Daniello v Dall Cab Corp.
2020 NY Slip Op 30872(U)
February 26, 2020
Supreme Court, Bronx County
Docket Number: 25507/2018E
Judge: John R. Higgitt

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

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JOHN DANIELLO and MATTHEW DELLABONTA,

Plaintiffs,

- against -

DALL CAB CORPORATION and MOHAMMED M. HOSSEN,

Defendants.

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DECISION AND ORDER

Index No. 25507/2018E

John R. Higgitt, J.

Upon defendants' January 6, 2020 notice of motion and the affirmation and exhibits submitted in support thereof; plaintiffs' February 12, 2020 affirmation in opposition and the exhibits submitted therewith; defendants' February 13, 2020 affirmation in reply; and due deliberation; defendants' motion for summary judgment on the ground that plaintiff Matthew Dellabonta did not sustain "serious injuries," as defined in Insurance Law § 5102(d), in the subject May 28, 2016 motor vehicle accident is granted in part.

Plaintiff Dellabonta (hereinafter plaintiff) alleges that, as a result of the subject accident, he sustained injuries to the cervical, thoracic and lumbar aspects of his spine. Plaintiff alleges "serious injury" under the categories of permanent loss of use, permanent consequential limitation, significant limitation and 90/180-day injury.

In support of the motion, defendants submitted the sworn reports of an orthopedic surgeon, Jonathan D. Glassman, M.D., and the transcript of plaintiff's June 19, 2019 deposition testimony.

Defendants' submissions are sufficient to demonstrate prima facie that plaintiff did not sustain a significant or permanent consequential limitation of use of his cervical and thoracic spine as a result of the subject accident (*see Hayes v Gaceur*, 162 AD3d 437, 438 [1st Dept 2018]; *Andrade v Lugo*, 160 AD3d 535, 535-536 [1st Dept 2018]; *Latus v Ishtarq*, 159 AD3d 433 [1st Dept 2018]; *Dziuma v Jet Taxi, Inc.*, 148 AD3d 573, 573-574 [1st Dept 2017]; *Hernandez v Cespedes*, 141 AD3d 483, 484 [1st Dept 2016]; *Michels v Marton*, 130 AD3d 476, 476-477 [1st Dept 2015]). Dr. Glassman's July 16, 2019

examination of plaintiff found minor limitations of range of motion in the cervical spine, with negative objective testing and normal neurological testing. Dr. Glassman's examination of plaintiff's thoracic spine was normal. Dr. Glassman concluded that plaintiff's cervical and thoracic sprains/strains were fully resolved and there was no objective evidence of a significant or permanent injury. Dr. Glassman's findings of minor limitations did not defeat defendants' initial showing that plaintiff did not have either significant or permanent limitations of use of his cervical spine (*see Bianchi v Mason*, 2020 NY Slip Op 00504 [1st Dept]; *Stephanie N. v Davis*, 126 AD3d 502, 502 [1st Dept 2015]; *see also Nakamura v Montalvo*, 137 AD3d 695, 696 [1st Dept 2016]).

However, defendants failed to meet their prima facie burden concerning plaintiff's claims of permanent consequential and significant limitations of use of his lumbar spine because defendants' evidence demonstrated significant restricted range of motion in such area based upon a recent examination (*see Johnson v Salaj*, 130 AD3d 502, 502-503 [1st Dept 2015]; *Collazo v Anderson*, 103 AD3d 527, 528 [1st Dept 2013]; *see also Lewis v Revello*, 172 AD3d 505 [1st Dept 2019]). Dr. Glassman's examination revealed limitations in right and left lateral flexion (30 degrees of a normal 45 degrees). These limitations represent a 33.34 per cent restriction in range of motion and are not "minor" as a matter of law (*see Long v Taida Orchids, Inc.*, 117 AD3d 624, 625 [1st Dept 2014]; *Hodder v United States*, 328 F Supp 2d 335, 356 [EDNY 2004] ["While there is no set percentage for determining whether a limitation in range of motion is sufficient to establish 'serious injury,' the cases have generally found that a limitation of twenty percent or more is significant for summary judgment purposes"]). Furthermore, Dr. Glassman offered no opinion as to whether plaintiff's lumbar spine sprain/strain was causally related to the accident (*see Fuentes v Sanchez*, 91 AD3d 418 [1st Dept 2012]; *Bernardez v Babou*, 83 AD3d 499, 499 [1st Dept 2011).

