Montero v Urgiles
2019 NY Slip Op 32128(U)
May 13, 2019
Supreme Court, Bronx County
Docket Number: 26010/2017E
Judge: John R. Higgitt

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 14

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NELSON MONTERO,

Plaintiff,

- against -

JOHN P. URGILES and MARIA WARD,

Defendants.

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DECISION AND ORDER

Index No. 26010/2017E

John R. Higgitt, J.

Upon defendants' September 25, 2018 notice of motion and the affirmation and exhibits submitted in support thereof; plaintiff's March 28, 2019 affirmation in opposition and exhibit submitted therewith; defendants' April 22, 2019 affirmation in reply; and due deliberation; defendants' motion for summary judgment on the ground that plaintiff did not sustain a "serious injury," as defined in Insurance Law § 5102(d), in the subject May 25, 2016 motor vehicle accident is granted.

Plaintiff alleges that the vehicle in which he was a front seat passenger was struck in the rear by the vehicle operated by defendant Maria Ward and owned by defendant John P. Urgiles. Plaintiff testified that following the impact, a large, flat piece of stainless-steel scrap metal, which was in the rear of the vehicle, struck him in the head and pushed his head into the side window. As a result of such accident, plaintiff alleges that he sustained a laceration to his head,[1] blurry vision, knee and skull pain, and injuries to the cervical, thoracic and lumbar aspects of his spine. Without further specificity (*see* CPLR 3043[a][6]), plaintiff alleges "serious injury" as defined by Insurance Law § 5102(d).

Defendants submitted the affirmed expert report of an orthopedic surgeon, Regina Hillsman, M.D., and the transcript of plaintiff's March 26, 2018 deposition testimony.

On May 31, 2018, Dr. Hillsman examined plaintiff. Plaintiff complained of headaches and

[1] Plaintiff's laceration allegedly required nine staples to repair.

neck pain, and reported no prior history of injuries to his head, knees, neck or lower back. Dr. Hillsman reviewed plaintiff's New York Presbyterian Hospital records, dated September 24, 2015 through March 15, 2016, and a motor vehicle accident report, dated September 24, 2015. Dr. Hillsman measured full ranges of motion in plaintiff's cervical spine, thoracic spine, lumbar spine, right knee and left knee, with no paraspinal spasm or tenderness. All provocative testing, including straight-leg raising, was negative. Neurological testing yielded normal results without deficits in muscle testing, sensation or reflexes in the upper and lower extremities. Dr. Hillsman diagnosed plaintiff with resolved lumbar spine sprain/strain and bilateral knee strains/contusions. Based upon the history provided and the medial records reviewed, Dr. Hillsman opined that there was a causal relationship between the diagnosed injuries and the subject accident, but there was no evidence of permanency.

This evidence is sufficient to demonstrate prima facie that plaintiff did not sustain a "serious injury" as a result of the accident (*see Hayes v Gaceur*, 162 AD3d 437, 438 [1st Dept 2018]; *Andrade v Lugo*, 160 AD3d 535, 535-536 [1st Dept 2018]; *Latus v Ishtarq*, 159 AD3d 433 [1st Dept 2018]; *Dziuma v Jet Taxi, Inc.*, 148 AD3d 573, 573-574 [1st Dept 2017]; *Hernandez v Cespedes*, 141 AD3d 483, 484 [1st Dept 2016]; *Michels v Marton*, 130 AD3d 476, 476-477 [1st Dept 2015]).

Defendants also assert that plaintiff had a subsequent work-related accident in which he reinjured the same body parts claimed to have been injured by the subject accident. Specifically, plaintiff testified that he fell down a staircase at a construction site, injuring his "whole body." He went to the hospital, had x-rays performed and was diagnosed with a fractured rib. As a result of the subsequent accident, plaintiff underwent MRIs and was still receiving physical therapy and treating with an orthopedist and neurologist as of the date of his deposition.

With regard to the alleged head injuries, plaintiff testified to no treatment, or the need for treatment, related to his claimed headaches, skull pain and dizziness (*see Thompson v Abbasi*, 15

AD3d 95, 97, 788 NYS2d 48 [2005]). While plaintiff alleges that the subject accident caused blurry vision, he could not remember whether he had blurry vision prior to the accident, and did not wear glasses prior to the accident. Plaintiff testified that, following the accident, his eye doctor recommended glasses and laser eye surgery. Plaintiff testified that he did not know what type of eye surgery he underwent in 2017, that his vision was the same following the operation and that he was advised to return to the eye doctor, but had yet to do so.

"For the categories of permanent consequential limitation of use of a body organ or member and significant limitation of use of a body function or system, the proof must relate to 'medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part'" (*Pinkowski v All-States Sawing & Trenching, Inc.*, 1 AD3d 874 [3rd Dept 2003] [quotations omitted]; *see Toure v Avis Rent a Car Sys.*, 98 NY2d 345, 353 [2002]). Plaintiff's failure to return to the eye doctor and his testimony that the only thing he could not do, as a result of the claimed injuries, was read the newspaper for 15 to 20 minutes, fails to suggest that his blurry vision rises to the level of a limitation that can be considered significant (*see Knoll v Seafood Express*, 17 AD3d 233, 233-234 [1st Dept 2005], *affd* 5 NY3d 817 [2005]).

In opposition, plaintiff submitted the reports of Mark S. McMahon, M.D., and a radiologist, Steven B. Losik, M.D., and plaintiff's February 7, 2019 affidavit.[2] Plaintiff asserted that defendants failed to meet their prima facie burden, and that plaintiff's submissions are sufficient to raise a question of fact as to whether plaintiff sustained a "serious injury" under the Insurance Law § 5102(d)

[2] While neither Dr. McMahon nor Dr. Losik's reports are sworn to pursuant to CPLR 2106 or under the penalty of perjury, defendants waived any technical objection to the admissibility of such reports (*see Jones v MTA Bus Co.*, 123 AD3d 614, 614-615 [1st Dept 2014] [court may not *sua sponte* refuse to consider expert report that is submitted in improper form]; *Long v Taida Orchids, Inc.*, 117 AD3d at 625; *Akamnonu v Rodriguez*, 12 AD3d 187, 187 [1st Dept 2004]; *Shinn v Catanzaro*, 1 AD3d 195, 197 [1st Dept 2003]; *Scudera v Mahbubur*, 299 AD2d 535, 535 [2d Dept 2002], *affd* 12 AD3d 660 [2d Dept 2004]; *see also Offman v Singh*, 27 AD3d 284, 284 [1st Dept 2006]).

categories of permanent loss of use, permanent consequential limitation, or a significant limitation.

On November 12, 2015, Dr. Losik reviewed MRIs taken of plaintiff's cervical spine and lumbar spine. He found that the films demonstrated cervical spine disc herniations from the C3 to T1, a C4/C5 disc bulge, and lumbar spine disc herniations from L3 to S1, with ligamentum hypertrophic changes and moderate spinal canal stenosis.

Dr. McMahon's report is dated January 23, 2019. While not specifically stated, it appears that Dr. McMahon reviewed plaintiff's records and performed a recent examination of plaintiff. Dr. McMahon notes that from October 15, 2015 through March/April 2016, plaintiff received chiropractic treatment and acupuncture. From October 22, 2015 through April 4, 2016, plaintiff received physical therapy. Dr. McMahon noted that, on November 3, 2015, plaintiff underwent a cervical spine MRI that revealed mild to severe loss of disc space height with herniations and a bulge, and a November 21, 2015 lumbar spine MRI that revealed loss of disc space height at L3 through S1, with diffuse disc herniations. Dr. McMahon noted current complaints related to the cervical spine, lumbar spine and left knee. He measured significant range-of-motion restrictions in plaintiff's cervical spine, lumbar spine and left knee, with tenderness. Dr. McMahon diagnosed plaintiff with a 3.5 cm scalp laceration, a head injury with resultant dizziness and blurred vision (requiring glasses), cervical and lumbar injuries and a left knee injury. He causally related plaintiff's injuries to the subject accident. Dr. McMahon concluded that plaintiff's condition is permanent, that his condition interferes with his quality of life and activities of daily living, and that he is unable to work as a result of his injuries.

Plaintiff averred that he still feels pain in his neck and lower back. He admitted that the subsequent accident, which occurred on April 21, 2017, aggravated his lower back injury; however, plaintiff asserted that the level of pain returned to the same level it was following the subject accident and immediately prior to the subsequent accident.

Plaintiff's submissions failed to raise a triable issue of fact because plaintiff did not present

admissible evidence of contemporaneous quantitative or qualitative limitations in any of the body parts claimed to have been injured (*see Pines v Lopez*, 88 AD3d 545, 545 [1st Dept 2011]; *Clemmer v Drah Cab Corp.*, 74 AD3d 660, 662-663 [1st Dept 2010]; *see also Rivera v Gonzalez*, 107 AD3d 500, 500 [1st Dept 2013] [a finding of a herniation alone is insufficient to establish a serious injury; additional objective medical evidence of significant physical limitations resulting from the herniation is required]). Also, Dr. McMahon does not identify the injuries plaintiff's post-accident treatment intended to address. Dr. McMahon's quantitative assessment of the range-of-motion restrictions of plaintiff's neck, back and left knee, conducted more than three years after the accident, was too remote in time to warrant the inference that such limitations were caused by the accident (*see Ikeda v Hussain*, 81 AD3d 496, 496-497 [1st Dept 2011]). Moreover, because Dr. McMahon fails to acknowledge or account for plaintiff's subsequent accident that resulted in "whole body" injuries, his conclusion that plaintiff's current conditions were caused by the subject accident is speculative (*see Mendoza v L. Two Go, Inc.*, ___AD3d___, 2019 NY Slip Op 02613, *1 [2019]; *Zhijian Yang v Alston*, 73 AD3d 562, 563 [1st Dept 2010]; *Lunkins v Toure*, 50 AD3d 399, 399-400 [1st Dept 2008]; *Arzu v Rahmanan*, 34 Misc 3d 143[A], 2012 NY Slip Op 50100[U], *1-2 [App Term 2012]). Plaintiff's failure to submit a fact-based medical opinion ruling out the subsequent accident as a cause of his limitations entitles defendants to summary judgment (*see Pines v Lopez*, 88 AD3d at 546; *Rose v Citywide Auto Leasing, Inc.*, 60 AD3d 520, 520 [1st Dept 2009]).

It is obvious that plaintiff did not sustain a permanent loss of use. Such loss must be total (*see Oberly v Bangs Ambulance Inc.*, 96 NY2d 295 [2001]), and evidence of mere limitations of use are insufficient (*see Byong Yol Yi v Canela*, 70 AD3d 584, 585 [1st Dept 2010]).

Accordingly, it is

ORDERED, that defendants' motion seeking summary judgment is granted; and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of defendants

dismissing plaintiff's complaint.

This constitutes the decision and order of the court.

Dated: 5/13/19

John R. Higgitt, A.J.S.C.