

Coles v Branch

2019 NY Slip Op 32193(U)

March 13, 2019

Supreme Court, Bronx County

Docket Number: 22370/15E

Judge: Mary Ann Brigantti

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX – PART 15

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ERIC COLES,

Index No. 22370/15E

Plaintiff,

- against -

DECISION/ ORDER

JUAN P. CORNIEL BRANCH AND AMERICAN
UNITED TRANSPORTATION, INC.,

Defendants.

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Hon. Mary Ann Brigantti

Upon the foregoing papers, defendants Juan P. Corniel Branch and American United Transportation, Inc. seek summary judgment dismissing the complaint on the ground that, as a matter of law, plaintiff did not sustain a “serious injury” as required by Insurance Law § 5104(a).

This action arises from a motor vehicle accident that occurred on December 14, 2014, at or about the intersection of West 145th Street and Lenox Avenue, in New York County. At the time of the accident plaintiff was operating his Cadillac Escalade. Plaintiff was stopped at a red traffic light when his vehicle was allegedly struck in the rear by defendants’ vehicle. As a result of the impact defendants’ vehicle was lodged underneath the rear of plaintiff’s vehicle and plaintiff’s vehicle to move forward and “tapped” the vehicle in front of him.

It is alleged that as a result of the subject accident plaintiff sustained injuries to his right knee, left shoulder, cervical spine and lumbar spine. Plaintiff underwent left shoulder arthroscopy on May 4, 2015. Plaintiff also claims that he was confined to his bed and home for approximately 2 weeks immediately following the accident and then for approximately 2 months immediately following his surgery. Plaintiff alleges “serious injury” as defined by Insurance Law § 5102(d) in that he sustained death; disfigurement; a fracture; permanent loss of use of a body organ, member, function or system;

a significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevented him from performing substantially all of the material acts which constitute his usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.¹ Plaintiff further alleges aggravation and exacerbation of any pre-existing condition.

Proof of a “significant limitation of use of a body function or system” requires objective evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration based upon a recent examination or a sufficient description of the “qualitative nature” of plaintiff’s limitations (i.e., quantitative analysis), with an objective basis, and correlating plaintiff’s limitations to the normal function, purpose and use of the body part (i.e., qualitative analysis) (*see Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345[2000]; *see Zoldas v Louise Cab Corp.*, 108 AD2d 378, 382 [1st Dept 1985]). While the “significant limitation” category of the statute does not require proof of permanency, an “assessment of the limitation’s significance does require consideration of its duration in addition to its extent and degree” (*Vasquez v Almanzar*, 107 AD3d 538, 539-540 [1st Dept 2013]). To recover under the “permanent loss of use” category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (*Oberly v Bangs Ambulance*, 96 NY2d 295, 296 [2001]).

On a motion for summary judgment, the defendants have the initial burden of making a prima facie showing, by evidence in admissible form, that the injured plaintiff did not sustain a “serious

¹ Notably, while plaintiff alleges, in his bill of particulars, a “permanent loss of use of a body organ or member,” he does not allege a “serious injury” under the separate “permanent consequential limitation of use of a body organ or member” category. Accordingly, the latter category will not be considered by the court.

injury” within the meaning of Insurance Law § 5102(d) (*see Gaddy v Eyler*, 79 NY2d 955 [1992]). If by their submission the defendants make a prima facie showing, the burden shifts to the plaintiff to come forward with sufficient evidence, in admissible form, to raise a triable issue of fact (*Gaddy v Eyler*, 79 NY2d at 956-957; *see Grasso v Angerami*, 79 NY2d 813 [1991]).

In support of summary judgment defendants submit the pleadings, the verified bill of particulars, plaintiff’s June 6, 2017 deposition transcript, the note of issue, and the affirmed reports of orthopedic surgeon Dr. Ronald Mann, neurologist Dr. Michael J. Carciente, and radiologist Dr. Darrent Fitzpatrick. Dr. Mann performed various orthopedic tests on the plaintiff’s neck, back, shoulders and knees during his examination of plaintiff on November 16, 2017. Dr. Mann found no objective evidence to support plaintiff’s subjective complaints of pain, no evidence of disability or permanency due to the cervical, thoracic, lumbar spines, left shoulder or knees. Although Dr. Mann did not review plaintiff’s medical records or diagnostic studies, he concludes that plaintiff’s cervical, thoracic, and lumbar spine sprains/strains were resolved and that plaintiff’s bilateral knee sprain/fracture was resolved. Dr. Mann also concluded that plaintiff’s left shoulder arthroscopic surgery was healed. Dr. Mann’s examination revealed range of motion restriction in plaintiff’s neck, back, left shoulder and bilateral knees. However, Dr. Mann fails to identify the tests he employed to arrive at such limitations rendering his findings of little value.

