Beckford v Diaz
2019 NY Slip Op 34226(U)
December 18, 2019
Supreme Court, Westchester County
Docket Number: 67378/2018
Judge: Lawrence H. Ecker

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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HAROLD BECKFORD,

Plaintiff,

-against -

RICHARD D. DIAZ,

Defendant.

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Index No. 67378/2018
DECISION/ORDER
Submission Date: 12/04/2019
Motion Seq. 1

ECKER, J.

The following papers were considered on the motion of defendant RICHARD D. DIAZ [Mot. Seq. 1], made pursuant to CPLR 3212, for an order dismissing the complaint on the ground that plaintiff HAROLD BECKFORD (plaintiff) has not sustained a serious injury as defined by Insurance Law 5102(d):

PAPERS
Notice of Motion, Affirmation, Exhibits A-F
Affirmation in Opposition, Exhibits A-C[1]
Reply Affirmation

Upon the foregoing papers, the court determines as follows:

Plaintiff alleges that he sustained injuries on December 21, 2017, as a result of having been involved in a rear-end automobile accident with defendant's vehicle on the south bound side of the Hutchinson River Parkway (the Accident). Defendant now moves to dismiss the complaint as against plaintiff on the ground that, as a matter of law, plaintiff has not demonstrated, by competent medical evidence, that he sustained a serious injury, as defined in Insurance Law 5102. In support of their respective positions on the motion for summary judgment, the parties have submitted copies of the pleadings, the bills of particulars, attorney affirmations, medical records, medical expert reports, and points of law.

[1] The court notes that the parties uploaded the exhibits incorrectly. The upload of documents, without label or name beyond an exhibit letter, is useless to the court and parties. Exhibits uploaded to NYSCEF must have a designation that allows a user to identify the name and nature of the document from the title. In addition, rather than uploading all of the various medical reports and records under one exhibit, clarity would be better served by uploading the records with appropriate designations and dates individually.

In terms of medical evidence as to the issue of serious injury, the report of plaintiff's MRI of the lumbar spine, taken on June 29, 2018, at Greater Waterbury Imaging Center, Waterbury, CT is submitted (the June 2018 MRI). [NYSCEF Nos. 21, 31]. In the resulting report, the doctor (Dr. Brian Girard, D.O.) found no fracture, with a mild diffuse disk bulge at L4-L-5 and L5–S1. The bulges did not involve central canal atenosis or evidence of nerve root compression

In addition, the medical records of plaintiff's treatment at the Rosa Chiropractic Center are submitted. [NYSCEF No. 31]. In a report dated January 23, 2018, the treating doctor (Dr. Steven C. Rosa, D.C., CCRD) states under "diagnosis" that plaintiff has a cervical sprain with cervical segmental dysfunction, a thoracic sprain with segmental dysfunction, and a lumbar sprain with lumbar segmental dysfunction. He finds that these injuries are the result of the Accident.

The submitted records show that, from January 23, 2018 to June 12, 2018, plaintiff was treated at the Rosa Chiropractic Center. In a June 12, 2018, report, Rosa opines that:

> "It is my opinion that as a result of [the Accident, plaintiff] has sustained a permanent impairment to his lumbar spine. This impairment . . . results in a 5% permanent impairment . . . Due to the nature of these injuries, this patient will be prone to symptomatic exacerbations" [NYSCEF No. 31].

In addition, plaintiff appeared for defendant's orthopaedic examination, on May 22, 2019, by Dr. John R. Denton, M.D., a board certified orthopedic surgeon. [NYSCEF No. 22]. In his report, Denton found range of motion in the cervical spine to be, in all areas, around 5 degrees less than normal. While he found some restriction in the range of motion of the shoulders, plaintiff does not claim shoulder injury in this action. Denton found the thoracic spine and muscle strength were normal.

Denton opined that the strains to the cervical spine, lumbar spine, and bilateral shoulder were resolved. He averred that "decreased ranges of motion or subjective complaints of pain were not supported by any positive, objective, correlative findings." He concluded that:

> "[b]ased on today's examination and within reasonable degree of a medical certainty, there is no objective evidence of an orthopaedic disability. Decreased ranges of motion or subjective complaints of pain were not supported by any positive, objective, correlative findings."

He went on to state that "the documentation provided support a causal relationship between [plaintiff's] reported injuries and the accident." Finally, he averred that "all opinions expressed are based upon a reasonable degree of medical certainty."

