

**Aquino v Delgado**

2019 NY Slip Op 34989(U)

October 31, 2019

Supreme Court, Bronx County

Docket Number: Index No. 31164/2017E

Judge: John R. Higgitt

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: I.A.S. PART 14

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RAFAEL AQUINO,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 31164/2017E

CARLOS J. DELGADO and FORT CIRCA ROOFING  
GEN CONTRACTORS INC.,

Defendants.  
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John R. Higgitt, J.

Upon plaintiff’s July 24, 2019 notice of motion and the affirmation and exhibits submitted in support thereof; defendants’ October 16, 2019 affirmation in opposition; plaintiff’s October 22, 2019 affirmation in reply; and due deliberation; plaintiff’s motion for summary judgment on the ground that plaintiff sustained a “serious injury,” under the 90/180-day injury category as defined in Insurance Law § 5102(d) in the subject May 2, 2017 motor vehicle accident is granted.

Plaintiff alleges that, as a result of such accident, he sustained injuries to his neck, back, left shoulder and left knee resulting in a medically determined injury that prevented him from his employment as an UBER driver and from performing his usual and customary activities for at least 90 days during the 180 days immediately following the subject accident. In support of summary judgment, plaintiff submitted his affidavit dated July 22, 2019; Workers’ Compensation Board decisions related to the subject accident dated September 15, 2017 and December 14, 2017; the affidavit of a chiropractor, Ilyce Maranga, R.N., D.C. and related medical records; the certified reports of a radiologist, Thomas M. Kolb, M.D.<sup>1</sup>; and the affirmation of an orthopedic surgeon, Ira J. Chernoff, M.D.

Plaintiff avers that approximately three days following the subject accident he presented to

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<sup>1</sup> Dr. Kolb’s reports relate to left knee and left shoulder MRIs performed on May 31, 2017; cervical and lumbar spine MRIs performed on June 1, 2017; and left knee and left shoulder X rays performed on February 13, 2019.

Dr. Maranga who examined him, prescribed physical therapy and chiropractic treatment and recommended MRIs and an orthopedic consultation. Plaintiff avers that Dr. Maranga causally related plaintiff's neck, back, left shoulder and left knee injuries to the subject accident and determined that plaintiff was totally disabled from working and restricted from performing many activities of daily living. Plaintiff avers that at the time of the subject accident he was a full-time driver with UBER. Plaintiff returned to work on a part-time basis for approximately two and a half weeks, but then stopped working, as recommended by Dr. Maranga, due to the claimed injuries.

Plaintiff received Workers' Compensation disability benefits from May 22, 2017 through December 12, 2017. During this period, plaintiff did not work, drive or leave the house except for medical appointments. Plaintiff asserts that he followed the physical restrictions put in place by Dr. Maranga, including no prolonged sitting, heavy or repetitive lifting, prolonged standing, prolonged walking, exercising, bending, climbing, pushing, pulling, reaching, stooping, crawling or performing household chores. Plaintiff further avers that during this period he could not cook, dress himself, work out, run, exercise at home or help his wife with household chores, all of which he did prior to the subject accident. Plaintiff also contends that he was unable to have sexual relations with his wife during the six months following the accident.

Dr. Maranga initially examined plaintiff on May 5, 2017, finding limited ranges of motion in the cervical spine, lumbar spine, left shoulder and left knee; positive provocative orthopedic testing; and tenderness in the cervical and lumbar spine musculature. Dr. Maranga noted that plaintiff did not report prior symptoms or injuries to the claimed areas. Based upon Dr. Maranga's objective clinical findings she concluded that as a direct result of the subject accident plaintiff was 100% "disabled from performing substantially all of his usual and customary daily activities." Dr. Maranga opined that plaintiff's disability was caused by his spinal disc injuries and internal derangements of the left shoulder and left knee. As a result, plaintiff was restricted from heavy or repetitive lifting, prolonged

sitting, prolonged standing, prolonged walking, unsupervised exercise at the gym, driving, bending, climbing, pushing, pulling, reaching, stooping, crawling and household chores.

Dr. Maranga reviewed the reports of Dr. Kolb from MRIs of plaintiff's neck, lower back, left shoulder and left knee performed in May and June 2017. Dr. Maranga noted findings of cervical disc herniations, lumbar disc bulging and tears of his left shoulder and left knee. Dr. Maranga opined that the plaintiff's spinal injuries noted by the MRIs were caused by the subject accident and that these injuries, along with plaintiff's left knee and left shoulder tears, rendered plaintiff totally disabled for at least 90 days during the 180 days following the subject accident. Dr. Maranga's disability statements dated May 24, 2017 through October 27, 2017 deemed plaintiff 100% temporarily disabled due to decreased range of motion in the cervical and lumbar spine, left shoulder and left knee, with pain and discomfort.

In opposition, defendants point out that February 13, 2019 X ray reports of Dr. Kolb, related to plaintiff's left shoulder and left knee, noted degenerative changes. Defendants contend that these findings render plaintiff's expert's opinion as to causation speculative because plaintiff's expert does not address the findings of degeneration.

"Serious injury" under the 90/180-day injury category requires plaintiff to demonstrate evidence of "a medically determined injury or impairment of a non-permanent nature which prevents [him or her] 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" (Insurance Law § 5102[d]; see *Williams v Tatham*, 92 AD3d 472, 473 [1st Dept 2012]). The words "'substantially all' should be construed to mean that the person has been curtailed from performing his [or her] usual activities to a great extent rather than some slight curtailment" (*Licari v Elliott*, 57 NY2d 230, 236 [1982]; see *Frias v Gonzalez-Vargas*, 147 AD3d 500, 502 [1st Dept 2017]; *Cartha v Quin*, 50 AD3d 530, 530

[1st Dept 2008], *lv denied* 11 NY3d 704 [2008]). Here, plaintiff's evidence that he was totally disabled from working and from performing his usual and customary activities, including dressing, driving and household chores, for approximately five months, and plaintiff's expert's conclusion that such disability was the result of medically determined injuries and limitations caused by the subject accident, is sufficient to demonstrate, *prima facie*, under the 90/180-day injury category of "serious injury" (*Taylor v Delgado*, 154 AD3d 620, 621 [1st Dept 2017]; *Coley v DeLarosa*, 105 AD3d 527, 528-529 [1st Dept 2013]; *Williams v Tatham, supra*; *Jean-Louis v Gueye*, 94 AD3d 504, 505 [1st Dept 2012]).

Defendants' opposition failed to raise a triable issue of fact as to whether plaintiff was medically prevented from going to work or performing "substantially all" of his daily activities, or whether all of plaintiff's alleged injuries were caused by the accident (*cf. Jean-Louis v Gueye*, 94 AD3d at 505). While defendants assert that degeneration in plaintiff left shoulder and left knee was a "pre-existing condition," plaintiff's prior MRI examinations performed within months of the subject accident showed no evidence of degeneration. Rather, evidence of degeneration was present in X rays performed in February 2019 one and a half years following the subject accident and subsequent to left shoulder and left knee arthroscopies. Dr. Maranga's opinion as to causation was not rendered speculative as it was based upon his contemporaneous physical examinations and treatment of plaintiff and plaintiff's May and June 2017 MRIs that did not reveal degeneration, at that time (*see Montoya v Rosenberger*, \_\_\_AD3d\_\_\_, 2019 NY Slip Op 07694, \*1 [1st Dept 2019] [plaintiff's doctor's opinion as to causation based on his treatment and review of plaintiff's medical records, sufficiently raised "a different, yet altogether equally plausible, cause" of the injuries notwithstanding evidence of degeneration]). Moreover, Dr. Maranga noted that plaintiff was previously asymptomatic.

Assuming, without determining, that plaintiff's left knee injury "was most likely degenerative

in that plaintiff had loose bodies noted” during surgery, as noted by plaintiff’s orthopedic surgeon, defendants failed to raise an issue of fact as to whether plaintiff’s alleged cervical and lumbar spine injuries resulted in a medically determined injury causally related to the subject accident. In this regard, Dr. Maranga diagnosed plaintiff with cervicgia, lower back pain and thoracic spine pain that he opined was causally related to the subject accident and resulted in decreased ranges of motion in the cervical and lumbar spine and rendered plaintiff totally disabled for at least 90 of the 180 days immediately following the subject accident.

Accordingly, it is

ORDERED, that plaintiff’s motion for summary judgment on his claim of “serious injury” under the 90/180-day injury category of Insurance Law § 5102(d) is granted.

The parties are reminded of the December 16, 2019 pre-trial conference before the undersigned.

This constitutes the decision and order of the court.

Dated: October 31, 2019

  
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John R. Higgitt, A.J.S.C.