Costa v Hassan
2019 NY Slip Op 34607(U)
April 18, 2019
Supreme Court, Suffolk County
Docket Number: Index No. 17-601419
Judge: William G. Ford
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SHORT FORM ORDER

INDEX No. 17-601419
CAL. No. 18-02121MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

Hon. WILLIAM G. FORD
Justice of the Supreme Court

MOTION DATE 1-3-19 (001)
MOTION DATE 3-14-19 (002)
ADJ. DATE
Mot. Seq. # 001 - MD
Mot. Seq. # 002 - MG; CASE DISP

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ANTONIO COSTA,

Plaintiff,

- against -

ASHIF HASSAN,

Defendant.

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Upon the following papers read on these motions for vacatur of the note of issue and summary judgment: Notice of Motion and supporting papers by the defendant, dated December 5, 2018 ; Notice of Motion and supporting papers by the defendant, dated February 8, 2019; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motions by defendant are consolidated for purposes of this determination; and it is

ORDERED that the motion (seq. 001) by defendant for vacatur of the note of issue and other related relief is denied; and it is further

ORDERED that the motion (seq. 002) by defendant for summary judgment dismissing the complaint against him is granted.

This action was commenced by plaintiff Antonio Costa to recover damages for injuries he allegedly sustained on September 10, 2016, when his motor vehicle was struck by a vehicle operated by defendant Ashif Hassan. By his bill of particulars, plaintiff claims he suffered, among other things, derangement of the cervical spine, left paracentral protrusion at C5-C6, posterior central protrusion at C6-C7, exacerbation of previous cervical spine pathology, derangement of the left shoulder, tendinopathy of the supraspinatus, and a tear of his left rotator cuff.

Defendant now moves for an order vacating the note of issue, arguing that plaintiff has not complied with requests to provide certain "corrected" authorizations. He further seeks an order compelling plaintiff to comply with the alleged outstanding disclosure demands and extending his time to move for summary judgment. By separate motion, defendant moves for summary judgment in his favor, arguing that Insurance Law § 5104 precludes plaintiff from recovering for non-economic loss, as he did not suffer a "serious injury" within the meaning of Insurance Law § 5102 (d). In support of his summary judgment motion, defendant submits copies of the pleadings, a transcript of plaintiff's deposition testimony, various medical records, and sworn medical reports prepared by Dr. Gary Kelman and Dr. Alan B. Greenfield. At defendant's request, Dr. Kelman, an orthopedic surgeon, conducted an examination of plaintiff on March 28, 2018, and Dr. Greenfield, a radiologist, review MRI images of plaintiff's cervical spine and left shoulder obtained shortly after the September 2016 accident.

Plaintiff testified that in the early morning of the date in question, he was involved in a motor vehicle accident in which Ashif Hassan's vehicle allegedly impacted his vehicle's passenger side. He stated that he did not request an ambulance at the scene, but sought medical treatment later in the morning, complaining of neck pain, shoulder pain, and bruising of his face. Plaintiff indicated that x-rays were taken, which revealed no broken bones, and that he was told to see an orthopedist. He testified that he then sought orthopedic care from Orlin & Cohen, where he was given injections in his shoulder and neck, then told to obtain MRI studies of those regions, which he did. Plaintiff stated that he also began treating with a chiropractor three times a week for approximately six months, during which time he also began seeing an acupuncturist. He indicated that No Fault benefits were eventually discontinued, after which he continued treatment at his own expense for a time, until "it started getting a little expensive."

Plaintiff testified that he was employed at the time of the accident, and missed one week of work due to his injuries therefrom. He stated that his injuries prevent him from playing softball and from "carry[ing] groceries up the stairs on [his] left side," and limit his ability to play basketball and football with his children. Plaintiff indicated that his orthopedist recommended rotator cuff surgery to repair his shoulder, but that he is "not ready" to undergo that procedure.

In his report, Dr. Gary Kelman states that he performed an independent orthopedic examination of plaintiff on March 28, 2018. Dr. Kelman indicated that prior to his examination of plaintiff, he reviewed, among other things, plaintiff's bill of particulars, MRI reports dated September 29, 2016, x-ray reports dated September 10, 2016 and June 12, 2017, and chiropractic evaluation reports dated November 3, 2016, November 20, 2016, and March 30, 2017. He indicates that plaintiff's present complaints include "pain in the neck and left shoulder."

Dr. Kelman states that he used a handheld goniometer to measure plaintiff's ranges of motion, and compared those measurements to the ranges of normal values set forth by American Medical Association guidelines. As to plaintiff's cervical spine, Dr. Kelman indicates that range of motion testing revealed the following measurements: flexion to 50 degrees, where the normal range of motion is 50 degrees; extension to 60 degrees, where normal is 60 degrees; left and right rotation to 80 degrees, where the normal range is 80 degrees; and left and right lateral bending to 45 degrees, where normal is

45 degrees. Testing of plaintiff's right and left shoulders revealed the following measurements: abduction to 180 degrees, where normal is 180 degrees; adduction to 30 degrees, where normal is 30 degrees; forward flexion to 180 degrees, where normal is 180 degrees; extension to 40 degrees, where normal is 40 degrees; internal rotation to 80 degrees, where normal is 80 degrees; and external rotation to 90 degrees, where normal is 90 degrees. Dr. Kelman reports that plaintiff exhibited no tenderness upon palpation of any of the examined regions, and no muscle atrophy. As a result of his examination, Dr. Kelman diagnosed plaintiff with a resolved cervical spine sprain/strain and a resolved left shoulder sprain/strain, and concluded that he has "no applicable orthopedic disability."

Dr. Alan Greenfield's report states that he reviewed the images of MRI examinations of plaintiff's cervical region and left shoulder performed on September 29, 2016. Dr. Greenfield states that the MRI testing of plaintiff's left shoulder revealed "chronic degenerative tendinosis of the supraspinatus tendon but without tendinitis of tear," which he states is "longstanding and cannot be attributed" to an accident occurring only weeks prior, given that such condition "evolve[s] over a period of years." As to plaintiff's cervical spine, Dr. Greenfield states that the MRI films reveal "degenerative disc disease at all cervical disc levels and associated with mild degenerative disc bulging as well as degenerative bone spur formation at C5-C6 and C6-C7." He further states that those findings "are clearly chronic, longstanding and degenerative, developing over a period of years." In summary, Dr. Greenfield opines that "there are no findings on this study which can be attributed to [the] accident [in question]."

A party moving for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923 [1986]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (*see* ***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (*see* ***O'Brien v Port Auth. of N.Y. & N.J.***, 29 NY3d 27, 52 NYS3d 68 [2017]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (*see* ***Ortiz v Varsity Holdings, LLC***, 18 NY3d 335, 339, 937 NYS2d 157 [2011]).

It is for the Court to determine in the first instance whether a plaintiff claiming personal injury as a result of a motor vehicle accident has established a prima facie case that he or she sustained "serious injury" and may maintain a common law tort action (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]). Insurance Law § 5102 (d) defines "serious injury" as "a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's 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."

A defendant moving for summary judgment on the ground that a plaintiff's negligence claim is barred by the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a "serious injury" (*see* ***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2002]; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]). A defendant can establish that a plaintiff's injuries are not serious within the meaning of Insurance Law § 5102 (d) "by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (***Nuñez v Teel***, 162 AD3d 1058, 1059, 75 NYS3d 541 [2d Dept 2018], quoting ***Grossman v Wright***, 268 AD2d 79, 83-84, 707 NYS2d 233 [2d Dept 2000]). Once a defendant meets this burden, plaintiff must present proof in admissible form which creates a material issue of fact (*see* ***Gaddy v Eyler***, *supra*; *see generally* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

A plaintiff claiming injury within the "permanent consequential limitation" or "significant limitation" of use categories of the statute must substantiate his or her complaints of pain with objective medical evidence showing the extent or degree of the limitation of movement caused by the injury and its duration (*see* ***Schilling v Labrador***, 136 AD3d 884, 25 NYS3d 331 [2d Dept 2016]; ***Rovelo v Volcy***, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]; ***McLoud v Reyes***, 82 AD3d 848, 919 NYS2d 32 [2d Dept 2011]). To prove significant physical limitation, a plaintiff must present either objective quantitative evidence of the loss of range of motion and its duration based on a recent examination or a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose, and use of the body part (*see* ***Perl v Meher***, 18 NY3d 208, 936 NYS2d 655 [2011]; ***Toure v Avis Rent A Car Systems, Inc.***, *supra*; ***McEachin v City of New York***, 137 AD3d 753, 756, 25 NYS3d 672 [2d Dept 2016]).

The 90/180 category of serious injury, as codified in Insurance Law § 5102 (d), requires that a plaintiff prove he or she experienced a "medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities." Further, to qualify as a serious injury within the 90/180 category, there must be objective medical evidence of a medically-determined injury or impairment of a non-permanent nature, as well as evidence that plaintiff's activities were significantly curtailed due to such injury (*see* ***Toure v Avis Rent A Car Systems, Inc.***, *supra*; ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Ocasio v Henry***, 276 AD2d 611, 714 NYS2d 139 [2d Dept 2000]). In addition to demonstrating an inability to perform "substantially all" usual activities for at least 90 days of the 180 days following the accident, a plaintiff asserting a 90/180 claim must show through competent medical evidence that his or her inability to perform such activities was medically indicated and causally related to the subject accident (*see* ***Penaloza v Chavez***, 48 AD3d 654, 852 NYS2d 315 [2d Dept 2008]).

Defendant has established a prima facie case of entitlement to summary judgment in his favor through the testimony of plaintiff, as well as the expert affirmations supplied (*see* ***Nuñez v Teel***, *supra*;

see generally ***Alvarez v Prospect Hosp.***, *supra*). Plaintiff testified that he missed only one week of work due to his alleged injuries, demonstrating, prima facie, that he cannot sustain a claim under the 90/180 category of serious injury (*see* ***Radoncic v Faulk***, __ AD3d __, 2019 NY Slip Op 02134 [2d Dept 2019]). Further, as to plaintiff's claims under the "permanent consequential limitation" or "significant limitation" categories of serious injury, the affirmations of Drs. Kelman and Greenfield established, prima facie, that plaintiff possesses full ranges of motion in all relevant regions, and that the pathologies present in his cervical spine, as evidenced by his MRI films, are degenerative in nature. The burden, thus, shifts to plaintiff to raise a triable issue (*see* ***Perl v Meher***, *supra*; *see generally* ***Vega v Restani Constr. Corp.***, *supra*).

Plaintiff submitted no opposition to the summary judgment motion and, therefore, failed to raise a triable issue. Accordingly, the motion by defendant Ashif Hassan for summary judgment dismissing the complaint against him is granted. In view of this determination, defendant's motion for vacatur of the note of issue and other related relief is denied, as moot.

Dated: April 18, 2019
Riverhead, New York

WILLIAM G. FORD J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION