SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX - IAS PART 26

ELDER OMIDIO REYES-MENDEZ

Plaintiff,

-against-

THE CITY OF NEW YORK, NEW YORK CITY POLICE DEPARTMENT, P.O. VLADIMIR DELGADO and JOSE R ANTIGUA

Defendant(s).

Index No. 300971/2014

MEMORANDUM DECISION/ORDER

Rubén Franco, J.

In this personal injury action, defendants the City of New York, New York City Police Department, and P.O. Vladimir Delgado (City defendants) move for summary judgment (CPLR 3212) claiming that the injuries allegedly sustained by plaintiff do not satisfy the "serious injury" threshold requirement of Insurance Law § 5102 (d). Defendant Jose R. Antigua cross-moves for the same relief, relying upon the submissions of the City defendants.

The court has gleaned the following facts from the pleadings and the documents submitted by the parties in connection with the instant motions: The action arises from a motor vehicle accident that occurred on September 19, 2013, when plaintiff was a passenger in a van which came in contact with a motor vehicle driven by P.O. Vladimir Delgado at the intersection of Eastchester Road and Pelham Parkway North in Bronx County. When the front portion of the van struck the police vehicle, the airbags deployed and struck plaintiff in the face causing him to experience pain in his lower back, left shoulder, and neck. Plaintiff was taken to the emergency room at Jacobi Medical Center by ambulance, where he was evaluated, x-rayed, treated with medication and released the same day.

Plaintiff testified at his deposition that he only missed three days of work. In his bill of particulars, he alleges that he sustained the following serious injuries under Insurance Law § 5102 (d): significant limitation of use of a body function or system; "permanent loss of a body organ or member"; and "a medically determined injury or impairment which prevents plaintiff from performing substantially all of the material acts which constituted plaintiff's usual and customary activities for such period of time all as specified by Section 5102 of the Insurance Law, Subsection (d)." He claims that the injuries are of a lasting nature to his cervical spine, lumbar spine, and thoracic spine, and left shoulder.

In support of their motion, the City defendants rely on the Notice of Claim, plaintiff's deposition testimony, the pleadings, the verified bill of particulars, Delgado's deposition testimony, expert witness disclosures, and the reports of Dr. Arnold T. Berman (Berman), an orthopedic surgeon, and Dr. Michael J. Carciente (Carciente), a neurologist.

Berman conducted an independent orthopedic medical evaluation on December 8, 2016 and found, upon examination of the cervical spine, that reflexes were normal and equal; examination of the thoraco-lumbar spine revealed no tenderness, spasm or pain with palpation and mild pain on range of motion; examination of the right shoulder revealed there was no pain on range of motion, and no heat, swelling, tenderness, clicking, erythema or effusion present; examination of the left shoulder revealed mild neck pain only on range of motion and no heat, swelling, tenderness, clicking, erythema, or effusion present. Berman found that plaintiff had cervical spine, lumbar spine, and thoracic spine sprain/strain which were resolved with no residuals; and a left shoulder strain/contusion resolved with no residuals and no aggravation of pre-existing degenerative joint disease and impingement. Berman concludes that plaintiff has no functional loss and no disability due to the accident.

Carciente conducted an independent neurological examination of plaintiff on September 1, 2015, and upon examination of the cervical spine, thoracic spine, lumbar spine, Carciente found

no tenderness and no evidence of paraspinal spasm, and the straight leg maneuver was normal. He found no objective neurological findings, and no evidence of an ongoing neurological injury, disability, or permanency.

In contrast, plaintiff relies on the July 14, 2017 report of Dr. Boris Tsatskis (Tsatskis), who concludes that plaintiff can expect intermittent exacerbations of pain and stiffness in the cervical and lumbar regions, and that plaintiff has sustained significant functional limitation in those areas, as well as the left shoulder. Tsatskis' prognosis is guarded, as there was some decreased range of motion, which the City defendants assert is inconsistent with earlier range of motion findings observed during Tsatskis' prior office treatment showing that plaintiff had full range of motion. Tsatskis' report does not support plaintiff's claim that he was prevented from performing the usual activities of his daily living for 90 out of the 180 days immediately following the subject accident, or that plaintiff has been permanently disabled.

In the emergency room on the date of the incident, plaintiff was diagnosed with a contusion of the knee with no identifiable injury to his cervical spine, thoracic spine, or lumbar spine, or left shoulder. Plaintiff testified that he only missed three days of work, and in his application for no-fault benefits, he indicated that he returned to work within the first 90 days immediately following the incident. At his deposition, plaintiff could not recall when he was last treated. He had some physical therapy after the incident and did not have surgery.

On a motion for summary judgment the initial burden falls on the proponent of the motion to set forth a *prima facie* case that the alleged injury is not "serious" (*see Flores v Leslie*, 27 AD3d 220, 221 [1st Dept 2006]; Insurance Law § 5102 [d]). In *Charley v Goss* (54 AD3d 569, 570 [1st Dept 2008]), the Court explained the burden of proof which each party bears:

> Once the proponent of a motion for summary judgment has set forth a prima facie case that the injury is not serious, the burden then shifts to plaintiff to demonstrate, by the submission of objective proof of the nature and degree of the injury, that he/she did sustain such an injury, or that there are questions of fact as to whether the purported injury was 'serious' (*Toure* [*v Avis Rent A Car Sys.*], 98 NY2d [345]

> at 350 [2002]; *Cortez v Manhattan Bible Church*, 14 AD3d 466 [(1st Dept) 2005]). Moreover, 'even where there is objective medical proof, when additional contributory factors interrupt the chain of causation between the accident and claimed injury—*such as a gap in treatment, an intervening medical problem or a preexisting condition*—summary dismissal of the complaint may be appropriate' (*Pommells v Perez*, 4 NY3d 566, 572 [2005] [emphasis added]; *see Perez v Rodriguez*, 25 AD3d 506, 508 [(1st Dept) 2006]).

