Louis v Baktis
2018 NY Slip Op 34275(U)
July 17, 2018
Supreme Court, Nassau County
Docket Number: Index No. 608733/2016
Judge: Karen V. Murphy

Short Form Order

SUPREME COURT – STATE OF NEW YORK
TRIAL TERM, PART 8 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

MARCO LOUIS,

Plaintiff,

-against-

COLLEEN BAKTIS,

Defendant.

Index No. 608733/2016

Motion Submitted: 05/11/18
Motion Sequence: 002

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....	X
Answering Papers.....	X
Reply.....	X
Briefs: Plaintiff's/Petitioner's.....	
Defendant's/Respondent's.....	X

Defendant moves this Court for an Order granting summary judgment, and dismissing the complaint, because plaintiff has not sustained a serious injury within the meaning of Insurance Law § 5102 (d). Plaintiff opposes the requested relief.

The motor vehicle accident giving rise to this action occurred on July 2, 2016, at approximately 2:20 p.m.

Plaintiff alleges to have suffered injuries to his cervical and lumbar spine areas, resulting in pain, weakness, limited range of motion, restricted use and impairment of function of those areas, inability to sit or stand for extended periods of time, difficulty bending, sitting down, getting up, and climbing stairs, as well as difficulty in staying in one position for any prolonged period of time. Specifically, plaintiff claims injuries under the following categories of injury as provided by Insurance Law § 5102 (d): 1) permanent loss of use of a body organ, member, function or system; 2) permanent consequential limitation of use of a body organ or member; 3) significant limitation of use of a body function or system; and 4) a medically determined injury or impairment of

a non-permanent nature which prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment (90/180 claim).

It is well recognized that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact (***Andre v. Pomeroy,*** 35 NY2d 361 [1974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact (***Cauthers v. Brite Ideas, LLC,*** 41 AD3d 755 [2d Dept 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the plaintiff (***Makaj v. Metropolitan Transportation Authority***, 18 AD3d 625 [2d Dept 2005]).

A party moving for summary judgment must make a *prima facie* showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (***Winegrad v. New York Univ. Med. Center***, 64 NY2d 851 [1985]; ***Zuckerman v. City of New York***, 49 NY2d 557 [1980]). Here, the defendant must demonstrate that the plaintiff did not sustain a serious injury within the meaning of Insurance Law Section 5102(d) as a result of this accident (***Felix v. New York City Transit Auth.,*** 32 AD3d 527 [2d Dept 2006]).

The affirmed medical reports of defendant's physicians, as well as the plaintiff's deposition testimony can be sufficient to establish *prima facie* that the plaintiff did not sustain a serious injury in a motor vehicle collision within the meaning of Insurance Law § 5102(d) (*see* ***Park v. Orellana***, 49 AD3d 721 [2d Dept 2008]; ***Tarhan v. Kabashi***, 44 AD3d 847 [2d Dept 2007]).

The Court notes that, a tear in tendons, as well as a tear in a ligament or bulging disc is not evidence of a serious injury under the no-fault law in the absence of objective evidence of the extent of the alleged physical limitations resulting from injury and its duration (***Little v. Locoh***, 71 AD3d 837 [2d Dept 2010]). Thus, regardless of an interpretation of an MRI study, plaintiff must still exhibit physical limitations in order to sustain a claim of serious injury within the meaning of the Insurance Law.

In this case, defendant's submissions demonstrate that plaintiff suffered from physical limitations in movement as of the date of the Independent Medical Examination (IME). Raymond A. Shebairo, M.D., an orthopedic surgeon, examined plaintiff on July 28, 2017, which was slightly more than one year after the occurrence of the subject motor vehicle accident giving rise to this action.

Upon examination of plaintiff using a hand-held goniometer and comparing the values obtained to guidelines published by the American Medical Association, 5th

Edition, Dr. Shebairo reported some significant range of motion deficits in plaintiff's cervical and lumbar spine areas. Specifically, Dr. Shebairo recorded values signifying a 40% restriction in cervical spine flexion; a 50% restriction in cervical spine extension; 33% restrictions in left lateral and right lateral bend of the cervical spine; a 37% restriction in left rotation, and a 37% restriction in right rotation of the cervical spine. As to the lumbar spine, Dr. Shebairo noted 20% restrictions in the left and right lateral bend (*cf.* ***Cebron v. Tuncoglu***, 109 AD3d 631 [2d Dept 2013] [10% restriction in lumbar spine insignificant within meaning of no-fault law]; ***Il Chung Lim v. Chrabaszcz***, 95 AD3d 950 [2d Dept 2012] [13% limitation of left knee not significant within meaning of Insurance Law]; ***Waldman v. Chang***, 175 AD2d 204 [2d Dept 1991] [15% limitation in cervical spine range of motion not considered significant limitation of use]).

