

Cesar v Jean-Charles
2019 NY Slip Op 34781(U)
April 29, 2019
Supreme Court, Rockland County
Docket Number: Index No. 33717/2016
Judge: Kathie E. Davidson
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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 ROCKLAND

-----X

JOHNSON CESAR,

Plaintiff,

-against-

ROMANE JEAN-CHARLES,

Defendant.

-----X

DAVIDSON, J.

DECISION & ORDER

Index No. 33717/2016
Motion Seq. No. 1

The following papers were read and considered on defendant’s motion for summary judgment dismissing the complaint on the grounds that plaintiff did not suffer a “serious injury” pursuant to Insurance Law §5102[d].

Notice of Motion - Attorney Affirmation - Exhibits A-G
Affirmation in Opposition - Exhibits A-G
Reply Affirmation

Background Facts:

This action arises out of a motor vehicle accident that occurred on September 20, 2013 at or near the intersection of South Main Street and East Castle Avenue in the Village of Spring Valley, County of Rockland, State of New York. Plaintiff was traveling northbound on South Main Street, and the defendant was traveling southbound on South Main Street. It is alleged that the defendant was attempting to make a left turn when defendant failed to yield to plaintiff’s right of way, thus striking plaintiff’s vehicle and causing plaintiff’s vehicle to strike a stopped vehicle within the intersection. (See Doc. 14).

On September 7, 2016, plaintiff commenced this action to recover for personal injuries sustained in the accident. Issue was joined by defendant on November 3, 2016. Note of Issue has been filed on September 12, 2018.

Defendant filed the instant motion for summary judgment dismissing the complaint on the grounds that plaintiff has not suffered a “serious injury” within the meaning of Insurance Law §5102[d]. Defendant claims plaintiff did not sustain a medically-determined injury that prevented plaintiff from resuming usual activities in the first 90 to 180 days following the accident. It is further alleged that plaintiff has not proffered any evidence of any significant

limitation of use and/or consequential limitation of use within the meaning of the 'serious injury' statutory threshold. Defense counsel cites plaintiff's deposition testimony and medical evidence in support of their dispositive motion.

At his deposition, plaintiff testified that following the collision, plaintiff exited his vehicle and walked in front to assess the damage thereto (Doc. 16 at pg. 57); plaintiff did not make any complaints of injuries to the responding police officer nor was an ambulance called to the scene (*id.* at pg. 59); plaintiff presented to a chiropractor, Dr. Capolino, on the date of the accident with complaints of back, neck, and knee pain (*id.* at pg. 62-63); plaintiff presented to Dr. Capolino solely with pain complaints (*id.* at pg. 63, 80); Dr. Capolino referred plaintiff for an MRI for his neck, back, and knee (*id.* at pg. 67); and at no time did Dr. Capolino prescribe any medication nor recommend any injections, physical therapy or surgery (*id.* at pg. 69).

Counsel also cites plaintiff's testimony that, following a four-week leave of absence from work, plaintiff was able to resume his normal work schedule and duties which included work as a security officer for Good Samaritan, a laborer at Nice-Pak squeezing liquid solution into machines, a car washer at Mercedes Benz, and a patient handler at Camp Venture. (Doc. 16 at pg. 17-24).

Counsel also proffers medical evidence in support of defendant's contention that plaintiff did not sustain a 'serious injury' as defined in Insurance Law §5102[d]. First, counsel argues that the magnetic resonance imaging ("MRI") of plaintiff's cervical spine, lumbar spine and thoracic spine only revealed annular bulging, without any evidence of herniated disc or central stenosis. (Doc. 12 ¶23). Second, counsel argues that the MRI of plaintiff's left knee revealed no evidence of a cartilage tear. (Doc. 12 ¶24). Third, counsel submits the independent medical examination ("IME") report by Dr. Salkin, a board certified orthopedic surgeon. (Doc. 20). Counsel notes that Dr. Salkin opined that plaintiff suffered cervical and lumbar spine sprains and soft tissue injury, all of which have resolved, thus enabling plaintiff to resume his usual work and living tasks without restrictions.

Plaintiff's Opposition

Plaintiff contends that he sustained serious injuries as set forth in Insurance Law §5102[d]. Counsel cites medical evidence to demonstrate that plaintiff sustained a significant limitation in range of motion that limited his usual daily activities to, at the least, raise a material issue of fact.

