

Rosenberg v Desir
2020 NY Slip Op 32523(U)
July 31, 2020
Supreme Court, Kings County
Docket Number: 507419/2018
Judge: Lillian Wan
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 17

Index No.: 507419/2018
Motion Date: 7-22-20
Motion Seq.: 04
Mot. Cal. No.: 16

-----X
NATHAN ROSENBERG AND GITTY
ROSENBERG,

Plaintiffs,

DECISION AND ORDER

- against -

WOODLEY DESIR and ANDRAY WHARTON,

Defendants.

-----X
The following e-filed documents, listed by NYSCEF document number (Motion 04) 52-78
were read on this motion for summary judgment.

The defendants, Woodley Desir and Andray Wharton, seek an order granting summary judgment pursuant to CPLR §3212, on the grounds that the injuries sustained by the plaintiff, Nathan Rosenberg, as a result of a motor vehicle accident fail to meet the “serious injury” threshold of Insurance Law § 5102(d). For the reasons set forth below, the defendants’ motion is denied.

The plaintiff’s injuries arise out of a motor vehicle accident that occurred on April 30, 2015, when the vehicle driven by defendant, Woodley Desir, rear ended the plaintiff’s vehicle while he was stopped at a red traffic light. Plaintiff claims that as a result of the accident he sustained permanent injuries, including herniated discs at C6-7, L2-3 and L5-S1. Further injuries include decreased range of motion, strength and sensation on the neck, back, right and left upper extremities and the left lower extremity. Plaintiff claims that his injuries prevented him from performing substantially all of the material acts which constitute his usual and customary daily activities for more than 90 days during the 180 days immediately following the accident, as defined by Insurance Law §5012(d)(9)(a).

Defendants argue that they are entitled to summary judgment because injuries sustained by the plaintiff in the subject accident are the result of aggravation and/or exacerbation of previous injuries he sustained in 2011 and 2012. In May, 2011, approximately four years prior to the subject accident, plaintiff underwent back surgery, a laminotomy and discectomy at L5-S1 after lifting a heavy object. Approximately two months later he returned to work full-time. In 2012, the plaintiff was involved in an accident when struck by a vehicle while he was riding a bicycle. He lost consciousness, and had complaints of facial and neck pain and tenderness. The defendants also assert that the plaintiff’s injuries are degenerative in nature, and that the plaintiff does not exhibit new complaints as a result of the subject accident.

In support of their motion the defendants rely on the pleadings, plaintiff's deposition testimony, medical records from the previous injuries and the report of the defendants' examining physician, Dr. Nicholas Post, a board certified neurologist.

Plaintiff's opposition includes a detailed analysis of the plaintiff's injuries, along with medical and physical therapy records and the affirmed report of their medical expert, Dr. Christopher Kyriakedes, who examined the plaintiff and recorded his findings concerning the plaintiff's physical limitations. There is no dispute that plaintiff underwent a laminotomy and discectomy at L5-S1 in 2011. Following the bicycle accident in 2012, the plaintiff had oral surgery to repair his facial features, which has nothing to do with the injuries alleged in the subject accident.

Approximately two weeks after the accident the plaintiff was examined by Dr. Irving Friedman, a board certified neurologist. Dr. Friedman's report noted the plaintiff's past medical history and that the plaintiff had fully recovered prior to the instant accident. The report also states that the "above multiple deficits are directly and causally related to the injuries sustained on April 30, 2015." An MRI of the cervical spine was done and revealed that there was a disc herniation at the C6-7 level.

Shortly thereafter, the plaintiff was examined by Dr. Alan Dayan for an orthopedic evaluation. Dr. Dayan's report notes that the plaintiff had fully healed and had no symptoms to the lower back prior to this accident. He found that the plaintiff had decreased range of motion, headaches, nausea dizziness, tingling and numbness in the lower extremities with spasms and neck and back sprain. Dr. Dayan ordered a course of physical therapy for range of motion and strengthening exercises. The plaintiff attended physical therapy and subsequent examinations revealed decreased range of motion of the right ankle, and cervical and lumbar spine. The plaintiff was directed to attend physical therapy three times weekly for three months. He attended physical therapy for four months. The records show that ultimately, the plaintiff required at least two lumbosacral epidural injections.

The plaintiff presented additional medical reports and the findings of diagnostic tests that were done during the period that he was receiving physical therapy and thereafter, which unequivocally show that his injuries were painful, debilitating and interfered with his ability to carry out his usual and customary daily activities for at least 90 of the 180 days following the accident. It appears that in the four years between his previous accidents and the current accident the plaintiff was able to carry out those activities without limitation. The plaintiff points out that even the report of the defendants' examining physician, Dr. Nicholas Post, a board certified neurologist, which was relied upon by the defendants in support of their motion, revealed limited range of motion.

The affirmed narrative evaluation of the plaintiff's examining physician, Dr. Christopher Kyriakides, which included a summary of the findings contained in the plaintiff's medical treatment records and diagnostic testing reports since the accident, recorded a quantitative measurement of the degree of plaintiff's injury. Dr. Kyriakides reported that the plaintiff's neurologic deficits were "quite pronounce[d] [sic]." The report also noted that the plaintiff had

no complaints of back and neck pain and no doctor visits for his prior injuries after 2012 until the instant accident. In fact, Dr. Kyriakides reported that the plaintiff was in “excellent health” after his previous accidents, and remained in that condition up until the time of the accident in 2015.

The plaintiff also relies on the deposition testimony of both the plaintiff and his spouse, which detail the diminution in the plaintiff’s activity level after the subject accident. According to his deposition testimony, the plaintiff has worked for a property management company for the past 20 years. He testified that he works regular hours, five days a week, and that his duties include visiting the buildings managed by his employer and responding to emergency situations as they arise. He testified that approximately fifty percent of the time he sits at a desk while at work. Plaintiff also testified that he missed “a couple of weeks” of work after the accident.

Based on the foregoing, the defendants’ motion must be denied since they failed to meet their *prima facie* burden of showing that the plaintiff did not sustain a serious injury under the 90/180-day category of Insurance Law § 5102(d). *See Toure v Avis Rent A Car Sys.*, 98 NY2d 345 (2002); *McEachin v City of New York*, 137 AD3d 753 (2d Dept 2016). The papers submitted by the defendants failed to adequately address plaintiff’s claim, as set forth in the bill of particulars, that he sustained a serious injury under this category of serious injury. *See Che Hong Kim v Kossoff*, 90 AD3d 969 (2d Dept 2011). Significantly, the medical report of Dr. Nicholas Post, the defendants’ own examining physician, conducted more than three years after the accident, established that the plaintiff continued to have limited range of motion.

Even assuming *arguendo* that the defendants did make a *prima facie* showing that the plaintiff did not sustain a serious injury pursuant to the 90/180 category, the affirmed narrative evaluation of Dr. Kyriakides, the plaintiff’s examining doctor and medical expert, quantified the limitation of motion using objective findings, including straight leg raising, which case law has consistently treated as objective evidence of serious injury. *See O’Dol v Malley*, 245 AD2d 436 (2d Dept 1997). Dr. Kyriakides’ affirmation was sufficient to raise a triable issue of fact as to whether the plaintiff suffered a serious injury. *See Risbrook v Coronamos Cab Corp.*, 244 AD2d 397 (2d Dept 1997). After conducting various objective testing, Dr. Kyriakides found that “the patient has sustained a loss of use of the cervical and lumbosacral spine of more than 70% and has a 30% loss of use of the left ankle.” According to the report the plaintiff continues to suffer from severe headaches on a constant basis, and objective testing revealed left ankle derangement and decreased range of motion of the right upper extremity. Before Dr. Kyriakides’ examination, neurological diagnostic testing revealed that the plaintiff suffered from neuropathy of the left lower extremity. The limitations were still present more than five years after the accident, when Dr. Kyriakides examined the plaintiff. Notably, the plaintiff had no prior cervical spine, left ankle or right upper extremity injuries as a result of the accidents in 2011 and 2012.

Therefore, Dr. Kyriakides’ affirmation, the plaintiff’s medical and physical therapy records following the accident, and the findings of defendants’ medical expert, Dr. Nicholas Post, amply address the plaintiff’s medical condition during the 90/180-day period, and create a question of fact as to whether he suffered a serious injury under the 90/180-day category. Likewise, the deposition testimony of both plaintiffs detail the limitations of the plaintiff’s usual

and customary activities after the accident caused by his injuries, including difficulty picking up his newborn baby and interacting with his three children.

Accordingly, the defendants' motion for summary judgment is DENIED.

Dated: July 31, 2020



HON. LILLIAN WAN, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020.