1/2 and central herniation at L4/5. Bulging or herniated discs alone, however, are insufficient to establish a serious injury (*Toure v Avis Rent-a-Car Systems, Inc.*, 98 NY2d 345 [2002]).

Dr. Rehova, plaintiff Moore's physiatrist, examined Mr. Moore on 2/3/15 and 2/14/15. On 2/3/15, Mr. Moore complained of back pain (4 out of 10) with radiating symptoms to his right lower extremity and tingling. His lumbar spine ROM tests revealed five to twenty degree restrictions. The doctor opined that the plaintiff sustained lumbar spine myofascial derangement with possible disc involvement. On 2/14/15, Dr. Rehova performed ROM tests on plaintiff's cervical and lumbar spine. His cervical spine ROM test, performed for the first time, revealed 10 to 20 degree restrictions. His lumbar spine ROM test showed improvement

when compared to the 2/3/15 ROM test. His restrictions ranged from zero to ten degrees. The doctor's assessment of plaintiff's condition remained the same.

Plaintiff Moore commenced physical therapy on 2/3/15 and continued until 6/30/15. On 4/15/15 and on 5/27/15, Dr. Saulle, a physiatrist, examined the plaintiff. During these examinations, plaintiff's lumbar spine ROM steadily improved and his Straight Leg Raise test was negative on both occasions. The doctor opined that the plaintiff sustained lumbar disc herniation and disc bulge and recommended that Mr. Moore continue therapy on a once-a-week basis. He next examined plaintiff Moore on 7/15/15, approximately two weeks after he ceased physical therapy. ROM tests performed on plaintiff's back revealed ten degree restrictions during flexion and lateral bending movements. He opined that the plaintiff reached maximal medical improvement. They discussed lumbar epidural steroid injections but plaintiff refused. The doctor recommended that plaintiff continue with home exercises.

Dr. Saulle last examined plaintiff Moore on 11/2/17, almost two-and-a-half years later. The plaintiff reported that he continued to experience lower back pain radiating down his right lower extremity. The pain is aggravated with prolonged sitting or walking and when he bends and lifts heavy objects. The doctor reports that an MRI was performed on plaintiff's lumbar spine on 2/28/17 but the report is not annexed. He performed ROM tests on plaintiff's back and a Straight Leg Raise test. His ROM during flexion movement revealed thirty degree restrictions and his Straight Leg Raise test performed on both sides caused "worsening of the lower back pain." Dr. Saulle concluded that the plaintiff sustained a permanent injury to his lumbar spine as a result of the subject accident resulting in a partial permanent disability.

CONCLUSION

Defendant Walker, as the movant for summary judgment on threshold grounds, bears the burden to establish, by the submission of evidentiary proof in admissible form, that the plaintiff did not suffer a serious injury as a result of the automobile accident. The burden thereafter shifts to the plaintiffs to demonstrate the existence of a triable issue of fact (*Perez v Rodriguez*, 25 AD3d 506 [1st Dept 2006]).

After a review of the evidence, the Court finds that the defendant met her burden. The plaintiffs, however, failed to meet their shifting burden of proof. Their proffered medical evidence shows that plaintiff Moore's claimed lumbar spine injury falls short of the threshold

criteria. The diagnostic tests performed at Montefiore Hospital on th day of the accident show no spinal injuries relative to the subject accident. Lumbar spine ROM tests performed by Dr. Rehova revealed ten degree restrictions which do not constitute serious injury (*Williams v Dickerson*, 867 NYS2d 379[App Term, 1st Dept. 2008]; *Ikeda v Hussain*, 81 AD3d 496 [1st Dept 2011]). Dr. Saulle's examination findings after the commencement and cessation of plaintiff's physical therapy also revealed ten degree restrictions of his lumbar spine and a negative Straight Leg Raise test; the plaintiff's condition was improving. Two years later, however, the plaintiff's ROM decreased by twenty degrees and his Straight Leg Raise test produced pain. Dr. Saulle provides no explanation for the inconsistent findings between the 7/15/15 and 11/2/17 examinations and thus, his conclusory assertion that the plaintiff's lumbar spine injury is permanent and causally related to the subject accident does not warrant the denial of summary judgment (*Lopez v Senatore*, 65 NY2d 1017 [1985]; *Shaw v Looking Glass Associates, LP*, 8 AD3d 100 [1st Dept 2004]).

Plaintiffs present no evidence that plaintiff Moore was prevented from performing his usual and customary activities to a great extent in accordance with the statutory definition of a 90/180 day claim (*Thompson v Abbasi*, 15 AD3d 95 [1st Dept 2005]).

Based on the foregoing, defendant Walker's motion is GRANTED.

Service of a copy of this Decision and Order with Notice of Entry shall be effected within 30 days.

Dated: September 5, 2018

So ordered,



Hon. Lizbeth González, JSC