First, counsel argues that plaintiff presented to his chiropractor Dr. Capolino on the date of the accident, who performed a total of thirteen weeks of chiropractic treatment on plaintiff following the accident. (Doc. 26, 28). Counsel cites Dr. Capolino's affidavit which, in part, attested to the significant limitations of motion of the cervical spine and lumbar spine. (Doc. 23 ¶21 *citing* Doc. 28). Second, counsel proffers the supporting affidavit of Dr. Traflet, a board certified radiologist (Doc. 29). Upon his review of the medical evidence including the MRI films, Dr. Traflet opined that mild hypertrophy, annular bulges, trace amount or mild annular bulges

related to the cervical spine. Dr. Traflet also opined to presence of facet hypertrophy, mild foraminal impression, mild posterolateral annular bulges and proximal foramina, and mild annular bulges related to the lumbar spine. (Doc. 29). Third, counsel cites the affidavit of licensed chiropractor Dr. David Allonce (Doc. 27). Allonce conducted a recent independent physical examination of plaintiff, and reviewed the previous MRI films of plaintiff's cervical and lumbar spine. Based on the foregoing, Dr. Allonce utilized an inclinometer to examine plaintiff's range of motion, after which he opined to the existence of significant limitation in range of motion of the cervical and lumbar spine varying from 10 to as much as 30 degrees below normal range of extensions/flexion. Allonce opined to positive orthopedic tests for "foraminal compressions, cervical distraction, costoclavicular, Spurling's, Soto Hall for cervical lesions, Straight Leg raise, Milgrams, Minor sign, Gawnsien's, Left Kemp's, Yeoman's and Nachlas for lumbar lesions with radiculopathy to the lower left extremity" (Doc. 27 ¶7). Allonce opined that the aforementioned conditions which render plaintiff "partially-permanently disabled" were causally related to the accident. (*Id.* at ¶9, ¶10).

Lastly, counsel cites plaintiff's affidavit which, in pertinent part, attests that despite treatment, he still experiences neck, back, and (occasional) knee pain which has limited his usual daily activities including heavy lifting, grocery shopping, laundry, and shoveling snow. (Doc. 26).

Decision

On a summary judgment motion, the movant has the initial obligation to show its entitlement to judgment as a matter of law. (*Zuckerman v. City of N.Y.*, 49 NY2d 557 [1980]). Thus, it is the defendants' burden to show that plaintiff did not suffer any of the following: (1) permanent loss of use of a body organ, member, function or system; (2) permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or (3) a medically determined injury or impairment which prevented the injured person from performing substantially all his usual and customary daily activities for not less than 90 days of the 180 days immediately following the occurrence of the injury. (*See Insurance Law* § 5102[d]). Upon such showing, the burden then shifts to the plaintiff opposing the motion to demonstrate by evidentiary facts that genuine issues of fact exist regarding whether plaintiff sustained a "serious injury" so as to preclude summary judgment.

The motion record contains material issues of fact raised by the conflicting medical opinions submitted by the parties related to whether plaintiff sustained serious injury within the meaning of Insurance Law §5102[d] based upon the alleged significant limitation of use and range of motion causally related to the accident. (*Wilcoxon v Palladino*, 122 AD3d 727 [2d Dept. 2014]; *see also* medical report of independent orthopedist Dr. Salkin, *compared to* medical reports of treating chiropractor Dr. Capolino and independent chiropractor Dr. Allonce).

All other arguments raised on this motion and evidence submitted by the parties in connection thereto have been considered by this court, notwithstanding the specific absence of reference thereto.

Based on the foregoing, it is

ORDERED that defendant's motion for summary judgment is denied based on the conflicting medical evidence and documentary evidence related to the serious injury threshold.

Any relief not specifically granted herein is denied and/or rendered moot by the foregoing determination.

The foregoing constitutes the Decision and Order of this court.

Dated: White Plains, New York
April 29, 2019



HON. KATHIE E. DAVIDSON, J.S.C.

TO:

By NYSCEF to counsel of record:

Martin H. Pollack, Esq.
Law Offices of Martin H. Pollack, P.C.
Attorneys for Plaintiff

Richard B. Schoenberg, Esq.
Law Office of John Trop
Attorneys for Defendant