Dr. Carciente examined plaintiff on September 10, 2017 finding completely normal neurological test results, no objective findings, no correlation between the MRI findings and the exam and no on-going neurological disability or permanency. Dr. Carciente’s opinion as to the lack of correlation between plaintiff’s presentation and the MRI findings is without evidentiary basis in view of his failure to demonstrate that he reviewed any of the plaintiff’s MRI studies or medical reports.

Dr. Fitzpatrick reviewed plaintiff's February 14, 2015 cervical spine MRI, March 20, 2015 lumbar spine MRI, March 20, 2015 left shoulder MRI and March 20, 2015 right knee MRI studies. Dr. Fitzpatrick contends that mild degenerative disc disease is present in the cervical spine consisting of mild diffuse loss of disc height and disc signal which he contends is age related and not traumatic in basis. While he notes no bulges, canal stenosis or neural foraminal, he comments that disc herniation is a degenerative process that can result in the narrowing of the spinal canal or space around the exiting nerve roots, the neural foramen. In the lumbar spine Dr. Fitzpatrick finds no bulge, canal stenosis or neural forminal narrowing. However, he contends that there is "minimal/mild lumbar degenerative disc disease" that includes a mild loss of disc height and mild anterior endplate productive changes, which suggests chronic disc degeneration, which requires at least 6 months to develop.

Dr. Fitzpatrick notes that plaintiff's left shoulder and right knee MRI images are degraded due to poor signal-to-noise ratio. Nevertheless, Dr. Fitzpatrick notes the presence of left shoulder mild acromioclavicular ("AC") arthropathy with findings suggesting subacromial impingement and mild subacromial bursitis. He contends that such finding is an acquired degenerative condition with no traumatic basis. In the right knee, Dr. Fitzpatrick finds small joint effusion and surrounding soft tissue edema, which is suggestive of recent trauma.

Defendants also contend that there is a break in causation created by a gap in treatment. In this regard, defendants rely upon plaintiff's deposition testimony that in the year following the accident he received physical therapy on Eastchester Road, in the Bronx, underwent MRI studies, treated with an orthopedic surgeon, and underwent shoulder surgery. Plaintiff's physical therapy stopped at the end of 2015 when he was advised that he had exhausted the time allowed and was

advised that he could not continue therapy unless he was in pain. Plaintiff testified that he sought no further medical treatment related to the injuries alleged herein. As of his June 2017 deposition he was not currently treating with any medical providers related to the alleged injuries and did not have any future appointment planned. Moreover, plaintiff testified that in 2015 he got a job as a driver with Luxury Base and in 2016 started work for Con Edison. The burden therefore shift to plaintiff to offer a reasonable explanation for his cessation of treatment as of the end of 2015.

As to the 90/180-day category defendant contend that there is a lack of causation, as explained by their radiologist, in addition they rely upon plaintiff's deposition testimony and bill of particulars. In this regard, the plaintiff merely alleges that he was confined to his bed and home and incapacitated from his household duties for 2 weeks immediately followed the accident. While plaintiff alleges that he was confined to his home and bed and incapacitated for 2 months following his May 2015 surgery, a portion of such period of incapacity falls beyond the 180-day statutory period and, thus, plaintiff does not allege at least 90 days of incapacity in the 180-day immediately following the subject accident.

In opposition, plaintiff supplies his sworn affidavit; the affirmations of orthopaedic surgeon Dr. Randall Ehrlich, physical medicine and rehabilitation specialist Dr. Emil Stracar, and neuroradiologist Dr. Vincent Frazzini, Jr.; and certified treatment records from StraCar Medical Services, P.C., Sweetwater Chiropractic, P.C. and BOB Acupuncture, P.C. Plaintiff's submissions are sufficient to raise a triable issue of fact as to whether he sustained a significant limitation of use of a body function or system as a result of injury to his left shoulder, which was caused by the subject accident (*see Perdomo v City of NY*, 129 AD3d 585, 586 [1st Dept 2015])[orthopedic surgeon's opinion that it was necessary to perform arthroscopic knee surgery two months after the

accident due to continued symptoms despite conservative treatment and that the injury was attributed to the accident, not degeneration, based upon plaintiff's age and was previously asymptomatic sufficient to raise issue of fact]; *Rosado v Wadolowski*, 128 AD3d 454, 455 [1st Dept 2015]; *Kang v Almanzar*, 116 AD3d 540, 541 [1st Dept 2014]; see also *Lazzari v Qualcon Constr., LLC*, 162 AD3d 440, 441 [1st Dept 2018]).

Dr. Ehrlich started treating plaintiff's left shoulder injury on April 21, 2015, after he had completed a course of formal supervised physical therapy. Upon his initial examination plaintiff was examined with a goniometer and found to have significant range of motion restrictions in active and passive range of motion, limited by pain and spasm. His examination also revealed splinting and guarding, tenderness to palpation at the anterolateral acromion and lateral acromial margin, a positive Neer impingement sign, a positive Hawkins impingement test, and a positive crossarm adduction test. Dr. Ehrlich contends that his review of plaintiff's March 20, 2015 left shoulder MRI revealed anterior subcutaneous edema consistent with recent trauma as well as moderate joint effusion. Dr. Ehrlich recommended arthroscopic intervention which he performed on May 4, 2015. His intraoperative findings include a Type 1, SLAP tear, anterior labral partial tear with an incarcerating unstable flap, a post-traumatic joint capsule contracture and reactive synovitis.

Dr. Ehrlich's current examination of plaintiff, with a goniometer, revealed continuing, markedly decreased range of motion in active and passive testing, limited by pain and spasm, strength 4+/5 to forward elevation and abduction with 5-/5 strength to internal and external rotation. He concluded, based upon the plaintiff history of no prior shoulder injury, no prior symptoms, and his objective personal findings, that plaintiff incurred a significant and permanent traumatic injury to his

left shoulder as a result of the subject accident, which necessitated the prior months of treatment and surgery.

Dr. Stracar treated plaintiff from December 16, 2014 through March 20, 2015. His examinations of plaintiff's left shoulder revealed significant on-going range of motion limitations. On March 20, 2015, Dr. Stracar diagnosed plaintiff with a left shoulder traumatic subacromial impingement, AC joint arthropathy and anterior capsular contracture, all resulting from the trauma he sustained in the subject accident.

Finally, Dr. Frazzini reviewed plaintiff's March 20, 2015 left shoulder MRI report and opines that while the MRI did not show a labral tear, it is not uncommon for an MRI to fail to reveal the existence or extent of any tears, which may be unidentifiable due to the quality of the radiological film and/or the MRI machine, the way the body part was imaged, movement by the subject, or the location of the injury. Here, Dr. Frazzini points out that defendants' radiologist Dr. Fitzpatrick acknowledged that the images were degraded due to poor signal-to-noise ratio. Dr. Frazzini opines that such degraded images are the reason why the labral tear was not identified in the film and that such tear, which was identified during the surgery, was in fact present when the MRI was taken less than two months earlier. Dr. Frazzini notes that while a subacromial impingement in the shoulder can result from degenerative condition, as alleged by Dr. Fitzpatrick, it may also be traumatically induced. Thus, here plaintiff has adequately addressed the issue of causation by providing an explanation for why the tear was not noted on the plaintiff's MRI study, evidence of contemporaneous significant range of motion limitations in the shoulder, and intra-operative findings of a tear within 5 months of the accident (*contra Rosa v Delacruz*, 158 AD3d 571 [1st Dept 2018], *affirmed* NYLJ, October 24, 2018, at 27, col 5 [Ct App])[plaintiff failed to raise an issue of fact as her radiologist acknowledged

the truth of the MRI findings of no tear, plaintiff show no contemporaneous limitations, and plaintiff's orthopedic surgeon conclusorly related his operative findings of a tear, two years post accident, to the subject accident]).

Notably, none of defendants' experts address the cause for plaintiff's "Type 1 SLAP tear, anterior labral partial tear with an incarcerating unstable flap, [and] a post-traumatic joint capsule contracutre and reactive synovitis" identified during plaintiff's May 2015 surgery and causally related to the subject accident. In this regard, Dr. Fitzpatrick only argues that his finding of subacromial impingement is a degenerative condition.

Plaintiff's submissions are sufficient to offer a reasonable explanation for the alleged gap in treatment. Dr. Stracar avers that plaintiff stopped treatment in March 2016 because his insurance failed to authorize further treatment. This contention is consistent with plaintiff's testimony that he stopped physical therapy when his benefits were terminated and he was advised that he could not return unless he was in pain. Plaintiff further alleges in his affidavit that his no-fault insurance company determined that he had received the maximum benefit from physical therapy.

However, plaintiff fails to rebut defendants' prima facie evidence that he did not sustain a serious injury under his 90/180-day claim. In this regard, plaintiff does not submit medical or other evidence to demonstrate a substantial interference with his usual and customary daily activities for 90 of the first 180 days following the accident (*see Frias v Gonzalez-Vargas*, 147 AD3d 500, 502 [1st Dept 2017]; *Cartha v Quin*, 50 AD3d 530, 530 [2008]; *see also Perl v Meher*, 18 NY3d 208, 220 [2011]; *Licari v Elliott*, 57 NY2d 230, 236 [1982]; *Nelson v Distant*, 308 AD2d 338, 339 [1st Dept 2003]). Therefore, plaintiff's claims of "serious injury" predicated on the 90/180-day category of serious injury are dismissed. Accordingly, it is hereby

ORDERED, that the aspects of defendants' motion seeking dismissal of plaintiff's claim of "serious injury" predicated upon the death; disfigurement; fracture; permanent loss of use of a body organ, member, function or system; and 90/180-day categories of "serious injury" are granted, and the remaining aspects of the motion are denied.

This constitutes the decision and order of the Court.

Dated: March 13, 2019

ENTER,
Mary Ann Brigantti
MARY ANN BRIGANTTI, J.S.C.