

Monsegue v Shamailov
2020 NY Slip Op 31123(U)
April 21, 2020
Supreme Court, Kings County
Docket Number: 502704/2016
Judge: Edgar G. Walker
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: IAS PART 90

PRESENT: HON. EDGAR G. WALKER, J.S.C.

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CARL MONSEGUE,

Plaintiff,

Decision and Order

-against-

Index No. 502704/2016

SHAMAIL SHAMAILOV,

Defendant.

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The portion of the defendant’s motion seeking summary judgment and dismissal of the complaint based upon his contention that the plaintiff has not sustained permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person’s usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment pursuant to Insurance Law §5102(d) is denied. The portion of the defendant’s motion seeking summary judgment and dismissal of the complaint based upon his contention that the plaintiff has not sustained permanent and total loss of use of a body organ, member, function or system as defined by the Insurance Law is granted.

This case arises out of a motor vehicle accident that occurred on July 8, 2015. At the time of the accident, the plaintiff was operating his vehicle at the intersection of Caton Avenue and Coney Island Avenue in Kings County, New York, when he alleges that the defendant’s vehicle made contact with his vehicle. As a result of the accident the plaintiff alleges to have

sustained severe and permanent personal injuries, including but not limited to injuries to his cervical and lumbar spine, right and left knee, and right ankle, which he claims caused him to be kicked out of his band, hurt his sex life, impaired his ability to walk and run and do certain household activities, and required a right knee surgery.

The Court finds that, except as to the 90 out of 180 category of the Insurance Law, the defendant has satisfactorily shifted the burden to the plaintiff to raise an issue of fact by submitting the affirmations of Dr. Pierce Ferriter, an orthopedic surgeon, Dr. Warren Cohen, a neurologist, and Dr. Scott Spring, a radiologist, as well as the plaintiff's deposition testimony in support of his motion.

Dr. Ferriter examined the plaintiff on August 13, 2018 and concluded that the plaintiff had resolved any injuries to his cervical and lumbar spine, his right knee post-surgery, his left knee, and his right ankle. He reviewed the plaintiff's history of the accident and treatment, the verified bill of particulars and the police accident report, and conducted neurological testing, including Distraction, Compression, Jackson's and Soto-Hall tests on the plaintiff's cervical spine, Febere, Ely's, Kemp's and Lasegue's tests on the plaintiff's lumbar spine, and Lachman's, Apley and Patella Tracking tests on the plaintiff's right and left knees, all of which were within normal limits and negative for objective indications of orthopedic limitations in use of the body parts. Dr. Ferriter additionally used a goniometer to measure the plaintiff's ranges of motion, including on the plaintiff's right ankle, and found them all to be normal. The doctor concluded that the plaintiff had no disability, that he presents with a normal orthopedic examination on all objective testing, and that the plaintiff's cervical and lumbar spine, left and right knee, and right ankle were functional for all normal activities of daily living.

Dr. Cohen examined the plaintiff on September 4, 2018 and concluded that the plaintiff reveals a normal neurological exam except for generalized areflexia and diminished sensation of the feet in a stocking distribution, both of which are attributable to a long-standing history of diabetes, and that there is no clinical objective evidence of any other deficit of neurologic function. He reviewed the plaintiff's history of the accident and treatment, the verified bill of particulars and the police accident report, and used a goniometer to measure the plaintiff's ranges of motion in his cervical and lumbar spine, and found them both to be normal. The doctor concluded that, while the plaintiff presents with persistent subjective complaints, that there are no objective clinical exam findings that correlate with those complaints, and that the exam demonstrates no impairment of neurologic function that would impair the plaintiff's ability to participate in activities of daily living and all usual activities.

Dr. Springer conducted a review of the plaintiff's MRI films on his cervical spine and right knee, both dated July 21, 2015, thirteen days after the date of the accident, and of the MRI film on his lumbar spine, dated August 9, 2015, one month and one day after the date of the accident, and issued affirmed reports in which he found that neither the cervical nor lumbar spine had any fractures or subluxation, and that the right knee also had no fractures or dislocations. Dr. Springer found the MRI on the plaintiff's cervical spine to reveal degenerative changes and disc desiccation, neither of which could have occurred as a result of the accident. Dr. Springer found the MRI on the plaintiff's right knee to reveal degenerative changes, a chronic tear of the posterior horn of the medial meniscus, and a bone cyst, none of which could have occurred as a result of the accident. Dr. Springer found the MRI on the plaintiff's lumbar spine to reveal degenerative changes and disc desiccation, neither of which could have occurred as a result of

the accident. The doctor concluded that there were no posttraumatic changes in the plaintiff's cervical and lumbar spine or the plaintiff's right knee causally related to the accident.

At his deposition the plaintiff testified that he was driven home from the scene of the accident by a friend. The plaintiff underwent surgery to his right knee on January 14, 2016. At the time of his deposition, taken April 19, 2018, the plaintiff did not have any future medical appointments for his alleged injuries. The plaintiff also stated at his deposition that he has been retired since March 13, 1993, including on the date of the accident.

In opposition to the motion, the Court finds that the plaintiff has raised triable issues of fact with respect to the permanent consequential limitation of use of a body organ or member, and significant limitation of use of a body function or system categories, as defined by the Insurance Law, by submitting the plaintiff's deposition testimony as well as the affirmations of East Flatbush Medical P.C., a medical clinic, Dr. Bradley Wasserman, an orthopedic surgeon, Dr. Leon Reyfman, a pain medicine specialist, and Dr. Howard Baum, an orthopedic surgeon.

At his deposition the plaintiff testified about the injuries he sustained as a result of the accident with the defendant and stated that he still suffered from the effects of these injuries. The plaintiff testified that, after the accident, his wife and children help him around the house. He stated that he has been using a cane since the time of the accident, and that Dr. Wasserman prescribed him the cane. As to the accident itself, the plaintiff testified that, when the front of the defendant's vehicle came into contact with the right-side driver's door of his vehicle, that his right ankle slipped between the brake and accelerator and that he injured his knees. He stated that he had never before in his life injured any parts of his body that he injured in this accident, and that he never reinjured any of those same parts in any subsequent accident. The plaintiff testified that, as a result, he went to physical therapy at East Flatbush Medical P.C. the day after

the accident, complaining of pain to his neck, back, and both knees, and that he was treated there four times a week for about a year, stopping treatment there because his insurance ran out. The plaintiff testified that Dr. Wasserman was the surgeon who operated on his right knee, and that he did so because he found that the plaintiff had a tear there. He also testified to having received back injections four times because his back was locking up. The plaintiff further testified that he can no longer play music in the band that he used to play with every other week because he can no longer sit for long periods of time, that he can no longer shovel snow or change the brake pads in his car, that his sex life with his wife has been affected, and that he used to walk and run but that he can no longer do so because it hurts to. The plaintiff testified that he has pain regularly, that the doctors at East Flatbush Medical P.C. gave him neck and back braces, in addition to the cane Dr. Wasserman gave him, and that he moves at about 45 percent of his capacity. He testified that if he walks up steps, while his knee may be fine one minute, it will give way the next, which is why he uses his cane. The plaintiff testified that he was confined to his bed for six weeks following the accident.

Examining physicians at East Flatbush Medical P.C., using an AMA-approved inclinometer, found, unlike Dr. Ferriter or Dr. Cohen, restrictions to the plaintiff's ranges of motion. The plaintiff first went to the office of East Flatbush Medical P.C. on July 10, 2015, where he was examined and it was found that the range of motion of his cervical spine was moderately decreased and palpation of the neck revealed moderate tenderness at C4-C5 levels, that the range of motion of his lumbar spine was moderately decreased and that there was moderate tenderness at L4-L5 levels, and that the plaintiff also had decreased ranges of motion of both knees and his right ankle. The plaintiff had a second examination at the office of East Flatbush Medical P.C. on October 10, 2015, where it was again found that the plaintiff's ranges

of motion of the cervical and lumbar spine, as well as of both knees, had all decreased. The plaintiff had a third examination at the office of East Flatbush Medical P.C. on January 27, 2016 where it was once more found that plaintiff's ranges of motion of the cervical and lumbar spine, and of the right knee, had all decreased. The plaintiff had a fourth examination at the office of East Flatbush Medical P.C. on September 9, 2016 where it was found that he had decreased range of motion of the right knee, and thereafter he was discharged that same day from physical therapy because he had reached maximum medical improvement.

Dr. Wasserman performed the surgery on the plaintiff's right knee. Dr. Wasserman had first examined the plaintiff on September 2, 2015 after the plaintiff complained of persistent problems with his right knee and right ankle, and after conducting range of motion testing on the plaintiff's right and left knee and right ankle, found that they were all somewhat limited. Dr. Wasserman ordered MRI films of the plaintiff's knees, and unlike Dr. Springer, found, on December 30, 2015, that they showed a right knee cartilage injury, of the femoral trochela, cyst and internal derangement. After the right knee surgery, the plaintiff had several follow-up visits with Dr. Wasserman, with the doctor concluding, during the last of these visits on August 17, 2016, that the plaintiff's range of motion of the right knee was limited to 135 degrees, but that the plaintiff had reached maximum medical benefits with respect to his treatment for his bilateral knees, and he was discharged from treatment and directed to return on an as needed basis. In his attached affirmation, dated September 26, 2019, Dr. Wasserman, unlike Dr. Ferriter, Dr. Cohen, and Dr. Springer, concludes with a reasonable degree of medical certainty that, based on the plaintiff's accident and treatment history, and the fact that the plaintiff denies having had pain to his bilateral knees prior to the accident with the defendant, that the accident is causally related to the plaintiff's bilateral knee injuries.

Dr. Reyfman performed interlaminar steroid injections on the plaintiff's cervical spine on September 16, 2015 and on the plaintiff's lumbar spine on October 7, 2015. After examining the plaintiff, Dr. Reyfman found that the plaintiff had cervical disc displacement and lumbar disc displacement. Based on the plaintiff's medical and accident history, and that there were no pre-existing conditions related to these injuries, Dr. Reyfman, unlike Dr. Ferriter, Dr. Cohen, and Dr. Springer, concluded that there was a direct causal relationship between the accident and the plaintiff's injuries, and that the plaintiff's symptoms and clinical findings were consistent with those musculoskeletal injuries.

Dr. Baum conducted an examination of the ranges of motion of the plaintiff's cervical and lumbar spine, right and left knee, and left and right ankle on June 29, 2019. Dr. Baum was familiar with the plaintiff's medical, accident, and treatment history, and was provided with the plaintiff's medical records. Using a goniometer, Dr. Baum, unlike Dr. Ferriter and Dr. Cohen when they conducted the same test on these same body parts, found that the ranges of motion of the plaintiff's cervical and lumbar spine, right and left knee, and left and right ankle had been restricted and do not present in the normal ranges compared to normal values obtained from the AMA guidelines. Dr. Baum's assessment upon completion of his examination of the plaintiff and review of the plaintiff's medical records was that the plaintiff had cervical and lumbar radiculopathy with herniated discs at levels L1-L2, L4-L5, and L5-S1, a left knee sprain, s/p right knee arthroscopy with chondral injury, and a bilateral ankle sprain. Dr. Baum further found that the plaintiff has residual patellofemoral chondromalacia to the right knee, some chondromalacia to the left knee, some sinus tarsi edema and pain, some anterolateral pain to the left ankle with some restricted motion with positive nerve tests, and also some left quad atrophy about 2 cm where the plaintiff did not fully improve and recover from his knee injury. The

doctor, based on the plaintiff having no history of pain prior to accident with the defendant, concluded that these injuries appear to be causally related to that accident. The doctor estimated that the plaintiff will likely require future treatments over the course of his lifetime, including epidurals and potentially even neck or back surgery, potentially necessary operative intervention on his right knee in the form of repeat arthroscopies, as well as Cortisone injections, viscoelastic supplementation and even the possible need for a knee replacement due to the chondral injuries and the potential for developing posttraumatic arthritis over the course of his lifetime. At the conclusion of his submitted affirmation, Dr. Baum reiterated that the plaintiff's restricted ranges of motion and injuries to his neck, low back, and knees are causally related to the accident.

This Court finds that the plaintiff has successfully raised triable issues of fact on two of the categories of "serious injury" he alleges under the Insurance Law. As such, the defendant's motion seeking summary judgment and dismissal of the complaint based upon his contention that the plaintiff has not sustained a permanent consequential limitation of a body organ or member, or a significant limitation of use of a body function or system as defined by the Insurance Law is denied.

With respect to the 90 out of 180 category of the Insurance Law, the Court finds that the defendant failed to make a *prima facie* showing that the plaintiff did not sustain a "serious injury" as a result of being incapacitated for 90 out of the first 180 days following the accident. Although the plaintiff testified at his deposition that he was bedridden for only six weeks after the accident, he also testified that after the accident he could not perform substantially all of the material acts which constituted his usual and customary daily activities prior to the accident. As he was retired, these included not being able to play in his band, not being able to do household chores, and not being able to walk or run, among other limitations. As such, the portion of the

defendant's motion seeking dismissal of the plaintiff's claim that he sustained a "serious injury" as a result of being incapacitated for 90 out of the first 180 days following the accident is denied, regardless of the sufficiency of the opposing papers. Alvarez v. Prospect Hosp., 68 N.Y.2d 320 (1986).

With respect to the permanent and total loss category of the Insurance Law, the Court finds that the plaintiff has failed to raise a triable issue of fact. The defendant made a *prima facie* showing by offering the affidavits of Dr. Ferriter, Dr. Cohen, and Dr. Springer, all of whom found no permanent and total loss of a body organ, member, function or system of the plaintiff, as well as the plaintiff's deposition, in which the plaintiff never testified to having sustained any permanent and total loss. In opposition, the plaintiff failed to address this contention, let alone raise a question of fact. As such, the portion of the defendant's motion seeking dismissal of the plaintiff's claim that he suffered a permanent and total loss as a result of the accident is granted.

This constitutes the Decision and Order of the Court.

Dated: April 21, 2020



Hon. Edgar G. Walker, J.S.C.