Although Dr. Shebairo did not find any evidence of muscle spasm upon palpation of the affected areas, and plaintiff's neurological examination was apparently normal, Dr. Shebairo noted that plaintiff was wearing a back brace, and that plaintiff stated that he was working full time, "performing duties with limitations on no heavy lifting."

Dr. Shebairo reviewed plaintiff's Bill of Particulars, an office visit report from an Alexios Apazidis, M.D., and MRI reports pertaining to plaintiff's cervical and lumbar spine areas. The results of the MRI reports are set forth in detail in the IME report, noting disc bulges and central canal stenosis in the cervical spine, segmental straightening in the lumbar spine, disc bulges, and encroachments into the foramina, to name a few of the findings.

Dr. Shebairo also states that, based upon the history provided by plaintiff and a review of the submitted medical records, "there is a causal relationship between the accident of record and his reported injuries." Without explanation, however, Dr. Shebairo's impression is that "cervical spine C3-C7 disc bulge-resolved," and that "lumbar spine L1-L5 disc bulge-resolved." There is no indication in that portion of Dr. Shebairo's report setting forth the MRI findings that any of the bulges are resolved.

Based upon the foregoing, defendant has failed to establish her *prima facie* entitlement to summary judgment as a matter of law as to the following categories of injury: 1) permanent consequential limitation of use of a body organ or member; and 2) significant limitation of use of a body function or system.

A defendant may establish through presentation of a plaintiff's own deposition testimony that a plaintiff did not sustain a medically determined injury or impairment of a non-permanent nature which prevented plaintiff from performing substantially all of the material acts constituting plaintiff's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence (90/180 claim) (***Kuperberg v. Montalbano***, 72 AD3d 903 [2d Dept 2010]; ***Sanchez v. Williamsburg Volunteer of Hatzolah, Inc.***, 48 AD3d 664 [2d Dept 2008]).

A plaintiff's allegation of curtailment of recreation and household activities and an inability to lift heavy packages is generally insufficient to demonstrate that he or she was prevented from performing substantially all of his customary daily activities for not less than 90 days during the 180 days immediately following the accident (***Omar v. Goodman***, 295 AD2d 413 [2d Dept 2002]; ***Lauretta v. County of Suffolk***, 273 AD2d 204 [2d Dept 2000]).

Plaintiff's deposition testimony establishes that on the date of the subject accident, July 2, 2016, plaintiff's vehicle was rear-ended by defendant's vehicle. When police responded to the scene, plaintiff declined medical attention, although he testified that he felt "a little pressure" in his back. After the accident, he experienced pain in his neck, lower back, and left knee. Approximately one week after the accident, plaintiff sought medical attention from a chiropractor for his neck, lower back, and left knee. Plaintiff treated with the chiropractor for three to four months after the subject accident. As a result of the treatment, he stated that his neck would feel better sometimes, but sometimes the pain came back worse. Plaintiff testified that he experienced the same result with his lower back.

In November 2016, plaintiff began treating with Dr. Apazidis, who prescribed a back brace and physical therapy. Plaintiff testified that he also received two injections to his neck, and that, as of the date of his deposition (May 25, 2017), he was still treating with Dr. Apazidis twice per week. According to his testimony, plaintiff's neck and lower back still bother him. Plaintiff never received prior treatment to his neck or back, and he has suffered no subsequent injury to those areas.

Plaintiff testified that he missed five days of work as a result of the subject accident, returning full-time for a period of approximately six months before he was laid off in January 2017. His full-time job in maintenance at a hotel required him to shampoo carpets and tend to the garbage. Plaintiff testified that when he returned to work after the accident, he no longer tended to the garbage cart because it was too heavy. According to plaintiff, he was let go because he was caught by his supervisor sitting down, and he testified that he was sitting down because he was in pain.

When asked if any doctors told him not to go back to his job at the hotel, plaintiff testified that the chiropractor told him not to go back yet, but that he had to go back to work to pay his bills.

