

Torres v Benhamo

2020 NY Slip Op 33449(U)

October 16, 2020

Supreme Court, Kings County

Docket Number: 502021/2019

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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ANTHONY TORRES,

Plaintiff,

Decision and Order

-against-

Index No. 502021/2019

MIRIAM BENHAMO, AVRAHAM
BENHAMO and GILBERTO ORTIZ,

Defendant.
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Defendants Avraham Benhamo and Miriam Benhamo’s motion for summary judgment, and co-defendant Gilberto Ortiz’s motion for summary judgment, seeking dismissal of the plaintiff’s action based upon their contentions that the plaintiff fails to satisfy the threshold for serious injury pursuant to the Insurance Law, are denied..

The defendants’ motions both rely upon the same proof. In support of the motions, the defendants offer the affirmed report of an orthopedist, Dr. Jeffrey Passick. In the report from his physical examination of the plaintiff, Dr. Passick noted that, upon conducting range of motion tests, he found a 33% reduction in the plaintiff’s lumbar flexion when compared to normal. Although the defendants offer the MRI reports from the exams conducted of the plaintiff’s cervical spine, lumbar spine and right elbow, the only comment that Dr. Passick makes regarding these tests, or the findings therein, is an equivocal remark wherein he acknowledges that the plaintiff has a herniated disc at the L4-5 level but, while not determining that it was not caused by the accident, opines that it “could be” the result of degeneration. Despite repeating the findings from the MRIs in the list of documents that he reviewed, his report is otherwise silent regarding the findings of multiple herniated discs in the plaintiff’s cervical and lumbar spine or about the tear of the common flexor tendon in the plaintiff’s right elbow, and he offers no

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opinion regarding the cause of these injuries. Dr. Passick's diagnosis is that the plaintiff sustained strains to his cervical spine, lumbar spine and right elbow, all of which are resolved, and he opines that the "[t]here is no disability or permanency as it relates to the accident of 08/28/18," but aside from conclusorily stating that the plaintiff's "[r]ange of motion limitation is voluntary," he offers no other comment or opinion regarding the plaintiff's loss of range of motion in his lumbar spine and offers no opinion regarding causation.

With regard to the branch of the defendant's motion seeking dismissal of the plaintiff's claim that he satisfies the 90/180 category, the defendants point to portions of the plaintiff's deposition transcript about his ownership of an antique shop, and suggest that his finances caused the closure of the shop, as opposed to his injuries, but a review of the actual transcript raises questions of fact about that assertion.

Q. When did you last work with the antique shop?

A. I would say it's -- it was probably, probably about a year or so, about a year, year and a half was the last time that we basically stopped. I just couldn't continue with the shop.

Q. With the antique shop, you stated that it closed down approximately a year ago, correct?

A. Yes.

Q. What was the reason that it was closed up?

A. I couldn't keep up with the shop. It was too much involved with it, physical wise.

The deposition of the plaintiff was conducted on December 3, 2019, approximately a year and four months after the plaintiff's accident, which, based upon the plaintiff's testimony, means that his shop closed shortly after the within accident occurred, thus raising an additional question

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of fact regarding his 90/180 claim. The defendants also argue that because the plaintiff's bill of particulars states that he is not seeking lost earnings, that proves that he does not satisfy the 90/180 rule. Aside from the fact that the 90/180 rules speaks to an inability to do the things that make up your daily life, not your earnings, the plaintiff's deposition testimony also belies the defendants' contention that he is not making a lost wage claim.

Q. Do you claim that you lost income as a result of the injuries that you claim from this accident?

A. I actually did, yes.

Finally, the defendants argue that "[n]one of the plaintiff's treating physicians provided the plaintiff with any disability notes or noted in their reports where they ever directed Plaintiff to refrain from engaging in his work at the antiques shop or performing other normal activities of his daily living during the first six (6) months following the accident at issue herein." However, as the defendants fail to annex the records from the plaintiff's treating physicians, it's impossible for the Court to ascertain the accuracy of the defendants' contention.

Based upon the foregoing, the Court finds that the defendants have failed to establish *prima facie* entitlement to judgment as to whether the plaintiff sustained a permanent consequential limitation of use of a body organ or member, a 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. In the absence of a *prima facie* showing by the defendant, the motion must be denied regardless of the sufficiency of the opposition. Alvarez v. Prospect Hospital, 68 NY2d 320. Even if the defendants had made a *prima facie* showing, plaintiff's papers in opposition are sufficient to

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raise an issue of fact as to these categories.

This constitutes the decision and order of the court.

ENTER,



J. S. C.

HON. EDGAR G. WALKER

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Dated: October 16, 2020

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