Glaze v Genpi
2019 NY Slip Op 35122(U)
October 24, 2019
Supreme Court, Bronx County
Docket Number: Index No. 27325/2017E
Judge: John R. Higgitt

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

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CLESTON GLAZE,

Plaintiff,

- against -

AKUA GENPI and AMERICAN UNITED,

Defendants.

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DECISION AND ORDER

Index No. 27325/2017E

John R. Higgitt, J.

Upon defendants' May 3, 2019 notice of motion and the affirmation and exhibits submitted in support thereof; plaintiff's October 14, 2019 affirmation in opposition being considered although untimely (*see* CPLR 2001, 2214); and due deliberation; defendants' motion for summary judgment on the ground that plaintiff did not sustain a "serious injury" in the subject November 26, 2016 motor vehicle accident is granted in part.

Plaintiff claims injury to the cervical and lumbar aspects of his spine and alleges "serious injury" under the Insurance Law § 5102(d) categories of significant disfigurement, permanent consequential limitation, significant limitation and 90/180-day injury.

In support of the motion, defendants submit the affirmed reports of radiologist Dr. Decker, emergency medicine specialist Dr. Lane and neurologist Dr. Feuer, and the transcript of plaintiff's August 15, 2018 deposition testimony.

Dr. Decker reviewed the films from the December 28, 2016 MRI of plaintiff's cervical spine and the January 4, 2017 MRI of plaintiff's lumbar spine. Dr. Decker concluded that the films depicted longstanding diffuse degenerative disc disease unrelated to the accident, without evidence of acute traumatic injury.

Dr. Lane reviewed plaintiff's initial treatment and emergency room records. Dr. Lane opined that, given the absence of decreased ranges of motion, numbness, weakness, tenderness,

positive neurological findings, complaints of lumbar spine, and complaints of cervical pain upon range-of-motion testing, and the lack of specialty consultations or second-level imaging orders, the normal examinations documented in the records indicated that plaintiff did not sustain an acute cervical or lumbar injury as a result of the accident.

Dr. Feuer examined plaintiff on October 25, 2018, approximately two years after the accident. Plaintiff related to Dr. Feuer that he had undergone cervical fusion surgery six years prior to the subject accident as a result of a prior motor vehicle accident.[1] Dr. Feuer measured full ranges of motion in all tested planes of movement of plaintiff's cervical and lumbar spine, without tenderness or spasm. Straight-leg raising was negative bilaterally. The neurological examination yielded normal results, with symmetrical reflexes, intact sensation, normal muscle tone and full motor power. Dr. Feuer concluded that plaintiff's subjective complaints were not supported by any objective clinical findings, and that plaintiff did not exhibit disability or permanency from a neurological perspective.

This evidence was sufficient to meet defendants' prima facie burden with respect to plaintiff's claims of permanent consequential limitation and significant limitation (*see Munoz v Robinson*, 170 AD3d 414 [1st Dept 2019]; *Ampofo v Key*, 168 AD3d 601 [1st Dept 2019]; *Tejada v LKQ Hunts Point Parts*, 166 AD3d 436 [1st Dept 2018]). Notably, neither near-normal ranges of motion (*see Rose v Tall*, 149 AD3d 554 [1st Dept 2017]) nor minor or slight limitations (*see Stevens v Bolton*, 135 AD3d 647 [1st Dept 2018]) are consequential or significant (*see Caruso v Hall*, 101 AD2d 967 [3d Dept 1984], *affd* 64 NY2d 843 [1985]).

Moreover, defendants established, through their radiological and emergency medicine experts, that plaintiff did not sustain a "serious injury" causally related to the accident (*see*

[1] Defendants' assertions regarding a lack of causal connection between the accident and plaintiff's injuries are premised on their radiological expert's findings and the gap in treatment, and not a prior accident.

Jenkins v Livo Car Inc., 2019 Slip Op 07553 [1st Dept 2019]; *Streety v Toure*, 173 AD3d 462, 462 [1st Dept 2019]; *see also Sosa-Sanchez v Reyes*, 162 AD3d 414, 414 [1st Dept 2018]; *Hessing v Carroll*, 161 AD3d 462, 462 [1st Dept 2018]; *Alvarez v NYLL Mgt. Ltd.*, 120 AD3d 1043, 1044 [1st Dept 2014], *affd* 24 NY3d 1191 [2015]; *Kone v Rodriguez*, 107 AD3d 537, 538 [1st Dept 2013]; *Linton v Nawaz*, 62 AD3d 434, 439 [1st Dept 2009], *affd* 14 NY3d 821 [2010]).

Defendants also assert that there is an unexplained cessation in plaintiff's treatment that severs the causal connection between the accident and plaintiff's injuries (*see Pommells v Perez*, 4 NY3d 566, 574 [2005] ["a plaintiff who terminates therapeutic measures following the accident, while claiming 'serious injury,' must offer some reasonable explanation for having done so"]), shifting the burden of explanation to plaintiff (*see Arias v Martinez*, 2019 NY Slip Op 07531 [1st Dept 2019]). In opposition, plaintiff averred that his no-fault benefits were terminated and that he could not afford the co-payments of his private health insurance, given his income and his various weekly and monthly expenses. This was sufficient to raise an issue of fact regarding a reasonable explanation for the cessation of physical therapy (*see Ramkumar v Grand Style Transp. Enters. Inc.*, 22 NY3d 905 [2013], *rearg den* 22 NY3d 1102 [2014]; *cf. Davis v Zaheer Bros. Corp.*, 26 Misc 3d 141[A], 2010 NY Slip Op 50308[U] [App Term 1st Dept 2010]; *Garrett v Williams*, 2015 NY Slip Op 30791[U] [Sup Ct, Bronx County 2015]).

In opposition, plaintiff submitted the affirmed reports from MRIs of his cervical and lumbar spine, records of Dr. Guy, affirmed reports of Dr. Bhatia and the certified records of Starrett City Medical P.C.

The report from the January 4, 2017 lumbar spine MRI noted bulges and an inhomogenous signal throughout, consistent with age-related changes. The report from the December 28, 2016 MRI of plaintiff's cervical spine noted disc bulging. Dr. Bhatia affirmed that

he disagreed with Dr. Decker that the films showed degeneration and that, while plaintiff exhibited normal age-related degeneration, the bulges at C2-C7 and L1-L5 were causally related to the subject accident.

Dr. Guy affirmed that he started treating plaintiff on March 6, 2017 and administered caudal steroid fluoroscopic epidural injections on June 28, 2017, July 12, 2017 and August 23, 2017. Dr. Guy examined plaintiff on March 6, 2017 and June 19, 2017, noting reduced ranges of motion in the tested planes of motion of plaintiff's cervical and lumbar spine. Dr. Guy noted that the 2010 motor vehicle accident had resulted in herniated discs at C2-C7 and L4-S1, right-sided radiculopathy at C5-C7 and L4-S1 and cervical fusion surgery. Electromyography performed in Dr. Guy's office on June 16, 2017 was positive for L4-S1 radiculopathy. Dr. Guy opined that plaintiff's injuries were causally related to the subject accident.

Dr. Bhatia examined plaintiff on November 21, 2018, noting that plaintiff's complaints of pain were not radicular. Dr. Bhatia noted that the prior accident resulted in decreased cervical ranges of motion, but that plaintiff made a "full recovery" from the prior motor vehicle accident. Dr. Bhatia measured ranges of motion in plaintiff's lumbar spine that were insufficient to raise a question of fact regarding permanent consequential limitation (*see De Los Santos v Basilio*, 2019 NY Slip Op 07526 [1st Dept 2019]; *Sone v Qamar*, 68 AD3d 566 [1st Dept 2009]), and he found that straight-leg raising was negative bilaterally. He measured reductions in cervical extension and lateral flexion. Based upon the proximity of plaintiff's symptoms to the accident and the lack of prior similar symptoms, Dr. Bhatia concluded that plaintiff's injuries and limitations were causally related to the subject accident. Dr. Bhatia, however, noted, incongruously, that the prior accident produced similar cervical and lumbar symptoms.

The Starrett City records demonstrate that plaintiff attended eight physical therapy

sessions from December 2, 2016 to December 27, 2016.[2]

Plaintiff's proof was sufficient to raise an issue of fact as to whether he sustained a significant limitation of his cervical and/or lumbar spine, or a permanent consequential limitation of his cervical spine, causally related to the subject accident (*see Giap v Hathi Son Pham*, 159 AD3d 484 [1st Dept 2018]). Although it is apparent that plaintiff sustained similar or identical injuries in a prior motor vehicle accident, defendants did not submit the records of same or argue that the prior accident was the cause of plaintiff's limitations. Accordingly, the court is constrained to find that, to raise an issue of fact with respect to the issue of causation, plaintiff was not required to do more than identify contemporaneous and recent limitations correlated to objective evidence of injury that plaintiff's doctors opined were causally related to the subject accident (*see Aquino v Alvarez*, 162 AD3d 451 [1st Dept 2018]), particularly in light of his physicians' assertions that plaintiff's symptoms from the prior accident were resolved at the time of the subject accident (*see Sanchez v Oxcin*, 157 AD3d 561 [1st Dept 2018]).

Plaintiff's bill of particulars alleging confinement to bed and home and incapacity from his work as a plumber for one week following the accident, and his deposition testimony that he was not so confined, was sufficient to meet plaintiff's prima facie burden of establishing that plaintiff did not sustain a 90/180-day injury as a result of the accident (*see Williams v Laura Livery Corp.*, 2019 NY Slip Op 07540 [1st Dept 2019]; *Pouchie v Pichardo*, 173 AD3d 643 [1st Dept 2019]; *Streety, supra*; *Curet v Kuhlor*, 172 AD3d 634 [1st Dept 2019]; *Ortiz v Boamah*, 169 AD3d 486 [1st Dept 2019]; *Tejada, supra*; *Rosario v Cablevision Sys.*, 160 AD3d 545 [1st Dept 2018]; *Latus v Ishtarq*, 159 AD3d 433 [1st Dept 2018]; *Moreira v Mahabir*, 158 AD3d 518 [1st Dept 2018]; *Sanchez, supra*; *Fernandez v Hernandez*, 151 AD3d 581 [1st Dept 2017]; *Rose,*

[2] Dr. Guy's records indicate that plaintiff received additional treatment beyond the injection procedures.

supra). Plaintiff's proof was insufficient to raise issue of fact as to whether he was prevented from performing *substantially all* of the material acts constituting plaintiff's usual and customary daily activities for the statutory period (*see Pouchie*, *supra*; *Moreira*, *supra*; *Sanchez*, *supra*; *Fernandez*, *supra*).

It is obvious that plaintiff did not sustain a significant disfigurement. Plaintiff's medical records are devoid of evidence of scarring or other abnormality that could be considered unattractive or objectionable or subject plaintiff to pity or scorn (*see Fernandez, supra*).

Accordingly, it is

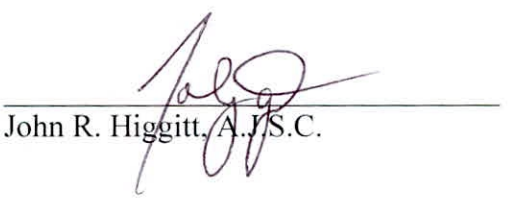
ORDERED, that the aspects of defendants' motion for summary judgment dismissing plaintiff's claims of "serious injury" under the significant disfigurement and 90/180-day injury categories of Insurance Law § 5102(d), and under the permanent consequential limitation category of Insurance Law § 5102(d) insofar as premised upon injuries to plaintiff's lumbar spine, are granted, and such claims are dismissed; and it is further

ORDERED, that the motion is otherwise denied.

The parties are reminded of the October 28, 2019 pre-trial conference before the undersigned.

This constitutes the decision and order of the court.

Dated: October 24, 2019



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