Plaintiff missed only a "couple days" from his additional, part-time job as a security guard at an apartment house. Plaintiff continues to work in this part-time capacity because he can sit while he monitors the security cameras. He works from 6 a.m. to 2 p.m., which is a "light shift," according to him. Plaintiff works this job

approximately thirty hours per week, and there has been no reduction in his hours since the subject accident.

Plaintiff testified that he can no longer play sports with his eleven-year-old son, or run. He cannot stand too long, or ride a bicycle for too long, because of his lower back and neck pain. Plaintiff also cannot turn his head too fast because "it hurts so much;" "if I turn suddenly, I get pain the whole day." In addition, he testified that he finds it hard to get up after sitting too long. When he goes to stand, his whole spine, including his lower back and neck, hurts.

Plaintiff's deposition testimony is sufficient herein to establish a *prima facie* showing that the plaintiff did not sustain a medically determined injury or impairment within the meaning of Insurance Law § 5102(d), under the 90/180 category of injury (*see* ***Jackson v. Colvert***, 24 AD3d 420 [2d Dept 2005]; ***Batista v. Olivo***, 17 AD3d 494 [2d Dept 2005]) ***Paul v. Trerotola***, 11 AD3d 441 [2d Dept 2004]). Plaintiff's deposition testimony is also sufficient to demonstrate defendant's *prima facie* entitlement to summary judgment as a matter of law as to plaintiff's claim that he suffered a permanent loss of use of a body organ, member, function or system.

As a result of the foregoing determinations, plaintiff is now required to come forward with viable, valid objective evidence to verify his complaints of pain, permanent injury and incapacity (***Farozes v. Kamran***, 22 AD3d 458 [2d Dept 2005]) as to the following categories of injury only: 1) permanent loss of use of a body organ, member, function or system and 2) his 90/180 claim.

Plaintiff does not submit his deposition testimony in opposition, but he submits a brief affidavit concerning his treatment and cessation of treatment due to termination of no-fault benefits and the closing of one facility at which he treated. Plaintiff does not assert that he has sustained the permanent loss of use of any body organ, member, function or system, nor could he do so in view of his deposition testimony. Furthermore, none of plaintiff's other submissions from medical providers support any determination that plaintiff has raised a triable issue of fact as to this particular category of injury. Accordingly, as to this category of injury, defendant's summary judgment motion is granted, and the claim as to permanent loss of use is dismissed.

The radiologists' affirmations, accompanied by the MRI reports concerning the cervical and lumbar spine areas, do not relate the findings to the subject accident, but simply report the findings as also reiterated by defendant's examining physician in his IME report. There is no mention of "degeneration" or "degenerative" conditions in either of the MRI reports or the accompanying affirmations.

There is no evidence in the submission from plaintiff's chiropractor, Kentia Jean-Charles, that plaintiff was directed to refrain from engaging in any physical activities

and/or from working from the date of first treatment through the end of chiropractic treatment (July 7, 2016 – November 29, 2016).

The affirmation and accompanying record of Alexios Apazidis, M.D., however, raises an issue of fact as to plaintiff's 90/180 claim. Dr. Apazidis first examined plaintiff on November 22, 2016, which falls within the 180-day period following the subject accident. The new patient evaluation, which is affirmed, states in pertinent part that, "[p]atient has difficulties lifting, prolonged sitting, reaching overhead, repetitive bending, and carrying. These activities are required at work; therefore, patient is unable to work and is temporarily totally disabled." Moreover, Dr. Apazidis states that, "[b]ased on the patient's history, nature of symptoms, and physical exam; these injuries seem to be related to the herein mentioned accident." Accordingly, summary judgment as to this category of injury is denied.

Based upon the foregoing, it is this Court's determination that defendant shall have summary judgment as to the following category of injury: 1) permanent loss of use of a body organ, member, function or system.

Summary judgment is denied as to the following categories of injury: 1) permanent consequential limitation of use of a body organ or member; 2) significant limitation of use of a body function or system; and 3) a medically determined injury or impairment of a non-permanent nature which prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment (90/180 claim).

The foregoing constitutes the Order of this Court.

Dated: July 17, 2018
Mineola, NY

Karen V. Murphy
J. S. C.

ENTERED
JUL 19 2018
NASSAU COUNTY
COUNTY CLERK'S OFFICE