Because defendants failed to meet their prima facie burden as to whether plaintiff sustained a "serious injury" as a result of injuries to his lumbar spine, the court does not consider the sufficiency of plaintiff's opposition papers on this claim (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Han v BJ Laura & Son, Inc.*, 122 AD3d 591, 593 [2d Dept 2014]).

In opposition, plaintiff submitted the affirmation of an orthopedic surgeon, Louis C. Rose, M.D., and an affidavit dated February 11, 2020.

Dr. Rose initially examined plaintiff on June 3, 2016, finding cervical spine range-of-motion restrictions, with paravertebral spasm and tenderness, and loss of cervical flexion and extension strength. Dr. Rose diagnosed plaintiff with a cervical spine sprain and prescribed physical therapy. Dr. Rose reviewed the films from the August 1, 2016 MRI of plaintiff's cervical spine, finding bulging discs impressing the thecal sac from the C3 through C6 levels. Based upon plaintiff's asymptomatic history and the accident history, Dr. Rose concluded that plaintiff's cervical spine injuries were causally related to the subject accident. Dr. Rose examined plaintiff again on April 6, 2018, finding continuing range of motion limitations, paravertebral spasms with tenderness and decreased sensory perception to light touch in the cervical spine despite chiropractic treatment. Dr. Rose opined that plaintiff had reached maximum medical improvement and that his injuries were permanent.

This evidence was sufficient to raise an issue of fact as to whether plaintiff sustained a significant, but not permanent, limitation of the use of his cervical spine as a result of the subject accident (*see Riollano v Leavey*, 173 AD3d 494, 495 [1st Dept 2019]; *Hernandez v Marcano*, 161 AD3d 676, 677-678 [1st Dept 2018]; *Holloman v American United Transp. Inc.*, 162 AD3d 423, 424 [1st Dept 2018]). Because plaintiff did not submit evidence of a recent examination finding limitations in cervical spine range of motion or disputing defendants' expert's recent findings, plaintiff failed to raise an issue of fact as to his cervical spine injuries under the permanent consequential limitation of use category (*see De Los Santos v Basilio*, 176 AD3d 544, 545 [1st Dept 2019]).

With respect to plaintiff's claim of "serious injury" under the 90/180-day category, plaintiff alleged that he was confined to his bed and home for approximately four day following the accident and intermittently thereafter. Plaintiff testified that at the time of the accident he was employed by Long Island Jewish Medical Center as a physician assistant and missed two days of work immediately following the accident. This evidence establishes as a matter of law that plaintiff Dellabonta did not sustain a 90/180-

day injury (*see Abreu v NYLL Mgt. Ltd.*, 107 AD3d 512, 513 [1st Dept 2013] [90/180-day injury claim dismissed where plaintiff did not allege that she was disabled for the minimum duration necessary to state such a claim]; *Valdez v Benjamin*, 101 AD3d 622, 623 [1st Dept 2012] [plaintiff did not suffer a 90/180-day injury as a matter of law where he admitted that he returned to work two days after the accident]; *Barhak v L. Almanzar-Cespedes*, 101 AD3d 564, 565 [1st Dept 2012] [90/180-day injury claim dismissed where plaintiff lost no time from work and did not allege confinement to bed or home after the accident]). In opposition, plaintiff submits no evidence of a medically determined injury that prevented him from performing *substantially* all of his customary daily activities within the relevant period (*see Frias v Gonzalez-Vargas*, 147 AD3d 500, 502 [1st Dept 2017]; *Cartha v Quin*, 50 AD3d 529, 530 [1st Dept 2008]; *see also Perl v Meher*, 18 NY3d 208, 220 [2011]; *Licari v Elliott*, 57 NY2d 230, 236 [1982]).

It is obvious that plaintiff did not sustain a permanent loss of use. Such loss must be total (*see Oberly v Bangs Ambulance Inc.*, 96 NY2d 295 [2001]), and evidence of mere limitations of use are insufficient (*see Byong Yol Yi v Canela*, 70 AD3d 584, 585 [1st Dept 2010]).

Accordingly, it is

ORDERED, that the aspects of defendants' motion seeking summary judgment dismissing plaintiff's claims of "serious injury" (1) under the permanent loss of use and 90/180-day categories of Insurance Law § 5102(d), (2) under the permanent consequential limitation category with respect to his cervical spine, and (3) with respect to his thoracic spine are granted, and these claims are dismissed; and it is further

ORDERED, that the motion is otherwise denied.

The parties are reminded of the March 2, 2020 pre-trial conference before the undersigned.

This constitutes the decision and order of the court.

Dated: February 26, 2020

John R. Higgitt, J.S.C.