

Singh v Paccione

2019 NY Slip Op 35207(U)

October 31, 2019

Supreme Court, Queens County

Docket Number: Index No. 702204/2018

Judge: Robert J. McDonald

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

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GURBAX SINGH,
Plaintiff,
- against -

Index No.: 702204/2018
Motion Date: 10/31/19
Motion No.: 34
Motion Seq.: 1

INDIRA B. PACCIONE,
Defendant.

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The following electronically filed documents read on this motion by defendant for an order pursuant to CPLR 3212, granting defendant summary judgment and dismissing the complaint of plaintiff on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law §§ 5104(a) and 5102(d):

Table with 2 columns: Document Name and Papers Numbered. Includes entries for Notice of Motion-Affirmation-Exhibits, Affirmation in Opposition-Exhibits, and Reply Affirmation-Exhibits.

In this negligence action, plaintiff seeks to recover damages for personal injuries allegedly sustained as a result of a motor vehicle accident that occurred on October 18, 2017. As a result of the accident, plaintiff alleges that he sustained serious injuries to his cervical spine, bilateral shoulders, and bilateral hips.

Plaintiff commenced this action by filing a summons and complaint on February 24, 2018. Defendant joined issue by service of an answer on March 23, 2018. Defendant now moves for an order pursuant to CPLR 3212, dismissing the complaint on the ground that the injuries claimed fail to satisfy the serious injury threshold requirement of Section 5102(d) of the Insurance Law.

In support of the motion, defendant submits Progress Notes from North Shore University Hospital, indicating that plaintiff complained of pain in his spine, bilateral thighs, and bilateral calves; Report of CT C-Spine and Brain from North Shore

University Hospital, indicating that there is no evidence of intracranial hemorrhage, mass effect or displaced calvarial fracture and no evidence for acute displaced fracture or traumatic malalignment; Reports of CTs of L-Spine and T-Spine from North Shore University Hospital, indicating that there was multilevel degenerative changes of the thoracic spine and no acute fracture or traumatic malignment of the lumbar spine or thoracic spine; Consult Notes from North Shore University Hospital, indicating that imaging revealed degenerative bone disease located in the spine with no acute findings; the Narrative Report from Philip D.P. Abessinio, D.C. dated November 3, 2017, indicating that plaintiff suffers from a prior total disability; the Cervical and Lumbar Spine MRI Reports indicating that there is disc desiccation; and Treatment Records from Azra Wiqas, M.D., indicating that on March 31, 2017, plaintiff had possible osteoarthritis of his knees and back.

Chandra Sharma, M.D. performed an independent orthopedic examination on plaintiff on June 3, 2019. Plaintiff presented with pain in his neck, back, and legs. Dr. Sharma indicates that plaintiff has been using a wheelchair for at least three or four years prior to the subject accident and was being helped by a Home Health Aide for three years prior to the subject accident. Dr. Sharma identifies the records reviewed prior to rendering the report. Dr. Sharma performed range of motion testing with a goniometer and found restricted ranges of motion in plaintiff's cervical spine. Dr. Sharma diagnosed plaintiff with cervical and lumbar sprain/strain, resolved; dementia, unrelated; and weakness of both legs due to polyneuropathy, unrelated. Dr. Sharma concludes that there are no causally related neurological problems, restrictions or disability. The neurological problems are pre-existing.

Based on the submitted evidence, defendant contends that the evidence submitted is sufficient to establish, prima facie, that plaintiff has not sustained an injury which resulted in a permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; or significant limitation of use of a body organ, member, function or system. Defendant also contends that plaintiff did not sustain a medically determined injury or impairment of a nonpermanent nature which prevented him for not less than 90 days during the immediate 180 days following the occurrence from performing substantially all of his usual daily activities as the subject accident did not cause any of the alleged injuries or impairments.

In opposition, plaintiff submits his own affidavit dated October 23, 2019. Plaintiff affirms that he was injured in the subject accident. After the accident, he felt severe pain in his neck, back, and right leg. When the ambulance arrived, he complained to the attendant about the severe pain he was feeling in his neck and right leg. The attendant put a neck brace on and put him on a stretcher into the ambulance to Northshore Hospital. When he arrived at the hospital, he told the doctors that he had severe pain in his neck, right side, and right leg. The doctor took several CT-scans and X-rays and gave him an injection with pain medication. He was unable to walk up the stairs and was confined to the downstairs of his home. On November 1, 2017, he saw his family doctor, Dr. Wiqas. He complained of pain in his neck and back. On November 3, 2017, he saw Dr. Philip Abessinio, a chiropractor at Hills Chiropractic. Dr. Abessinio recommended chiropractic treatment three times a week, MRIs, and a pain management doctor. Dr. Abessinio ordered a cervical brace, lumbar brace and a tens unit. He treated with Dr. Abessinio from November 3, 2017 until November 5, 2018. Dr. Abessinio recommended that he see Dr. Usman Saleem, a pain management doctor. He was also treated with Elm Oriental Medicine for acupuncture and Magaly Imbachi for massage therapy four times a month from November 2017 to May 2018. He received two epidural injections at New York Community Hospital. He also received seven trigger point injections to his neck and back. On May 19, 2018, Dr. Alluri performed nerve testing on the upper and lower part of his body. Because of the injuries from the accident, he presently experiences pain, loss of movement, and loss of mobility on a daily basis. He cannot move his neck from side to side or forward and back because of the pain, even though he did so before the accident. He cannot raise his arms above his head anymore. He is constantly taking pain medication, but the pain does not subside. Because he is confined to a wheelchair, he has no choice but to sit and experience pain. Most of the time he avoids doing any movement at all. He mostly goes from his wheelchair and into bed. It is difficult for him to sit and watch television, and he has difficulty sleeping.

Philip D.P. Abessinio, D.C. first examined plaintiff on November 3, 2017. Plaintiff presented with chief complaints of neck pain, neck stiffness, bilateral shoulder pain, arm radiation, middle back pain, lower back pain, buttock pain, hip pain, leg/calf pain and leg radiation. Dr. Abessinio performed range of motion testing with a goniometer and found limited ranges of motion in plaintiff's cervical spine and thoraco-lumbar spine. Other objective testing performed was positive. Dr. Abessinio opines that plaintiff sustained a causally related injury and that plaintiff's prognosis is guarded. Most recently, Dr. Abessinio performed range of motion testing on July 31, 2019, which revealed continued limited range of motion regarding

plaintiff's cervical spine and thoraco-lumbar spine. Other objective testing was positive. Dr. Abessinio opines that plaintiff's recovery plateaued, and plaintiff has sustained permanent injuries from the subject accident. Plaintiff's injuries are traumatic in nature. The subject accident was the direct competent producing cause of plaintiff's injuries, and the injuries were the competent producing cause of plaintiff's pain, loss of function, range of motion and severe additional disability.

Alan Greenfield, M.D. reviewed the radiological films of the cervical spine and lumbar spine of plaintiff both taken on December 19, 2017, finding, inter alia, bulging discs and herniations.

On a motion for summary judgment, where the issue is whether the plaintiff has sustained a serious injury under the no-fault law, the defendant bears the initial burden of presenting competent evidence that there is no cause of action (Wadford v Gruz, 35 AD3d 258 [1st Dept. 2006]). "[A] defendant can establish that a plaintiff's injuries are not serious within the meaning of Insurance Law § 5102 (d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (Grossman v Wright, 268 AD2d 79 [1st Dept. 2000]). Whether a plaintiff has sustained a serious injury is initially a question of law for the Court (Licari v Elliott, 57 NY2d 230 [1982]).

In opposition, this Court finds that plaintiff raised triable issues of fact as to whether he sustained a serious injury by submitting, inter alia, the medical affirmation from Dr. Abessinio affirming that plaintiff sustained injuries as a result of the subject accident, finding that plaintiff had significant limitations in ranges of motion both contemporaneous to the accident and in recent examinations, and concluding that the limitations are permanent and causally related to the accident (see Perl v Meher, 18 NY3d 208 [2011]; David v Caceres, 96 AD3d 990 [2d Dept. 2012]; Martin v Portexit Corp., 98 AD3d 63 [1st Dept. 2012]; Ortiz v Zorbas, 62 AD3d 770 [2d Dept. 2009]; Azor v Torado, 59 AD2d 367 [2d Dept. 2009]).

As such, plaintiff demonstrated issues of fact as to whether he sustained a serious injury under the permanent loss, permanent consequential limitation and/or the significant limitation of use categories of Insurance Law § 5102(d) as a result of the subject accident (see Khavosov v Castillo, 81 AD3d 903 [2d Dept. 2011]; Mahmood v Vicks, 81 AD3d 606 [2d Dept. 2011]; Compass v GAE Transp., Inc., 79 AD3d 1091 [2d Dept. 2010]; Evans v Pitt, 77

AD3d 611 [2d Dept. 2010]; Tai Ho Kang v Young Sun Cho, 74 AD3d 1328 743 [2d Dept. 2010]). Moreover, based on plaintiff's affidavit issues of fact as to whether he sustained a serious injury under the 90/180 category as a result of the subject accident also preclude summary judgment.

Accordingly, and for the reasons set forth above, it is hereby

ORDERED, that defendant's motion for summary judgment is denied.

Dated: October 31, 2019
Long Island City, N.Y.



ROBERT J. McDONALD
J.S.C.

FILED
NOV 12 2019
COUNTY CLERK
QUEENS COUNTY