

Lindo v City of New York
2019 NY Slip Op 31667(U)
June 11, 2019
Supreme Court, New York County
Docket Number: 159595/2016
Judge: Lyle E. Frank
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LYLE E. FRANK

PART

Justice

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INDEX NO. 159595/2016

ALLAN LINDO,

MOTION DATE 05/19/2019

Plaintiff,

MOTION SEQ. NO. 002

- v -

THE CITY OF NEW YORK, WELSBACH ELECTRIC CORP.,
JAMES LIRIANO, AMERICAN UNITED TRANSPORTATION INC.

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, the decision/order of the Court is as follows:

Defendants James Liriano (Liriano) and American United Transportation (American United) move for summary judgment dismissing the complaint. Defendant The City of New York (City) cross-moves for summary judgment dismissing the complaint (Defendant Welsbach Electric Corp. has been dismissed from this action by a stipulation of discontinuance).

Background

Defendants' Motions

This is a personal injury action which involves the application of section 5104 (a) of the Insurance Law. Plaintiff seeks damages resulting from an automobile accident that occurred on October 28, 2015 on West 159th Street near its intersection with Amsterdam Avenue in New York, New York. Plaintiff, a bus driver on duty at that time, collided with a cab driven by Liriano and owned by his employer, American United. Plaintiff also alleges that at the scene of the accident, a traffic light owned and operated by City was not functioning properly and added

to the accident. Plaintiff alleges that as a result of the accident, he has sustained permanent personal injuries which required right shoulder surgery, as well as continual medical treatment. Plaintiff seeks damages for pain and suffering and medical expenses, claiming that defendants acted negligently and/or recklessly at the time of the accident.

Liriano and American United both move for summary judgment, seeking dismissal of plaintiff's claims on the ground that his injuries allegedly derived from the accident are not those which constitute "serious injuries," pursuant to section 5104 (d) of the Insurance Law.

Liriano and American United submit the following evidence in support of their motion: plaintiff's Bill of Particulars; plaintiff's deposition testimony; various medical records and reports related to plaintiff's physical condition; affirmations from: Dr. Timothy Haydock (Haydock), a physician specializing in emergency medicine; Dr. Barbara Freeman (Freeman), a board certified orthopedist; Dr. Robert April (April), a board certified neurologist; and Dr. Robert Tantleff (Tantleff), a board certified radiologist. These moving defendants contend that the evidence demonstrates that plaintiff's present physical condition does not fall within any of the classifications provided by section 5104 (d), and that plaintiff lacks any valid claims against them.

In reviewing plaintiff's deposition, Liriano and American United claim that plaintiff was treated at the scene of the accident by EMS personnel and was transported to the emergency room at the New York Columbia Presbyterian Hospital, and that plaintiff admitted that he was discharged from the emergency room, without a sling, braces or prescriptions, and underwent no x-rays. Further in his deposition, they claim that plaintiff testified that he was able to drive shortly following this accident, that he was not confined to his bed or to his home for any period

of time following the accident, and that after seven weeks away from work, he returned to his normal duties as a full-time bus driver.

Dr. Haydock affirmed that he reviewed plaintiff's Bill of Particulars, police report, and EMS and emergency room records. Dr. Haydock concluded that plaintiff was ambulatory at the scene of the accident, with no note of obvious trauma, and that after undergoing a back examination in the emergency room, plaintiff did not reveal evidence of tenderness, restricted range of motion, swelling or deformity. Dr. Haydock further asserted that plaintiff demonstrated full strength in the right upper extremity with no ecchymosis overlying the triceps. Dr. Haydock noted that no orthopedic consultations or referrals were recommended for plaintiff.

Liriano and American United submit an affirmation from Dr. Freeman, who examined plaintiff on September 1, 2017 on behalf of defendants. She also reviewed plaintiff's medical records, concluding that this information exhibited no orthopedic disability with MRI findings consistent with preexisting and degenerate back conditions. Upon examining plaintiff, Dr. Freeman found no acute distress, negative signs of apprehension and impingement on his right shoulder, no tenderness in his thoracic spine and normal upper motor strength. She found the results of her straight leg raise, Fabere's and Lasegue's tests to be negative. She also found the range of motion findings on his right shoulder to be negative.

Liriano and American United submit an affirmation from Dr. April, who examined plaintiff on August 10, 2017 on behalf of defendants. Dr. April affirmed that based on his examination, the subject accident did not result in a neurological diagnosis, limitation or disability. He performed a range of motion testing using a goniometer, and concluded that plaintiff's ranges of motion were within normal limits. In his qualitative assessment, Dr. April found that plaintiff's straight leg raise to have been negative to 70 degrees normal with the

bowstring sign absent, that the percussion and palpation of plaintiff's vertebral columns and paraspinal muscles were negative for spasm and tenderness, and that plaintiff's cranial nerves and motor and sensory examinations were normal in relation to daily activities.

Liriano and American United submit an affirmation from Dr. Tantleff, who reviewed plaintiff's MRI reports on his right shoulder, lumber spine and cervical spine. These reports were completed within the 90-180 day period following the accident. Dr. Tantleff affirmed that the information confirmed longstanding evidence of degenerative conditions, including tendinosis and disc disease, absent trauma. He concluded that there was no causal relation between plaintiff's physical condition and the accident.

Liriano and American United argue that based on this evidence, they have made out a case for summary judgment, indicating that plaintiff suffered from no permanent injury or loss of use or movement, even if he submitted to surgery. Upon reviewing the results of various objective clinical tests performed by qualified physicians, the moving defendants contend that any basis of a permanent or consequential limitation of movement or other injury subject to the standards of section 5102 (d) has been dismissed as a matter of law in this action.

Defendant City cross-moves separately for summary judgment, dismissing this action against it on the same grounds invoked by Liriano and American United.

Plaintiff's Opposition

In opposition, plaintiff argues that defendants have failed to make out a case for summary judgment, or, alternatively, that there are issues of fact precluding summary judgment. Plaintiff contends that he has evidence to confirm that he had been forced to miss 10 months of work as a

result of the accident, and that he has submitted medical reports involving objective tests that show the extent of plaintiff's significant injuries.

During his deposition, plaintiff testified that immediately after the accident, he felt pressure in his right arm, which resulted in his transfer to the emergency room, where he was examined, given medication and discharged. After his release, plaintiff stated that he sought treatment at a facility in Brooklyn called Central Medical Services of Westrock (Westrock). After plaintiff initially complained of pain to his right shoulder, neck and back, his physician, Dr. Steven Roberts (Roberts) recommended an MRI, physical therapy, heat, chiropractic therapy, exercise, acupuncture and a back brace for his problems. Following plaintiff's right shoulder MRI, he was diagnosed with multiple tears in his right shoulder, requiring surgery. Plaintiff testified having surgery with Dr. Darren Friedman (Friedman) in March 2016. As a result, plaintiff claims to have two surgical scars on his right shoulder. Plaintiff also claims that he was required to wear a sling for over a month after the operation.

Plaintiff testified that he did not work for 10 months after the accident, and that after he returned to work, he experienced a renewal of pain, forcing him to resume treatment he had previously ceased. Plaintiff stated that he is limited in his range of motion regarding house work, lifting weights, holding objects for extended periods of time and playing sports. Plaintiff testified about feeling numbness in his right hand, as well as experiencing neck, back and shoulder pain, which requires continued treatment.

Plaintiff submits certified medical reports obtained from Westrock, as well as affirmations from Dr. Roberts and Dr. Friedman, along with Dr. Faith Chang (Chang), Dr. Tong Li (Li), Dr. Landis Barnes (Barnes) and Dr. Michael Hearn (Hearn). Dr. Roberts, associated with Westrock, examined plaintiff on several occasions. After a review of plaintiff's MRI, Dr.

Roberts diagnosed plaintiff with right shoulder derangement, cervical radiculopathy, cervical and lumbar strains and total temporary disability. Dr. Roberts conducted some range of motion tests, specifically Positive Spurlings and Neer testing, which revealed limited range of motion, muscle spasm and tenderness. Dr. Roberts affirmed that the accident was the source of the injuries sustained by plaintiff.

Plaintiff submits an affirmation from his surgeon, Dr. Friedman, who continues to treat him. During plaintiff's initial visit, Dr. Friedman performed positive active compression testing, Crank testing, labral shear testing and Hawkins testing, and upon observing the results, requested an authorization to operate on plaintiff, declaring plaintiff 100% temporarily disabled due to his right shoulder injuries. On March 8, 2016, plaintiff underwent a right shoulder glenohumeral joint debridement, arthroscopic anterior labral repair and capsulorrhaphy to repair a posttraumatic SLAP tear, anterior labral tear, a subacromial impingement with bursitis, low grade articular side rotator cuff tear, chondral defect anterior aspect of the glenoid, and a partial biceps tendon tear.

Dr. Friedman affirmed that he examined plaintiff on various occasions after the operation. As of March 1, 2018, the last examination date, he found plaintiff to be 25% disabled in his right shoulder, with continual pain in his scapula and spasm about the infraspinatus, requiring physical therapy and pain management. Dr. Friedman affirmed that plaintiff's accident was the source of his continuing injuries.

Plaintiff submits an affirmation from Dr. Chang, who is associated with Westrock. Dr. Chang examined and treated plaintiff on November 10, 2017, after he resumed work. Plaintiff went to Westrock after experiencing a renewal of neck, back and shoulder pain. A range of motion testing revealed to Dr. Chang that plaintiff's neck was limited to flexion of 45 degrees and extension of 30 degrees, and that his shoulder range of motion was limited to 90 degrees on

the right, compared to 160 degrees on the left. As a result, Dr. Chang recommended continual physical therapy and medication. She also causally related plaintiff's complaints of pain to the accident.

Plaintiff submits an affirmation from Dr. Li, who conducted several examinations, using positive Neers and Hawkins testing. Dr. Li also performed a right shoulder ultrasonography on plaintiff on January 19, 2018, revealing evidence of tendinosis, effusion and a tear. Dr. Li gave plaintiff trigger point, facet joint and steroid injections in an attempt to relieve plaintiff's neck, back and right shoulder pain. Dr. Li affirmed that within a reasonable degree of certainty, the accident was the source of plaintiff's injuries.

Plaintiff submits an affirmation from Dr. Barnes, who examined plaintiff, specifically using Spurling testing. Dr. Barnes found that plaintiff suffered from significant pain to his neck and lower back and recommended physical restraint from everyday activities. Dr. Barnes also affirmed a casual relation between the accident and his injuries.

Plaintiff submits an affirmation from Dr. Hearn, who examined plaintiff on December 13, 2018 after hearing his complaints of neck and back pain and discomfort. Dr. Hearn found that plaintiff suffered from a disability related to the accident, requiring further treatment. From his results, he concluded that plaintiff's right shoulder range of motion was limited to about 60 degrees, and the neck and back was found to have spasms.

Plaintiff contends that he has submitted enough proof that should defeat a summary judgment motion, including objective medical evidence provided to raise triable issues regarding serious injuries pursuant to section 5104 (d) of the Insurance Law.

Reply

In reply, Liriano and American United again argue that plaintiff has not raised a triable issue of fact as to the existence of a serious injury which can qualify under the Insurance Law through the medical documentation they have provided. They also argue that plaintiff has submitted evidence that is not admissible on medical issues, such as an attorney's affirmation and unsworn medical reports.

Discussion

"It is axiomatic that summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of factual issues" (*Birnbaum v Hyman*, 43 AD3d 374, 375 [1st Dept 2007]). "The substantive law governing a case dictates what facts are material, and '[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment [citation omitted]" (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008]). "To prevail on a summary judgment motion, the moving party must provide evidentiary proof in admissible form sufficient to warrant the direction of summary judgment in his or her favor [citation omitted]" (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 81 [1st Dept 2013]). "Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial [citation omitted]" (*id.* at 82).

This action is connected to the no-fault law, which guarantees first party benefits for those parties who can establish serious injuries sustained in vehicular accidents. Section 5102 (d) of the Insurance Law provides the relevant categories:

"... 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 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 ninety days during the one hundred and eighty days immediately following the occurrence of the injury or impairment."

The moving defendants contend that they have sufficient evidence showing that plaintiff does not qualify under any of the aforesaid categories that constitutes "serious injury." Two of their physicians examined plaintiff and submitted their findings. Dr. Freeman stated that on the range of motion of the cervical spine, plaintiff flexed 35 degrees with complaints of pain in the upper thoracic segments, and extended 45 degrees, performed 80 degrees pronation to the right, 75 degrees rotation to the left with complaints of ipsilateral pain bilaterally. On the range of motion of the right shoulder, plaintiff forward flexed 165 degrees, abducted 90 degrees, 90 degrees external rotation, 60 degrees internal rotation, reporting mild subacromial pain.

Dr. April, after conducting mechanical exams, reported that plaintiff's straight leg raising was normal to 70 degrees, the range of motion of the upper limbs was 40 degrees extension at the shoulder and full reach behind the back, without limitation in pronation (80 degrees), supination (80 degrees), elbow flexion (150 degrees) and wrist flexion (60 degrees).

After their examinations, plaintiff was examined by Dr. Chang and Dr. Li of Westrock. Their affirmations, as well as all the records submitted from Westrock, including MRI reports and physical test results, have been certified. Dr. Chang examined plaintiff on November 10, 2017. Based on her examination, she found that plaintiff's range of motion of his neck was decreased to forward flexion of 45 degrees, backward extension of 30 degrees, right lateral flexion of 30 degrees, left lateral flexion of 15 degrees and rotation of 45 degrees bilaterally. Plaintiff's range of motion of his shoulder was decreased to 90 degrees of forward extension on the right when compared to the left of 160 degrees and abduction of 90 degrees for the right

shoulder when compared to the left of 150 degrees, internal rotation is 85 degrees, external rotation is 75 degrees for the right and 85 degrees for the left.

Dr. Li, who examined plaintiff for several months in 2018, noted positive muscle spasm and tenderness as well as limitations in motion. He and Dr. Chang concluded that plaintiff's injuries were ongoing and required further treatment. They also connect the injuries to the accident. Plaintiff's surgeon, Dr. Friedman, has continued to consult with him after the surgery. On his last visit, on March 1, 2018, Dr. Friedman concluded that plaintiff's injuries were ongoing and required further treatment.

Where plaintiff's physician's affirmation conflicts with defendant's expert's affirmation to the extent or causation of plaintiff's injury, summary judgment is usually denied. (*see Tsamos v Diaz*, 81 AD3d 546, 547 [1st Dept 2011]). Here, the findings of the parties' physicians are in conflict. Moreover, the contrasting results of the objective medical examinations performed by a number of physicians raise an issue of fact as to whether plaintiff's injuries are permanent pursuant to section 5102 (d). Alternatively, the contrasting evidence also raises an issue as to whether plaintiff's condition would qualify under the 90-180 day category. While defendants contend that plaintiff missed 7 weeks of work, plaintiff testified that he missed 10 months of work as a result of the accident and provides medical evidence to confirm this. It is also of note that none of the defendants' doctors examined the plaintiff during the first 180 days following his accident.

Accordingly, it is

ORDERED, that defendants' summary motions are denied.

This constitutes the decision and order of the court.

6/11/2019

DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

**HON. LYLE E. FRANK
J.S.C.**

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE