

Delacruz v Raines

2020 NY Slip Op 33667(U)

October 30, 2020

Supreme Court, New York County

Docket Number: 161232/2017

Judge: Frank P. Nervo

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART IV

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ROY DELAZRUZ,

Plaintiff,

-against-

RICHARD C. RAINES, MTA BUS COMPANY, THE
CITY OF NEW YORK and NEW YORK CITY
TRANSIT AUTHORITY,

Defendants.

-----X

FRANK P. NERVO, J.S.C.

DECISION AND ORDER

Index Number

161232/2017

Defendant MTA Bus Company (hereinafter "MTA" or "MTA Bus" moves for summary judgment contending that plaintiff has failed to establish he suffered a serious injury as required by Insurance Law § 5102(d). Plaintiff opposes, contending that he has sufficient proof to raise a triable issue of fact as to whether his injuries constitute a serious injury.

As relevant to this motion, plaintiff was involved in a motor vehicle accident on May 10, 2017. Plaintiff's vehicle collided with an MTA Bus on 3rd Avenue's intersection with East 122nd street in Manhattan. Plaintiff alleges he suffered soft tissue injuries to his spine, left knee, and left shoulder.

Summary Judgment

On a motion for summary judgment, the burden rests with the moving party to make a prima facie showing they are entitled to judgment as a matter of law and demonstrate the absence of any material issues of fact (*Friends of Tháyer lake, LLC v. Brown*, 27 NY3d 1039 [2016]). Once met, the burden shifts to the opposing party to

submit admissible evidence to create a question of fact requiring trial (*Kershaw v. Hospital for Special Surgery*, 114 AD3d 75 [1st Dept 2013]). “Where a defendant moves for summary judgment and establishes a prima facie entitlement to such relief as a matter of law, the burden shifts to the plaintiff to raise a triable issue of fact” (*Kesselman v. Lever House Rest.*, 29 AD3d 302 [1st Dept 2006]). However, a “feigned issue of fact” will not defeat summary judgment (*Red Zone LLC v. Cadwalader, Wickersham & Taft LLP*, 27 NY3d 1048 [2016]). A failure to make a prima facie showing requires the Court to deny the motion, regardless of the sufficiency of opposing papers (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]; see also *JMD Holding Corp. v. Congress Financial Corp.*, 4 NY3d 373 [2005]).

A person injured in an automobile accident must establish that he or she has sustained a “serious injury” within the meaning of Insurance Law § 5102(d) in order to recover. No cause of action lies where an injured person fails to establish a serious injury (*Licari v. Elliott*, 57 NY2d 230 [1982]). Insurance Law § 5102(d) defines serious injury as:

a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; 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 ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

Thus, as relevant to this motion, a defendant moving for summary judgment against a plaintiff injured in an automobile accident must demonstrate the evidence does not support a finding that the plaintiff has suffered a serious injury in any of the categories contemplated by Insurance Law § 5102(d). “Although the question of whether a plaintiff has suffered a serious injury is usually a question of fact for the jury, it is for the court in the first instance, ‘to determine whether the plaintiff has established a prima facie case of sustaining serious injury’” (*Caruso v. Hall*, 101 AD2d 967 [3d Dept 1984] *aff’d* 64 NY2d 843[1985] quoting *Licari v. Elliott*, 57 NY2d at 237)

Here, as the plaintiff has alleged a serious injury under six categories of Insurance law § 5102(d), the Court will separately address each, in turn (*see* NYSCEF Doc. Nos. 1, 29, 32, and 33).¹

I. Significant Disfigurement

An injury results in significant disfigurement if a reasonable person would view the alteration to one’s physical appearance as “unattractive, objectionable, or... the subject of pity and scorn” (*Abdulai v. Roy*, 232 AD2d 229 [1st Dept 1996]) quoting *Caruso v. Hall*, 101 AD2d at 968). Where a defendant has met their prima facie burden establishing a plaintiff has not suffered significant disfigurement, a plaintiff may, nevertheless, establish a triable issue of fact exists sufficient to defeat a defendant’s summary judgment motion as to a claim of significant disfigurement through affidavits of medical professionals and photographs of the alleged disfigurement (*see Feutcher v.*

¹ As plaintiff’s claims of permanent consequential limitation of use of a body organ or member is closely related to his claims of a significant limitation of use of a body function or system, the Court has addressed both claims under subheading IV. Consequently, this decision and order addresses plaintiff’s six claims of serious injury in five subheadings.

Composite Transit, 171 Ad3d 647 [1st Dept 2019] defendants' submission of their plastic surgeon's affidavit sufficient to meet prima facie burden dismissing significant disfigurement claim rebutted by plaintiff's submission of photographs and plaintiff's plastic surgeon's affidavit raising triable issue of fact).

