Diaz v Diaz
2020 NY Slip Op 33544(U)
September 2, 2020
Supreme Court, Bronx County
Docket Number: 24093/2018E
Judge: Veronica G. Hummel
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IAS PART 31

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RADHAMES DIAZ,

Plaintiff,

-against -

AUEMDU DIAZ and BOOMEF MANAGEMENT CORP.,

Defendants.

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Index No. 24093/2018E
DECISION/ORDER
Motion Seq. 3

VERONICA G. HUMMEL, A.S.C.J.

In accordance with CPLR 2219 (a), the decision herein is made upon consideration of all papers filed by the parties in NYSCEF [Mot. Seq. 3], in support of and in opposition to the motion of defendants AUEMDU DIAZ and BOOMEF MANAGEMENT CORP. (defendants), made pursuant to CPLR 3212, for an order dismissing the complaint on the ground that plaintiff RADHAMES DIAZ (plaintiff) has not sustained a serious injury as defined by Insurance Law 5102(d).

This action arises out of a motor vehicle accident that allegedly occurred on December 11, 2017. At the time of the accident, plaintiff was working as a Fresh Direct delivery driver. The action was commenced on May 3, 2018, and defendants filed an answer. On May 8, 2020, plaintiff's motion [Mot. Seq. 2] for summary judgment on the issue of defendants' liability was granted. [NYSCEF No. 55].

Defendants now move for summary judgment dismissing the complaint as against plaintiff on the ground that, as a matter of law, plaintiff has not demonstrated, by competent medical evidence, that he sustained a serious injury, as defined in Insurance Law 5102. In support of their respective positions on the motion for summary judgment, the parties have submitted copies of the pleadings, the bills of particular, deposition transcripts, police report, attorney affirmations, medical records, and medical expert reports and affirmations. Defendants elected to not submit reply papers.

Defendants submit the IME report of Dr. John Buckner, an orthopaedic surgeon, dated June 17, 2019 (18 months post-accident). Plaintiff reported neck, back, right shoulder, left knee pain, and some numbness in his leg.Buckner reviewed the Bill of Particulars, police accident report, the initial physiatry evaluation by Dr. Anam Azeem (12/21/17), an Initial Exam Report by Physical Therapist Anjanette Garciano Zozobraddo at Citi Medical (12/22/17), and page one of a two-page interpretation of three MRIs (cervical spine, lumbar spine, and left knee), all dated January 2, 2018. Buckner states that plaintiff reported no previous injuries.

Buckner opines that the examination of plaintiff's spine, elbows, wrists, hands, legs and hips, and knees were normal. His diagnosis of plaintiff's complaints was "resolved" sprains of the left knee, cervical spine, and lumbar spine. He concluded that, based on the history presented, this diagnosis was causally related to the Accident. His diagnostic impressions were that there was no objective evidence of: cervical spinal injury; lumbar spine injury; right shoulder injury; or left knee injury. He found nicotinism, per the medical records, pre-existing, unrelated as the cause of any chronic, nonspecific back pain. His impression was that there was work-related low back pain, cited in the medical records, "pre-existing, unrelated-without documentation". He found plaintiff was not disabled, could work, and could carry out regular daily activities. Treatment to date was reasonable and necessary but no longer medically necessary. He opined that there was no permanency as the result of the accident.

Defendants also submit the IME report of Darren Fitzpatrick, a radiologist. He reviewed the right shoulder MRI performed on April 13, 2018 (the Right Shoulder MRI), approximately four months after the accident. His impression was a "complex tear of the inferior labrum". He concluded, in sum and substance, that the tears were the result of persistent continued stress, degenerative, and not the result of a traumatic event.

In opposition, plaintiff submits the affirmed report of Dr. Samuel Arce, plaintiff's treating physician. Plaintiff began treating with Arce on April 4, 2018, and his last exam of plaintiff was on March 11, 2020. Arce offers his opinion with regards to plaintiff's left knee and cervical spine.

The initial examination in April 2018, revealed loss of extension in the knee of 22% and in the cervical spine between 33%-55%. The five cervical tests produced positive results. Based on these findings, Arce diagnosed an internal derangement of the left knee and cervical disc trauma. He reviewed the MRIs of the left knee and cervical spine. He found that plaintiff sustained a complete tear of the posterior horn of the left medical meniscus and a herniated disc at level C5/6 with nerve root impingement. He provided non-surgical treatments until July 2019.

On April 23, 2018, plaintiff was treated by orthopedic surgeon Dr. Steven Struhl for his left knee pain. Struhl's orthopedic findings confirmed a tear and left knee and an arthroscopy was performed.

Arce continued to perform range of motion testing with a goniometer on plaintiff at five follow-up visits in 2018, 2019, and 2020. All five examinations showed loss of flexion and extension in the left knee and cervical spine. The final examination in March 2020 showed a

loss of 19% flexion to the left knee, and 25%-33% loss of flexion, extension and rotation to the cervical spine.

