Tarjavaara v Considine
2019 NY Slip Op 31908(U)
June 27, 2019
Supreme Court, New York County
Docket Number: 159817/2016
Judge: Adam Silvera

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 22

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JOHN TARJAVAARA,

Plaintiff,

- v -

MURIEL CONSIDINE, LYNDA CONSIDINE, EDIE GOWAN

Defendant.

INDEX NO. 159817/2016

MOTION DATE 09/17/2018

MOTION SEQ. NO. 002

DECISION AND ORDER

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HON. ADAM SILVERA:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 35, 36, 37, 38, 39, 40, 41, 42, 45, 46
were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

Upon the foregoing documents, it is ORDERED that defendants Muriel Considine, Lynda Considine, and Edie Gowan's motion, for summary judgment, pursuant to CPLR 3212, against plaintiff John Tarjavaara on the issue of "serious injury" as defined under Section § 5102(d) of the Insurance Law is granted.

The matter at issue stems from a motor vehicle accident which occurred on June 10, 2016, on West 43rd Street at or near its intersection with 9th Avenue in the County, City and State of New York when defendants' vehicle struck plaintiff bicyclist which allegedly led to his serious injury. Plaintiff's Bill of Particulars and Supplemental Bill of Particulars allege injuries to the left and right knee including a total left knee replacement as a result of the accident at issue.

"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 from the case" (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). Once such entitlement has been demonstrated by the moving party, the burden shifts to the party opposing the motion to "demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure … to do [so]" (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]).

In order to satisfy their burden under Insurance Law § 5102(d), a plaintiff must meet the "serious injury" threshold (*Toure v Avis Rent a Car Systems, Inc.*, 98 NY2d 345, 352 [2002] [finding that in order establish a prima facie case that a plaintiff in a negligence action arising from a motor vehicle accident did sustain a serious injury, plaintiff must establish the existence of either a "permanent consequential limitation of use of a body organ or member [or a] significant limitation of use of a body function or system"]).

Defendants allege that plaintiff has failed to demonstrate the existence of a "serious injury" as defined under Section 5102(d) of the Insurance Law. Defendants allege that the injuries plaintiff is seeking relief for are not causally related to the underlying accident and are a result of degenerative disc disease. In support of their motion defendants attach plaintiff's Bill of Particulars, the deposition of plaintiff John Tarjavaara, medical records from Emergency Medical Care dated June 10, 2016, the radiology report of Dr. Kevin Math dated October 11, 2010, and the affirmed medical report and Addendum of Dr. Jeffrey Dermksian dated June 6, 2018 and August 1, 2018 (Mot, Exh C, I, G, H, E & F).

Thus, defendants aver that plaintiff is unable to seek refuge under the ninth category of serious injury, that is, inability to perform his customary daily activities for at least 90 days out

of the first 180 days immediately after the accident. Defendants note that plaintiff testified that following the accident he was not out of work continuously for 126 days as he had alleged in his Bill of Particulars (*id*, Exh I at 10 & Exh C).

Emergency Medical Care records containing X-rays taken of plaintiff's left and right knee on the date of the accident, showed no acute fractures, demonstrated pre-existing osteoarthritis, and recorded that plaintiff's knees had a full range of motion (*id.*, Exh G). Dr. Math's report, which predates the accident, recorded pre-existing degenerative joint disease in the left knee (*id.*, Exh H). Dr. Dermksian examined plaintiff on June 6, 2018 and found no objective findings causally related to the accident on June 10, 2016, and further found that plaintiff did not sustain any permanent injury, loss of function, and was able to perform all the usual activities of daily living and work at his normal capacity (*id.*, Exh E & F). Thus, defendants have made a prima facie showing of entitlement to summary judgment and the burden shifts to plaintiff to raise an issue of fact.

In opposition, plaintiff attaches medical records from Dr. Benjamin Gross, plaintiff's MRI reports, the December 10, 2018, and the affirmed medical report of plaintiff's treating orthopedic surgeon, Dr. Rupesh Tarwala Aff in Opp, Exh B, C, D, G). Dr. Tarwala affirmed that plaintiff's injuries to both knees are causally related to the accident at issue of June 10, 2016 and that plaintiff suffers from posttraumatic osteoarthritis of both knees with a large displaced meniscal tear on the right knee, underwent a total left knee replacement, suffers from a loss of 30 degrees of range of motion to the left knee, suffered a loss of 75 degrees of range of motion to the right knee and is a candidate for a total right knee replacement (*id.*, Exh C).

In a June 28, 2016, NYU Langone Health System Progress Notes report by Dr. Robert Shay Bess, plaintiff's meniscus tears are "possibly" attributed to the accident at issue conclusion,

and plaintiff's degenerative changes are attributed to osteoarthritis (*id.*, Exh B3). Plaintiff's responding medical submissions fail to raise a triable issue of fact as to plaintiff's injuries. In *Rosa v Delacruz*, 32 NY3d 1060, 2018 N.Y. Slip Op. 07040 [2018], the Court of Appeals found that where a plaintiff's doctor opined that tears were causally related to the accident, but did not address findings of degeneration or explain why the tears and physical deficits found were not caused by the preexisting degenerative conditions, plaintiff failed to raise a triable issue of fact as it "failed to acknowledge, much less explain or contradict, the radiologist's finding. Instead, plaintiff relied on the purely conclusory assertion of his orthopedist that there was a causal relationship between the accident" (*See id.*)

Here, like the plaintiff in *Rosa,* plaintiff, fails to submit an opinion from his doctors which explain why plaintiff's injuries found in both knees were not caused by preexisting degenerative conditions but rather due to the accident at issue. Thus, the Court finds that plaintiff has not suffered a serious injury and defendants' motion for summary judgment to dismiss plaintiff's complaint on the grounds that the injuries alleged by plaintiff do not constitute a "serious injury" is granted.

Accordingly, it is

ORDERED that defendants' motion for summary judgment, on the grounds that plaintiff Josephine C. Duberson has not sustained a "serious injury" as defined in 5102 and 5104 of the Insurance Law, is granted; and it is further

ORDERED that defendants' motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that within 30 days of entry, defendants shall serve a copy of this decision/order upon all parties with notice of entry.

This constitutes the Decision/Order of the Court.

6/27/2019
DATE

ADAM SILVERA, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[X]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE