

Decatus v City of New Rochelle
2019 NY Slip Op 34662(U)
December 31, 2019
Supreme Court, Westchester County
Docket Number: Index No. 65844/2016
Judge: Sam D. Walker
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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
WESTCHESTER COUNTY
PRESENT: HON. SAM D. WALKER, J.S.C.**

-----X
DONALD DECATUS,

Plaintiff,

DECISION & ORDER

Index No. 65844/2016

Seq. # 1

-against-

THE CITY OF NEW ROCHELLE, NEW ROCHELLE
SANITATION, THE DEPARTMENT OF PUBLIC
WORKS and ROMEL C. JAMES,

Defendants.
-----X

The following papers were read and considered in deciding the present motion:

Notice of Motion/Affirmation/Exhibits A-J	1-12
Affirmation in Opposition/Exhibits A-H	13-21
Reply Affirmation/Exhibit K	22-23

Upon the foregoing papers it is ordered that the motion is DENIED.

FACTUAL AND PROCEDURAL BACKGROUND

The plaintiff, Donald Decatus, commenced this action on October 19, 2016, to recover monetary damages for alleged injuries sustained in a motor vehicle accident that occurred on August 11, 2015 at or near the intersection of North Avenue and Rochelle Place, New Rochelle, New York. The plaintiff alleges that, at the time of the accident, he was driving a taxi on North Avenue, intending to make a left turn onto Rochelle Place, when a garbage truck hit his vehicle from behind.

The defendants, City of New Rochelle, i/s/h/a The City of New Rochelle, New Rochelle Sanitation and The Department of Public Works, and Romel C. James, by

their attorney, now file the instant motion for summary judgment pursuant to CPLR 3212, seeking dismissal of the complaint on the basis that the plaintiff did not sustain a serious injury as defined under New York Insurance Law §§ 5102(d).

In support of the motion, the defendants rely upon, *inter alia*, the plaintiff's 50-h and deposition testimony, MRI reports, an IME report, an attorney's affirmation and copies of the pleadings. The defendants argue that the plaintiff's injuries do not constitute a serious injury under Insurance Law § 5102(d) and his alleged injuries are not causally related to the collision that occurred August 11, 2015. They assert that the plaintiff did not sustain a permanent loss of use of a body organ, member, function or system; or a permanent, consequential limitation of use of a body organ or member; or significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which would qualify her under the 90/180 day rule.

In opposition, the plaintiff, by his attorney, submitted a physician's report, medical records, ER records, MRI's and PT records. The attorney argues that the defendants failed to meet their prima facie burden of showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102[d], as a result of the August 2015 accident and failed to prove that the plaintiff did not suffer a permanent consequential limitation or significant limitation of use of a body function or system. The plaintiff further asserts that the defendants failed to meet their prima facie burden regarding the absence of causation. The plaintiff asserts, however, that he raises triable issues of fact that he sustained serious injuries to his cervical spine and lumbar spine

and the question of whether a bulging disc satisfies the serious injury threshold is a question of fact for the jury. Further, the plaintiff argues that differences in doctors' opinions on causation, are to be left for a jury determination.

The plaintiff's bill of particulars alleges that, as a result of the accident, he sustained serious personal injuries including head injury; lumbar spine: diffuse disc bulges at L2-3 through L4-5; cervical spine: straightening of the cervical spine and mild curvature of the cervical spine with convexity to the right, posterior central disc protrusion at C3-4, diffuse posterior disc bulges at C4-5 and C7-T1, right posterolateral to right foraminal disc protrusion at C5-6.

Discussion

"[T]he proponent of a summary judgment motion 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" (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers, (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

"Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (see *Alvarez v Prospect Hosp.*, 68 NY2d at 324, citing to *Zuckerman v City of New York*, 49 NY2d at 562). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion (see *Mgrditchian v Donato*, 141

AD2d 513 [2d Dept 1988]).

Insurance Law §5104(a) provides in pertinent part that:

Notwithstanding any other law, in any action by or on behalf of a covered person against another covered person for personal injuries arising out of negligence in the use of operation of a motor vehicle in this state, there shall be no right to recovery for non-economic loss, except in the case of a serious injury, or for basic economic loss....(McKinney's Insurance Law §5104[a])

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. (McKinney's Insurance Law §5102[d])

"The determination of whether [a] plaintiff sustained a serious injury within the meaning of the statute is, as a rule, a question for the jury." (31 N.Y.Prac., New York Insurance Law § 32:32 [2015-2016 ed.]; see also, *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345 [2002]). "[O]n a motion for summary judgment the defendant has the burden to show that the plaintiff has not sustained a serious injury as a matter of law" (*Id.*).

