

Brown v Dossantos
2019 NY Slip Op 34767(U)
March 6, 2019
Supreme Court, Westchester County
Docket Number: Index No. 51151/2017
Judge: William J. Giacomo
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To commence the statutory time period 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
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.**

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CLARENCE BROWN.,

Plaintiff,

-- against --

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FERNANDO F. DOSSANTOS, KELLY E. WILLIAMS, and
PAUL A. MENDES,

DECISION & ORDER

Defendants.

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In an action to recover damages for personal injuries, the defendant Kelly E. Williams moves for summary judgment dismissing the complaint on the grounds that plaintiff did not sustain a serious injury within the meaning of Insurance Law 5102:

Papers Considered

1. Notice of Motion/Affirmation of Sarah N. Wilson, Esq./Exhibits A-L; 1-4; M.
2. Affirmation of Elliot Skydel, Esq. in Opposition/Exhibits A-H;
3. Reply Affirmation of Sarah N. Wilson, Esq.

Factual and Procedural Background

The plaintiff commenced this action against the defendants seeking damages for personal injuries allegedly sustained on March 17, 2016, in a motor vehicle accident on Central Park Avenue near the intersection of Balint Drive in Yonkers.

Defendant Kelly E. Williams moves for summary judgment, pursuant to CLPR 3212, on the grounds that the plaintiff did not sustain a serious injury within the meaning of Insurance Law 5102(d).

In support of the motion, defendant submits an affirmation of Ronald Mann, M.D., a board certified orthopedic surgeon, who conducted an independent medical examination of plaintiff on May 11, 2018. Dr. Mann's physical examination of plaintiff revealed nearly normal range of motion in the cervical spine with 45 degrees flexion with 45 being normal; 40 degrees extension with 45 being normal, and 75 degrees right and left rotation with 80 being normal. Dr. Mann reviewed the plaintiff's cervical spine MRI

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done on July 13, 2016, which showed degenerative disc disease from C3 through C6. An EMG done on July 22, 2016, revealed chronic denervation at C5 through C7.

Dr. Mann's examination of the lumbar spine revealed forward flexion of 45 degrees with 60 being normal; and right and left lateral flexion to 20 degrees with 25 being normal. Dr. Mann reviewed plaintiff's diagnostic tests of the lumbar spine including X-rays dated March 18, 2016, and an MRI performed on June 1, 2016. The x-rays showed degenerative changes at L4-5 with multilevel osteophytes and facet arthropathy. There was no evidence of fracture or dislocation. The MRI demonstrated degenerative changes with mild central spinal stenosis and a small disc extrusion at L5-S1.

Dr. Mann's examination of plaintiff's shoulders revealed 170 degrees of forward flexion with 170 being normal; 165 degrees of abduction with 170 being normal; 75 degrees of internal rotation with 75 being normal; and 70 degrees of external rotation with 75 being normal.

Dr. Mann opined that plaintiff did not sustain a serious injury as a result of the accident. He may have sustained a cervical, lumbar, and left wrist sprain or strain which have fully resolved. The plaintiff's slight range of motion deficits were attributable to pre-existing degenerative diseases as shown on his diagnostic studies. Dr. Mann opined that plaintiff did not sustain a permanent consequential limitation or significant limitation of use of his cervical spine, lumbar spine, left wrist, or right shoulder, nor did he sustain a permanent loss of use of any body part as a result of the accident. Dr. Mann averred that plaintiff performs all of his activities of daily living independently. Dr. Mann also opines that the minor sprains or strains that plaintiff sustained did not prevent him from performing substantially all of his daily activities for 90 out of the first 180 days following the accident. Dr. Mann further avers that plaintiff did not suffer an aggravation or exacerbation of a pre-existing condition of his cervical or lumbar spine as a result of the motor vehicle accident.

Defendant also submits an affirmed medical report of George Burak, M.D., who conducted an independent medical examination of plaintiff on June 12, 2018. Upon Dr. Burak's examination, he found that plaintiff's range of motion of the cervical spine was 30 degrees of extension with 30 being normal; 70 degrees of flexion with 70 being normal; 80 degrees of rotation to the right and left with 80 being normal; and 45 degrees of inclination to the right and left with 45 being normal.

Dr. Burak stated that there was no evidence of spasm on the lumbar spine. Plaintiff's range of motion in the lumbar spine was 30 degrees of extension, with 30 degrees being a normal range; 75 degrees of flexion, with 75 degrees being a normal range; and 45 degrees of rotation and inclination to the right and left, with 45 degrees being a normal range.

Dr. Burak's examination of the right shoulder revealed abduction of 180 degrees with 180 being normal; forward flexion to 180 degrees with 180 being normal; external

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rotation to 60 degrees with 60 being normal; and internal rotation to L1 with L1 being normal.

Dr. Burak opined that plaintiff sustained a strain to the cervical and lumbar spine and right shoulder and that the has made a full and uneventful recovery from his injuries. There was no evidence of any kind of disability as a result of the accident and no evidence of any type of mechanical derangements referable to his neck, low back, or right shoulder.

In opposition, plaintiff argues that defendant failed to demonstrate entitlement to summary judgment on the 90/180 category arguing that plaintiff was unable to perform his work as a social worker for over 6 months. Plaintiff also argues that triable issue of fact exist as to whether he sustained a "significant limitation of use of a body function or system" as well as a "permanent consequential limitation of use of a body organ or member" pursuant to the Insurance Law. Plaintiff submits various uncertified and unaffirmed medical reports, records, and notations from doctors.

Discussion

On a motion for summary judgment in a personal injury action arising from a motor vehicle accident, the defendant is required to establish that the plaintiff did not sustain a serious injury within the meaning of Insurance Law 5102(d) (see *Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d 345 [2002]; *Gaddy v. Eyer*, 79 N.Y.2d 955 [1992]; *Licari v. Elliott*, 57 N.Y.2d 230 [1982]). Here, the defendant met her prima facie burden.

Defendant's medical experts examined the plaintiff and stated in affirmed reports that plaintiff had a normal and complete range of motion in the cervical and lumbar spine and made a full and complete recovery from his injuries. Dr. Mann further explained that any slight range of motion deficits were attributable to pre-existing degenerative diseases as exhibited on plaintiff's diagnostic studies. This, along with the plaintiff's testimony that he played golf and tennis in March 2016 after the accident was sufficient to establish a prima facie case that the plaintiff did not sustain a serious injury (see *Staff v. Yshua*, 59 A.D.3d 614 [2d Dept. 2009]; *Diaz v. Turner*, 306 A.D.2d 241 [2d Dep't 2003]; *Figueroa v. Westbury Trans, Inc.*, 304 A.D.2d 614 [2d Dep't 2003]).

In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff failed to submit any affirmed report from a medical expert or treating physician in opposition to the motion (see *Scheker v Brown*, 91 AD3d 751, 752 [2d Dept 2012]). Moreover, the unaffirmed letters from plaintiff's doctors stating that plaintiff "has been out of work from 3-17-16 to 7-28-16 due to a No Fault injury" is insufficient to raise a triable issue of fact. Notably, plaintiff has failed to submit any evidence in admissible form that a medical provider has determined that he was unable to work as a result of injuries sustained form the accident.

Therefore, summary judgment is granted in favor of the defendant Kelly E. Williams on the issue of serious injury. Further, having determined that plaintiff's injuries do not meet the serious injury threshold, the Court sua sponte grants summary judgment

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dismissing the complaint as against defendants Fernando F. Dossantos and Paul A. Mendes.

Accordingly, it is

ORDERED that defendant Kelly E. Williams' motion for summary judgment dismissing the complaint is **GRANTED** (motion sequence #3) and the complaint is dismissed insofar as asserted against her; and it is further

ORDERED that the Court sua sponte grants summary judgment dismissing the complaint as against the defendants Fernando F. Dossantos and Paul A. Mendes.

Dated: White Plains, New York
March 6, 2019



HON. WILLIAM J. GIACOMO, J.S.C.