In his findings, Arce disagrees with the conclusion of Buckner and Fitzpatrick. He opines that there is no evidence of relevant degeneration or preexisting conditions. He notes that defendants' doctors do not comment on plaintiff's disability period. Arce opines with a reasonable degree of medical certainty that plaintiff's injuries to his left knee and cervical spine are casually related to the Accident. Based on the March, 2020 examination, he opines that these injuries are permanent and when compared to normal ranges of motion, present significant ranged restriction and are not minor in nature. Lastly, he states that "although [plaintiff] returned to work as a taxi driver approximately two months post-accident, he could not continue in that capacity and I found him to be totally medically disabled from work and daily activities from my initial consultation on April 4, 2018 until July 6, 2018".

Plaintiff also submits the report of Dr. Jeffrey Cohen, a specialist in rehabilitation medicine, dated April 11, 2019 (one-year post-knee surgery). He states plaintiff appeared to him complaining, in sum and substance, of left knee pain, right shoulder pain, neck pain and lower back pain. Cohen notes that plaintiff has a "history of lower back injury sustained at work in 2016 from which [plaintiff] fully recovered".

Using a goniometer, Cohen found decreased range of motion in the cervical spine, lumbar spine, and right shoulder (positive results on Neer and Hawkins impingement tests). As to the left knee, he found well-healed arthroscopy scars, tenderness and pain on various stress levels. His impressions were, in essence: left knee medial meniscal tear and joint effusion; right shoulder tearing and tendinosis with thickening and inflammation; left C5-C6 radiculopathy with herniation with diffuse disc bulge impinging on the bitleral C7 ventral nerve roots and C6 existing nerve root; left L5-S-1 lumbar radiculopathy and aggravation of the L5-S1 diffuse disc budge with hernation impinging on the bilateral S1 traversing nerve roots and left L5 exiting nerve root; and aggravation of mild diffuse disc bulge at L-4-L5.

Cohen opines that there is a direct and causal relationship between plaintiff's present complaints and the Accident. In light of plaintiff's complaints concerning pain in the left knee, right shoulder, neck, and lower back, Cohen finds him to be permanently partially disabled with a prognosis of further recovery of poor.

On a motion for summary judgment it is the obligation of the court to determine whether or not there are issues of fact that militate against granting that relief to either plaintiff or defendant. It is not the court's function on a motion for summary judgment to assess credibility (*Varela v Rohif*, 176 AD3d 651 [1st Dept 2019]; *Rawls v Simon*, 157 AD3d 418 [1st Dept 2018]). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v Ceppos*, 46 NY2d 223 [1978]) The

burden on the movant is a heavy one, and the facts must be viewed in the light most favorable to the non-moving party (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824 [2014].).

Applying these governing legal principles here, the court finds that defendants met the *prima facie* burden of showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law 5102(d) as a result of the subject accident by submitting the medical findings and the opinions of the experts (*Perl v Meher*, 18 NY3d 208 [2011]; *Toure v Avis Rent A Car, Inc.*, 98 NY2d 345 [2002]; *DeJesus v Pauino*, 61 AD3d 605 [1st Dept 2009]).

In opposition, plaintiff raises an issue of fact as to his claimed injuries through the medical expert affirmations and submitted medical records. Plaintiff's medical experts made objective findings of injuries to left knee, right shoulder, neck and lower back based on examination and a personal review of objective tests performed, and the experts opined that plaintiff's condition was directly related to the Accident, and not the result of a pre-existing condition (s*ee, Hayes v Gaceur,* 162 AD3d 437 [1st Dept 2018];*Morales v Cabral*, 177 AD3d 556 [1st Dept 2019]). In addition, plaintiff's testimony, medical evidence, and expert opinions generate triable questions of fact as to plaintiff's 90/180-day claim (*See Pannell-Thomas v Bath*, 99 AD3d 485 [1st Dept 2012]; *Willams v Tatham,* 92 AD3d 472 [1st Dept 2012]). Hence, plaintiff submits competent medical expert evidence that generates triable issue of facts as to the same relevant serious injury issues addressed by defendants (*Pantojas v Lajara Auto Corp.*, 117 AD3d 577 [1st Dept 2014]; *see Mulhern v Gregory,* 161 AD3d 881 [2d Dept 2018]).To the extent that the experts conflict in their opinions, conflicting expert opinions may not be resolved on a motion for summary judgment (*see Dacosta v Gibbs,* 139 AD3d 487 [1st Dept 2016];*Pantojas v Lajara Auto Corp.*, *supra*; *Honsby v Cathedral Parkway Apartments Corp.*, 179 AD3d 584 [1st Dept 2020]). As such, defendants' motion for summary judgment dismissing the complaint is denied.

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the court, it is hereby denied. Accordingly, it is hereby

ORDERED that the motion of defendants AUEMDU DIAZ and BOOMEF MANAGEMENT CORP. (defendants) [Mot. Seq. 3], made pursuant to CPLR 3212, for an order dismissing the complaint on the ground that plaintiff RADHAMES DIAZ (plaintiff) has not sustained a serious injury as defined by Insurance Law 5102(d) is denied.

The parties are reminded that this action is scheduled for a pre-trial conference on November 25, 2020.

The foregoing constitutes the decision and order of the court.

Dated: September 2, 2020

ENTER,

Hon. Veronica G. Hummel

Hon. Veronica G. Hummel, A.J.S.C.