The degree or seriousness of an injury may be shown in one of two ways: either

by an expert's designation of a numeric percentage of a plaintiff's loss of range of motion or by an expert's qualitative assessment of a plaintiff's condition provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system (see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 357 [2002]). A defendant can establish that a plaintiff's injuries are not serious within the meaning of New York State Insurance Law § 5102(d), by the submission of an affirmed medical report from a medical expert who has examined the plaintiff and has determined that there are no objective medical findings to support the plaintiff's alleged claim (see *Rodriguez v Huerfano*, 46 AD3d 794 [2d Dept 2007]).

In this case, the plaintiff did not suffer death, dismemberment, significant disfigurement, a fracture, or loss of a fetus. Therefore, those categories of the Insurance Law § 5102(d) can be eliminated. The plaintiff alleges that he sustained a permanent loss of use of a body organ, member, function or system; a 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 prevented her from performing substantially all of the material acts which constitute her 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.

The defendants argue that the plaintiff did not sustain any injuries corresponding to those categories and submitted the affirmed report of Shanker Krishnamurthy, M.D.,

a New York State Licensed and Board Certified Orthopedic Surgeon, who performed an independent orthopedic evaluation on the plaintiff on February 20, 2019. Dr. Krishnamurthy stated that he performed all measurements using a goniometer. He examined the cervical spine, finding no loss of lordosis, no tenderness, no spasm, forward flexion 40 degrees (normal 45), extension 30 degrees (normal 30), lateral flexion 30 degrees (normal 40, right and left lateral rotation 70 degrees (normal 80), the spurling test was negative, there were no neurological deficits in the upper extremity, motor, sensory or reflexes. An examination of the lumbar spine revealed no loss of lordosis, forward flexion 80 degrees (normal 90), extension 15 degrees (normal 30, lateral flexion 25 degrees (normal 40), straight leg raise was negative, the flip test was negative and neurologic in the lower extremities reflexes were normal and symmetric and equal bilaterally.

Dr. Krishnamurthy opined, after reviewing the records and evaluating the plaintiff, that the plaintiff did not sustain any serious injury as described under the Insurance Law, as a result of the subject accident. The doctor states that the MRI does not show any evidence of acute injury and does not show any significant pathology, in either the cervical or the lumbar region. He avers that the plaintiff's prognosis is good and he has not received treatment since June 2016.

Dr. Krishnamurthy submitted a supplemental report after reviewing the radiologic studies and stated that there was no reason to change his opinion in the previous report.

Upon review and viewing the facts in the light most favorable to Bent-Tamir, this

Court finds that the defendants have failed to make a prima facie showing of entitlement to judgment as a matter of law with respect to the plaintiff suffering a 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.

Upon review and viewing the facts in the light most favorable to the plaintiff, this Court finds that the defendants have failed to make a prima facie showing of entitlement to judgment as a matter of law with respect to the plaintiff suffering a serious injury.

The plaintiff's MRI report revealed disc bulges and the IME revealed range of motion deficiencies in the plaintiff's cervical and lumbar spine, which the defendant's physician failed to address and stated in a conclusory manner that the plaintiff's injuries were not caused by the accident and have been resolved. The conclusion of the defendant's examining orthopedist was blied by the findins of limitations in range of motion in the plaintiff's cervical and lumbar spine (*Jenkins v Miled Hacking Corp.*, 43 AD3d 393 [2d Dept 2007]).

However, with regard to any claims of alleged injuries that prevented the plaintiff from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than ninety days during the one hundred eighty

days immediately following his alleged injury, such is denied. The defendant demonstrated through the plaintiff's testimony that he did not sustain an injury in this category. Further, to sustain 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, a plaintiff must present objective evidence of "a medically determined injury or impairment of a non-permanent nature" (see *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 357 [2002]). Curtailment of recreational and household activities is insufficient to meet the burden (*Omar v Goodman*, 295 AD2d 413 [2d Dept 2002]). The plaintiff testified that he missed six weeks of work and then was cleared by his physician to return to work and did not offer any medical evidence to support a claim that he was unable to perform substantially all of his usual and customary activities under this category.

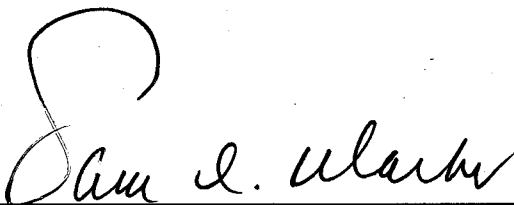
Accordingly, based upon the foregoing, it is

ORDERED that the defendants' motion for summary judgment is DENIED.

The parties are directed to appear before the Settlement Conference Part in Courtroom 1600 on February 18, 2020 at 9:15 a.m.

The foregoing shall constitute the Decision and Order of the Court.

Dated: White Plains, New York
December 31, 2019


HON SAM D. WALKER, J.S.C.