In addition, the March 19, 2019, MRI report of Dr. Audrey Eisenstadt, M.D. is submitted. Eisenstadt reviewed the June 2018 MRI. The doctor noted that the MRI was taken of plaintiff six months, eight days following the Accident. [NYSCEF No. 22]. The lumbar spine was found, in essence, to be normal, with no disc bulging or disc herniations. Eisenstadt opines:

> "Review of the lumbar spine MRI examination . . . reveals no posttraumatic osseous, ligamentous or intervertebral disc changes. No disc herniations or bony contusions are noted. There is a

> congenital variant seen, a failure of fusion of the S1 vertebra to the body of the sacrum. This is considered a transitional vertebra, which allows for abnormal movement in the lower lumbar spine and predisposes the patient to premature degenerative disc disease. At this time, however, no arthritic changes are noted and no post-traumatic abnormalities are seen."

In a final report, dated September 27, 2019, Dr. Lee Zalewski, D.C., CCRD from the Rosa Chiropractic Center, opines that:

> "It is my opinion that as a result of [the Accident, plaintiff] has sustained a permanent impairment to his lumbar spine. This impairment . . . results in a 6% permanent impairment . . . Due to the nature of these injuries, [plaintiff] will be prone to symptomatic exacerbations . . . the magnitude and frequency of these flare-ups will depend on his work and lifestyle activities." [NYSCEF No. 31].

Based on these medical records, defendant argues that plaintiff fails to prove the existence of a serous injury. Plaintiff opposes the motion, alleging that the records in fact generate a question of fact as to the issue.

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it should be granted only where the moving party "has tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented. Issue finding, rather than issue determination, is the key to the procedure (*Matter of Suffolk Co. Dept. of Social Services v James M.,* 83 NY2d 178 [1994]; *Vumbico v Estate of Wiltse,* 156 AD3d 939 [2d Dept 2017]).

Importantly, it is not the court's function on a motion for summary judgment to assess credibility(*Rawls v Simon,* 157 AD3d 418 [2d Dept 2018]), or to engage in the weighing of evidence (*Scott v Long Is. Power Auth*., 294 AD2d 348 [2d Dept 2002]). "Resolving questions of credibility, determining the accuracy of witnesses, and reconciling the testimony of witnesses are for the trier of fact" (*Bykov v Brody*, 150 AD3d 808 [2d Dept 2017]). Thus a motion for summary judgment "should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010]; *Civil Serv. Empls. Assn. v County of Nassau*, 144 AD3d 1077 [2d Dept 2016]). Here, defendant and plaintiff rely on the various medical reports to argue their respective positions.

Applying the legal principles governing motions for summary judgment to the evidence submitted here, the court finds that defendant met his *prima facie* burden of showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law 5102(d) as a result of the subject accident by submitting the medical findings and opinions of experts (*Perl v Meher*, 18 NY3d 208 [2011]; *Toure v Avis Rent A Car, Inc.*, 98 NY2d 345 [2002]). In opposition, plaintiff submits competent medical expert evidence that generates triable issue of facts as to the same relevant medical issues (*Karademir v D.A. Mirando-Jelinek*, 153 AD3d 509 [2d Dept 2017]; *Mulhern v Gregory,* 161 AD3d 881 [2d Dept 2018]). It is not for this court on a summary judgment motion to decide which expert or medical evidence is to be accepted over the other.

That is the function of the trier of fact (*Pantojas v Lajara Auto Corp.*, 117 AD3d 577 [1st Dept 2014]). The motion for summary judgment is therefore appropriately denied.

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the court, it is hereby denied. Accordingly, it is hereby

ORDERED that the motion of defendant RICHARD D. DIAZ [Mot. Seq. 1], made pursuant to CPLR 3212, for an order dismissing the complaint on the ground that plaintiff HAROLD BECKFORD has not sustained a serious injury as defined by Insurance Law 5102(d): is denied; and it is further

ORDERED that the parties shall appear at the Settlement Conference Part of the Court, Room 1600, on February 14, 2020, at 9:15 a.m.

The foregoing constitutes the decision and order of the court.

Dated: White Plains, New York
December 16 2019

ENTER,

HON. LAWRENCE H. ECKER, J.S.C.

Appearances

All parties via NYSCEF