

Dimanche v Ulysse

2019 NY Slip Op 35197(U)

October 16, 2019

Supreme Court, Queens County

Docket Number: Index No. 711805/17

Judge: Robert I. Caloras

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ROBERT I. CALORAS
Justice

PART 36

-----X
CONRAD M. DIMANCHE,

Plaintiff,

-against-

Index No. 711805/17
Motion Date: 8/29/19
Motion Cal. No. 8
Seq. No. 2

KERWIN ULYSSE, and SANTIAGO LIMO, INC.,

Defendants.
-----X

The following papers numbered E21-E47 read on this motion for an order pursuant to CPLR § 3212 granting defendants summary judgment and dismissing the Complaint, in as much as plaintiff fails to meet the serious injury threshold requirement mandated by Insurance Law § 5102 (d).

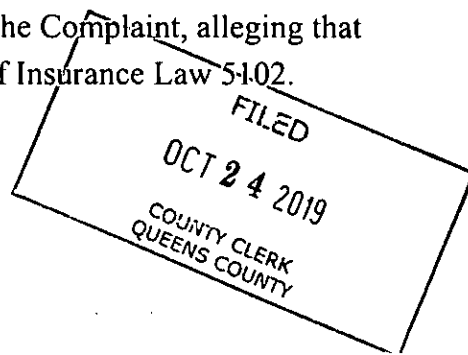
Table with 2 columns: Document Name and PAPER NUMBERED. Rows include Notice of Motion-Affirmation-Exhibits, Stipulations, Affirmation in Opposition-Exhibits, and Reply Affirmation.

Upon the foregoing papers, it is ordered that defendants' motion is granted as follows:

This is an action to recover damages for personal injuries plaintiff allegedly sustained as a result of a motor vehicle accident, which occurred on January 11, 2017. In the Bill of Particulars, plaintiff alleged, among other things, the following:

- Left shoulder: arthroscopy, rotator cuff tear and type I SLAP lesion, synovitis, debridement of type I SLAP lesion, glenohumeral synovectomy, subacromial bursectomy, arthroscopic rotator cuff repair, tears of supraspinatus and infraspinatus tendons, tear of the anterior labrum, biceps tenosynovitis,
Left knee: joint effusion, posterior subluxation,
Cervical spine: bulges and herniation;
Thoracic and lumbar spine: bulges.

Defendants now move for summary judgment, dismissing the Complaint, alleging that plaintiff did not sustain an a "serious injury" within the meaning of Insurance Law 5102.



Defendants have submitted the following: an attorney affirmation; Summons and Verified Complaint; Verified Answer with Demand for Bill of Particulars; Bill of Particulars; affirmation from Thomas P. Nipper, M.D., F.A.C.S.; affirmation from Scott A. Springer, D.O. D.A.B.R.; affirmation from Roger Chirugi, M.D.; Long Island Jewish Medical Center - Emergency Room records (Hereinafter "LIJ"); police report; and plaintiff's deposition transcript.

At defendant's request, Dr. Nipper, Diplomate American Board of Orthopedic Surgery, examined the plaintiff on February 14, 2019. Using a goniometer, Dr. Nipper found plaintiff's cervical spine, lumbar spine, bilateral shoulder, bilateral elbow, bilateral wrists, and bilateral knee had normal range of motion. Based upon his examination, Dr. Nipper found plaintiff's injuries had resolved, and that he did not sustain any significant or permanent injury as a result of the motor vehicle accident.

At defendant's request, Dr. Singer, a Radiologist, examined the MRI films, dated February 22, 2017, of plaintiff's cervical spine and lumbar spine, and the MRI films, dated March 23, 2017, of plaintiff's left shoulder and left knee. Based upon his review of these MRIs, Dr. Springer made the following findings: (1) cervical spine - degenerative changes, osteophyte and disc desiccation; (2) lumbar spine - degenerative findings; (3) left shoulder - no fracture, dislocation or acromioclavicular joint separation; showed degenerative changes to the lateral humeral head associated multiple subchondral bone cysts; and partial thickness tear at the insertions of the supraspinatus and infraspinatus tendons, which were most likely due to the chronic tendinitis seen due to weakening of the tendon fibers; and (4) left knee showed tricompartmental degenerative changes. Dr. Singer also found that there were no posttraumatic changes to these body partes that were causally related to the motor vehicle accident.

At defendant's request, Dr. Chirugi, Board Certified in Emergency Medicine, reviewed Plaintiff's Bill of Particulars, police report and the emergency room records from LIJ. Based upon his review of these records, Dr. Chirugi opined that the plaintiff did not sustain any significant injury as a result of the motor vehicle accident.

At plaintiff's deposition, he testified that he started working for Concepts of Independence as a health aide, in March 2017, less than two months after the accident. Plaintiff also testified that on August 14, 2017, Dr. Bernstein operated on his left shoulder. After the surgery, plaintiff testified that he was confined to bed for one month.

Based on the medical evidence, along with plaintiff's own testimony, defendants argue that plaintiff's alleged injuries were not caused by this accident, that no trauma was sustained, and/or the alleged injuries do not rise to the level of impairment sufficient to qualify under any category of the statute.

In opposition, plaintiff has submitted, among other things, the following: an attorney affirmation; no-fault file request; affirmation from Michael Green, M.D., and CitiMed Diagnostic's records; affirmation from Mark Bursztyn, and medical records. Plaintiff argues that defendants have failed to establish their *prima facie* burden of demonstrating that he has not sustained a serious injury as a result of this accident. In the alternative, plaintiff argues that he has submitted sufficient proof that raises issues of fact as to whether he sustained a serious injury under the statute as a result of the accident.

At his deposition, plaintiff testified that after the accident he was transported by ambulance to LIJ. At the hospital, he complained of pain to his entire left side, his upper body was numb and his left knee was hurting bad. He was administered Motrin and xrays were also taken. Three days later, plaintiff was treated at a physical therapy facility on Merrick Boulevard in Jamaica, New York. Plaintiff received physical therapy treatment three to four times per week, until GEICO stopped paying for medical benefits approximately seven months after the accident

Plaintiff claims that after the accident he received physical therapy at Medical Rehab of NY "Life Health", located at 90-04 Merrick Boulevard, Jamaica New York (Hereinafter "Life Health"). According to the plaintiff, "[a]fter numerous attempts to contact this facility, it is our understanding that they are no longer in business". Consequently, plaintiff has been unable to obtain his medical records from "Life Health". Plaintiff contacted GEICO to obtain the entire No-Fault file, but has not received the No-Fault file from GEICO. Plaintiff claims that he "has exhausted all adjournment requests", and as a result, has submitted his opposition papers without the records from Life Health.

On February 22, 2017, plaintiff had an MRI of his cervical spine and lumbar spine at CitiMed Diagnostic. In his report, Dr. De La Cruz, Diplomate, American Board of Radiology, found that plaintiff had a herniation and bulges in his cervical spine, and bulges in his lumbar spine. On March 23, 2017, plaintiff had an MRI of his left shoulder and left knee at CitiMed Diagnostic. In his report, Dr. De La Cruz determined that left shoulder MRI showed plaintiff had tears of the supraspinatus and infraspinatus tendons at the insertion with tendinosis, tear of the anterior labrum, and biceps tenosynovitis. Dr. De La Cruz found that the left knee MRI showed that plaintiff had an oblique tear at the junction of the body, and posterior or medial meniscus extending to the inferior articular surface.

Dr. Bursztyn, Board Certified Orthopaedic Surgeon, initially examined plaintiff on July 26, 2017, and performed a left shoulder arthroscopy on plaintiff on August 14, 2017.

Based upon the evidence he has submitted, plaintiff claims that as a result of this accident he has sustained, herniations, bulges, and tears, which constitute a permanent consequential limitation of use of a body organ or member, significant limitation of use of a

body function or system, and a 90/180 injury.

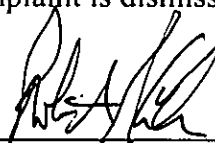
A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred by the No-Fault Insurance Law bears the initial burden of establishing a *prima facie* case that the plaintiff did not sustain a "serious injury" (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]; Beltran v Powow Limo, Inc., 98 AD3d 1070 [2d Dept. 2012]). When such a defendant's motion relies upon the findings of the defendant's own witnesses, those findings must be in admissible form, such as affidavits and affirmations, and not unsworn reports, to demonstrate entitlement to judgment as a matter of law (see Brite v Miller, 82 AD3d 811 [2d Dept. 2011]; Damas v Valdes, 84 AD3d 87 [2d Dept. 2011], citing Pagano v Kingsbury, 182 AD2d 268 [2d Dept. 1992]). A defendant also may establish entitlement to summary judgment using the plaintiff's deposition testimony (see Beltran v Powow Limo, Inc., supra; Bamundo v Fiero, 88 AD3d 831 [2d Dept. 2011]; McIntosh v O'Brien, 69 AD3d 585 [2d Dept. 2010]). Once a defendant meets this burden, the plaintiff must present proof, in admissible form, which creates a material issue of fact (see Gaddy v Eyler, supra; Zuckerman v City of New York, supra; Beltran v Powow Limo, Inc., supra).

The Court finds that the defendants made a *prima facie* showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject motor vehicle accident (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]). Consequently, the burden shifts to the plaintiff to come forward with evidence to overcome the defendants' submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law (see, Gaddy v Eyler, supra; Sin v Singh, 74 AD3d 1320 [2d Dept. 2010]).

The Court finds that the plaintiff has failed to raise a triable issue of fact. LIJ's medical records stated that plaintiff was treated for left shoulder pain, and an x-ray was taken of plaintiff's left shoulder. The x-ray showed moderate hypertrophic AC joint arthrosis and mild inferior humeral joint osteoarthritis. Plaintiff testified that he went to Life Health three days later. Plaintiff concedes that he was unable to obtain his medical records from Life Health, because this facility is no longer in business. However, plaintiff did not submit any documentary proof showing that Life Health is no longer in business, and failed to submit an affidavit setting forth what specific efforts he made to obtain these records. Although there is no requirement, to defeat a motion for summary judgment, that a plaintiff must show qualitative measurements suggesting serious injury that are recorded contemporaneous to the accident, plaintiff must submit a contemporaneous report showing that his injuries were causally related to the accident (see, Streeter v Stanley, 128 AD3d 477 [1st Dept. 2015]). Here, LIJ's records did not establish that plaintiff sustained bulges, herniations or tears. The

MRIs plaintiff had of his cervical spine, lumbar spine, and left shoulder did not establish that these injuries were causally related to the accident. As to Dr. Bursztyn's records, he did not initially examine the plaintiff until July 26, 2017, more than six months after the accident. Therefore, Dr. Bursztyn's report's was not contemporaneous with the accident, and his findings were too remote to raise an inference that plaintiff's injuries were caused by the accident" (see Kante v Diarrassouba, 61 AD3d 517 [1st Dept. 2009]). Under these circumstances, the Court finds that plaintiff has failed to raise a triable issue of fact demonstrating that his alleged injuries were causally related to the accident based upon a contemporaneous medical report (Giordano v Allstarz Limousine, 53 AD3d 470 [2d Dept. 2008]). Accordingly, the motion is granted, and the Complaint is dismissed.

Dated: October 16, 2019



ROBERT I. CALORAS, J.S.C.

FILED
OCT 24 2019
COUNTY CLERK
QUEENS COUNTY