

Vivona v Park

2019 NY Slip Op 31635(U)

April 5, 2019

Supreme Court, Queens County

Docket Number: 705390/2017

Judge: Robert J. McDonald

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

- - - - - x

MAURIZIO VIVONA, Index No.: 705390/2017
Plaintiff, Motion Date: 4/4/19
- against - Motion No.: 39
DOO Y PARK, Motion Seq.: 5

Defendant.

- - - - - x

The following electronically filed documents read on this motion by defendant for an order pursuant to CPLR 3212, granting defendants summary judgment and dismissing the complaint of plaintiff on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law §§ 5104(a) and 5102(d):

	Papers <u>Numbered</u>
Notice of Motion-Affirmation-Exhibits.....	EF 44 - 56
Affirmation in Opposition-Exhibits.....	EF 75 - 76
Reply Affirmation.....	EF 77 - 78

This is an action to recover damages for personal injuries allegedly sustained by plaintiff as a result of a motor vehicle accident that occurred on March 3, 2017 on Northern Boulevard at its intersection with 223rd Street, in Queens County, New York. As a result of the accident, plaintiff alleges that he sustained serious injuries to his cervical spine, thoracic spine, lumbar spine, head and face, and left hand and wrist.

Plaintiff commenced this action by filing a summons and verified complaint on April 19, 2017. Defendant joined issue by service of an answer on June 7, 2017. Defendant now moves for an order pursuant to CPLR 3212, dismissing the complaint on the ground that the injuries claimed fail to satisfy the serious injury threshold requirement of Section 5102(d) of the Insurance Law.

FILED
APR 16 2019
COUNTY CLERK
QUEENS COUNTY

Plaintiff appeared for an examination before trial on May 8, 2018 and testified that he was involved in the subject accident. Following the accident, he exited his vehicle without assistance, moved his vehicle, and waited for police to arrive. He did not request an ambulance. A day later he went to the Emergency Room of North Shore University Hospital. He complained of neck pain, lower back pain, and vision impairment. He was discharged the same day. Five days later he went to a clinic recommended by his attorney. He received treatment at the clinic consisting of electrical stimulation for his lower back and neck, acupuncture, and exercises. He received eight months of physical therapy. He also saw Dr. Demaira for back pain and a specialist for his neck and pinky. He had MRIs taken. He did not fracture his jaw or any part of his face, hand or wrist. He was involved in a prior motor vehicle accident approximately fourteen years ago wherein he sustained injuries to his neck and back. He received physical therapy three times a week for a period of three months. At the time of the subject accident, he was employed full-time. He missed one week from work. He missed an hour of work in the morning approximately ten to fifteen times for physical therapy. He quit his job in November 2017 because he decided to become a security guard. At the time of the deposition, his current complaints were headaches twice a week and back pain. He takes Tylenol or Advil two times a week for his headaches.

In support of the motion, defendants submit copies of plaintiff's medical records. The records from the Emergency Room of Northwell Health Northshore University Hospital indicate that plaintiff made no complaints of injury to his neck, back, hand or wrist. He was not diagnosed with any kind of injury to his cervical spine, lumbar spine, hand or wrist. The records indicate that plaintiff complained of only dizziness, headache and vision impairment. Plaintiff had full range of motion of his upper and lower extremities. Plaintiff was sent for a CT-scan of his brain, which showed no acute intracranial hemorrhage, mass effect, acute osseous fracture or acute vascular territorial infarct. Plaintiff was sent for a CT-scan of his cervical spine, which showed mild cervical spondylosis with no acute spine fracture or evidence of traumatic malignment. The attending physician diagnosed plaintiff with vision changes with no injury to his back, hand or wrist.

The records from Jordan Fersel, M.D. from March 21, 2017 indicate that plaintiff was diagnosed with a headache, cervical spine sprain, neck sprain, lumbar spine sprain, and low back pain. The records from Hao Zhang, M.D. from May 31, 2017 indicate that plaintiff's cervical pain and lumbar pain was caused by degenerative disc disease.

Teresa Habacker, M.D. performed an independent orthopedic examination on plaintiff on August 23, 2018. Plaintiff presented with current complaints of neck pain, low back pain, and constant headaches. Dr. Habacker identifies the records reviewed prior to rendering the report. Dr. Habacker performed range of motion testing and found full range of motion in plaintiff's cervical spine, thoracic/lumbosacral spine, wrist, and hand. All other objective testing was negative. Dr. Habacker opines that there is nothing in the medical records to support causality for an orthopaedic diagnosis. Dr. Habacker concludes that plaintiff does not demonstrate any disability and may continue normal daily living activities without restriction. He may work without restrictions.

Based on the submitted evidence, defendant contends that the evidence submitted is sufficient to establish, prima facie, that plaintiff has not sustained an injury which resulted in death; dismemberment; significant disfigurement; fracture; loss of fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; or significant limitation of use of a body organ, member, function or system. Defendant also contends that based on plaintiff's own testimony that he only missed one week from work following the accident, plaintiff did not sustain a medically determined injury or impairment of a nonpermanent nature which prevented him for not less than 90 days during the immediate 180 days following the occurrence from performing substantially all of his usual daily activities.

In opposition, plaintiff contends that he suffered a serious injury under the permanent consequential limitation of use of a body organ or member, significant limitation of use of a body organ, member, function or system, and 90/180 categories of serious injury. To support such contention, plaintiff submits a narrative report from Angel Macagno, M.D. from New York Spine Institute. Dr. Macagno examined plaintiff on February 21, 2019. Plaintiff presented with significant lower back pain radiating to bilateral lower extremities and neck pain. Plaintiff reported to Dr. Macagno that he was involved in a prior car accident twelve years ago that resulted in neck and back pain that resolved completely with conservative treatment. Plaintiff also reported that he did not have any more episodes of neck or lower back pain until the subject accident. Dr. Macagno indicates that he reviewed plaintiff's MRI of the cervical spine taken on April 10, 2017, the MRI of the lumbar spine taken on April 11, 2017, the MRI of the lumbar spine taken on February 21, 2019, the CT scan of the lumbar spine taken on February 21, 2019, and the X-rays of the lumbar spine taken on February 21, 2019. Dr. Macagno performed range of motion testing with a goniometer and found

decreased ranges of motion in plaintiff's cervical spine and lumbar spine. Dr. Macagno concludes that the current problem is causally related to the subject accident and the resultant injuries are permanent.

On a motion for summary judgment, where the issue is whether the plaintiff has sustained a serious injury under the no-fault law, the defendant bears the initial burden of presenting competent evidence that there is no cause of action (Wadford v Gruz, 35 AD3d 258 [1st Dept. 2006]). "[A] defendant can establish that a plaintiff's injuries are not serious within the meaning of Insurance Law § 5102 (d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (Grossman v Wright, 268 AD2d 79 [1st Dept. 2000]). Whether a plaintiff has sustained a serious injury is initially a question of law for the Court (Licari v Elliott, 57 NY2d 230 [1982]).

Here, the competent proof submitted by defendant, including the records from the Emergency Room of Northwell Health Northshore University Hospital, Dr. Fersel and Dr. Zhang, the affirmed report from Dr. Habacker, and plaintiff's own testimony that he only missed one week of work after the accident, is sufficient to meet defendant's prima facie burden by demonstrating that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]; Carballo v Pacheco, 85 AD3d 703 [2d Dept. 2011]; Ranford v Tim's Tree & Lawn Serv., Inc., 71 AD3d 973 [2d Dept. 2010]).

In opposition, this Court finds that plaintiff failed to raise a triable issue of fact. It is the plaintiff's burden to demonstrate that the plaintiff's injuries were proximately caused by the subject accident and not a prior or subsequent injury or long-standing degeneration (see Finkelshteyn v Harris, 280 AD2d 579 [2d Dept. 2001]; Alcalay v Town of Hempstead, 262 AD2d 258 [2d Dept. 1999]).

Here, plaintiff failed to establish that his claimed injuries were caused by the subject accident. While a quantitative assessment or numerical assessment of range of motion of injury is not required on an initial or contemporaneous examination, the courts still require a contemporaneous qualitative assessment of injuries from an examination close to the time of the accident. The absence of a contemporaneous medical report, as here, invites speculation as to causation (see

Griffiths v Munoz, 98 AD3d 997 [2d Dept. 2012])). Although Dr. Macagno, who was not plaintiff's treating physician, concludes that the injuries indicated in his report were sustained in the subject accident, plaintiff did not submit competent objective medical evidence that revealed any treatment or the existence of an injury that was contemporaneous with the subject accident. Dr. Macagno's examination of plaintiff occurred nearly two years after the subject accident. Moreover, Dr. Macagno fails to address the findings of degeneration by both defendant's expert and plaintiff's own providers (see Saint-Hilaire v PV Holding Corp., 56 AD3d 541 [2d Dept. 2008]). Additionally, Dr. Macagno did not state that he reviewed the records of plaintiff's prior injuries and treatment (see Vidor v Davila, 37 AD3d 826 [2d Dept. 2007])). As such, Dr. Macagno's opinion that plaintiff's injuries were sustained in the subject accident is speculative (see Perl v Meher, 18 N.Y.3d 308 [2011] ["a contemporaneous doctor's report is important to proof of causation"]; Griffiths v Munoz, 98 A.D.3d 997 [2d Dept. 2012]; Singh v City of New York, 71 A.D.3d 1121 [2d Dept. 2010])).

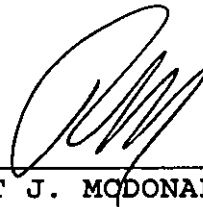
Additionally, plaintiff failed to explain the more than one year gap between the conclusion of his treatment and the date of Dr. Macagno's examination (see Sammur v Davis, 16 AD3d 658 [2d Dept. 2005])). Because plaintiff did not adequately explain the gap in treatment, Dr. Macagno's opinion as to permanency, significance, and causation is speculative and seemingly tailored to meet the statutory definition of serious injury (see Merrick v Lopez-Garcia, 100 AD3d 456 [1st Dept. 2012] [finding that the non-treating physician's affirmed report of recent findings of limitations was insufficient to demonstrate that the plaintiff suffered a serious injury under the significant limitation of use category, where plaintiff failed to address the gap between when plaintiff was last treated and the non-treating physician's evaluation]; Arjona v Calcano, 7 AD3d 279 [1st Dept. 2004])).

Regarding the 90/180 day category, plaintiff failed to submit competent medical evidence that the injuries allegedly sustained in the subject accident rendered him unable to perform substantially all of his usual and customary daily activities for not less than 90 days of the first 180 days following the subject accident (see Nieves v Michael, 73 AD3d 716 [2d Dept. 2010]; Sainte-Aime v Ho, 274 AD2d 569 [2d Dept. 2000])). In this regard, plaintiff admitted at his deposition that he only missed one week of work following the accident (Kabir v Vanderhost, 105 AD3d 811 [2d Dept. 2013]; Cebren v Tuncoqlu, 109 AD3d 631 [2d Dept. 2013])).

Accordingly, and for the reasons stated above, it is hereby

ORDERED, that defendant DOO Y PARK's summary judgment motion is granted, plaintiff's complaint is dismissed, and the Clerk of the Court shall enter judgment accordingly.

Dated: April 5, 2019
Long Island City, N.Y



ROBERT J. McDONALD
J.S.C.

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