Here, defendants establish that plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102 (d) by submitting reports from their medical experts, Berman and Carciente, who made determinations upon an examination of plaintiff, relevant court papers, deposition testimony, and medical records. The orthopedic surgeon Berman reported that plaintiff had all normal ranges of motion and plaintiff's injuries were resolved with no residuals, and no further treatment was indicated (*see Blocker v Yun Baek Sung*, 135 AD3d 494, 494 [1st Dept 2016]). The neurologist Carciente determined that plaintiff had a normal neurological examination with no ongoing neurological injury, disability or permanency (*see Gorden v Tibulcio*, 50 AD3d 460, 461-462 [1st Dept 2018]).

Thus, defendants make a *prima facie* showing of entitlement to judgment as a matter of law regarding plaintiff's claim of serious injury under the categories of permanent loss of use of a body organ, member, function or system; significant limitation of use of a body function or system; and, permanent consequential limitation of use of a body organ or member (CPLR 5102 [d]; *see Oberly v Bangs Ambulance*, 96 NY2d 295, 298 [2001]). Regarding the 90/180-day category, defendants met their *prima facie* burden through the plaintiff's deposition testimony, which demonstrates that he did not sustain a 90/180 injury or impairment (*see Correa v Saifuddin*, 95 AD3d 407, 409 [1st Dept 2012]; *Clemmer v Drah Cab Corp.*, 74 AD3d 660, 663 [1st Dept 2010]). Plaintiff testified that he lost three days from work within the 90 days immediately following the incident. There is no evidence establishing that plaintiff was limited "from performing

substantially all of the material acts which constitute [his] usual and customary daily activities" (Insurance Law § 5102[d]).

As noted, upon defendants' showing, the burden shifts to plaintiff "to come forward with sufficient evidence to overcome [defendants'] motion by demonstrating that [he] sustained a serious injury within the meaning of the No-Fault Insurance Law" (*Gaddy v Eyler*, 79 NY2d 955, 957 [1992]). Plaintiff must show that he suffered serious injury, as he claims, to his cervical spine, thoracic spine, and lumbar spine, and left shoulder, that resulted in any of the following categories: (1) permanent consequential limitation of use or significant limitation of use; or (2) permanent loss of use of a body organ, member, function or system (Insurance Law § 5102 [d]; *see Toure v Avis Rent A Car Sys.*, 98 NY2d at 353); or (3) a medically determined injury or impairment of a non-permanent nature which endured for 90 days or more and substantially limited the performance of his daily activities (Insurance Law § 5102 [d]; *Gaddy v Eyler*, 79 NY2d at 958).

Plaintiff relies on the affirmed report of Tsatskis, who examined him on July 14, 2017, and concluded from the examination that it is "suggestive [that there may be a] possible left median sensory neuropathy across the wrist [that is] causally related to the accident of 09/19/2013." It should be pointed out that plaintiff makes no claim of injury to his wrist. Tsatskis also states that plaintiff's "daily activities and work-related duties are affected although he continues to work." Tsatskis believes that plaintiff's symptoms are going to be recurrent. He states that plaintiff is expected to have intermittent exacerbations of pain and stiffness in the cervical and lumbar regions and recommends that plaintiff continue a home exercise program. Tsatskis opines, within a reasonable degree of medical certainty, that plaintiff sustained a "permanent disability to the lumbar, cervical spine, and left shoulder causality [*sic*] related to the accident of September 19, 2013."

Tsatskis' opinion that plaintiff sustained a permanent disability and his finding of disc bulges, is not only conclusory, but is also persuasively contradicted by the opposing medical

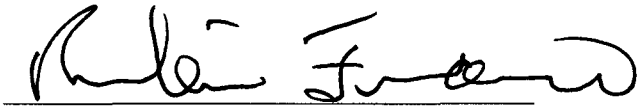
evidence, as well as by the gap in treatment. Plaintiff does not present objective medical evidence to raise a significant question of fact regarding whether he suffered a serious injury (*see Holmes v Brini Tr. Inc.*, 123 AD3d 628, 629 [1st Dept 2014]; *Merrick v Lopez-Garcia*, 100 AD3d 456, 457 [1st Dept 2012]). The existence of bulging discs does not satisfy the serious injury threshold (*see Pommells v Perez*, 4 NY3d at 574 [where the Court found that proof of a herniated disc, which is more serious that a bulging disc, does not establish a serious injury]). Berman and Carciente's objective findings are sufficient to establish the lack of a "serious injury" to plaintiff's cervical spine, thoracic spine, and lumbar spine, and left shoulder (*Style v Joseph*, 32 AD3d 212, 214 [1st Dept 2006]). Plaintiff's deposition testimony presents a picture of spotty medical treatment and some physical therapy which ceased in November 2014. This, coupled with evidence that he returned to work shortly after the accident, demonstrates that his injuries were not "significant," "permanent," or "consequential" (*see Alston v Elliott*, 159 AD3d 575, 576 [1st Dept 2018]). Plaintiff's claim that he ceased treatment because he did not have medical coverage is contradicted by other evidence showing that no-fault coverage was available to him.

Defendants have presented objective evidence which establishes that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d). Plaintiff has failed to counter with evidence sufficient to raise a factual issue.

Accordingly, the City defendants' motion and Antigua's cross motion for summary judgment dismissing the Complaint are granted.

This constitutes the Decision and Order of the court.

Dated: June 21, 2019



Ruben Franco, J.S.C.

HON. RUBÉN FRANCO