Here, MTA claims no evidence of a significant disfigurement has been proffered by plaintiff. Plaintiff has not addressed disfigurement in his opposition, nor has he submitted any evidence establishing a triable issue of fact. A reasonable jury could not find plaintiff suffered a significant disfigurement based upon a complete lack of evidence of same. Consequently, movant is entitled to summary judgment on this issue and plaintiff's claim of significant disfigurement is dismissed.

II. Fracture

Where a plaintiff has suffered a fracture as a result of a motor vehicle injury, he or she has sustained a serious injury under Insurance Law § 5102(d) and has a valid cause of action (*see generally Fernandez v. City of New York*, 165 AD3d 403 [1st Dept 2018]).

Here, no evidence has been submitted that indicates plaintiff suffered a fracture. Plaintiff's physicians' reports do not reference any fracture (NYSCEF Doc. Nos. 42 and 43), and plaintiff denies fractures (NYSCEF Doc. No. 35 - Plaintiff's EBT p. 101). Consequently, summary judgment in movant's favor is appropriate as to plaintiff's claim of a serious injury due to fracture.

III. Loss of Use of Body Organ, Member, Function, or System

Where a plaintiff claims he or she has suffered a permanent injury due to the loss of use of a bodily organ, the loss of use must be permanent and total (*Oberly v. Bangs*, 96 NY2d 298, 298 [2001]). The Court of Appeals found this position consistent with the legislature's adoption of a separate "limitation of use of body organ" category within the definition of serious injury (*id.*).

Here, no evidence has been proffered showing plaintiff suffered the total loss of a bodily organ, member, function, or system. At plaintiff's examination before trial he denied that he is unable to do any activity (NYSCEF Doc. No. 35 - Plaintiff's EBT p. 112). Stated differently, plaintiff does not claim the accident has precluded his completion of any activity (*id.*). Such claims are insufficient, as a matter of law, to sustain an action for loss of use of a body organ and MTA is awarded summary judgment on this issue.

IV. Limitation of Use of Body Organ, Member, Function, or System

Where a plaintiff claims he or she has suffered a permanent consequential limitation of use of a body organ or member, and/or a significant limitation of use of a body function or system, the plaintiff must demonstrate a limitation preventing their performance of daily activities. Medical evidence of such limitation is required, and may either ascribe a percentage of loss of range of motion or provide detailed qualitative descriptions of the injury² (*Toure v. Avis Rent A Car Systems*, 98 NY2d 345 [2002]). An expert opinion unsupported by an objective basis is speculative and without

² Where an expert's assessment of the plaintiff's condition is qualitative, the evaluation must compare the plaintiff's limitations to the normal function, purpose, and use of the affected body organ, function or system (*Toure v. Avis Rent A Car Systems*, 98 NY2d 345 [2002]).

evidentiary value (*id.*). Likewise, a plaintiff's subjective complaint alone is insufficient (*Gaddy v. Eycler*, 79 NY2d 955 [1992]; *id.*)

Here, plaintiff has submitted the expert opinion of his physician that he has suffered, and continues to suffer from, various limitations to bodily systems including his knee, shoulder, and spine (NYSCEF Doc. Nos. 42 and 43). Plaintiff's expert's opinion provides objective range of motion data upon which it is based and causally relates the limitations to the alleged accident. Defendant MTA contends that plaintiff's expert's opinion is unverified and therefore should not be considered. Defendant MTA further contends that the limitations are minor and do not rise to the level of a significant injury. Contrary to defendant's position, the Appellate Division has found specified range of motion limitations similar to those claimed by plaintiff sufficient to establish serious injuries (*see Bentham v. Rojas*, 48 AD3d 314 [1st Dept 2008]; *c.f. Colon v. Vincent Plumbing & Mechanical Co.*, 85 AD3d 541 [1st Dept 2011]). A triable issue of fact remains as to whether plaintiff has suffered permanent consequential limitation of use of a body organ or member, and/or a significant limitation of use of a body function or system as it relates to his shoulder, knee, and spine. Consequently, summary judgment on this issue is denied.

V. Loss of Customary Daily Activities 90/180 Days

Where a plaintiff establishes he or she has been prevented from "performing *substantially all* of the material acts which constitute [his or her] usual and customary daily activities" for a period of more than 90 days of the first 180 days following the accident, he or she has established a serious injury under Insurance Law § 5102(d)

(*Blake v. Portexit Corp.*, 69 AD3d 426 [1st Dept 2010] emphasis in original). However, the mere failure to work for more than 90 days is not determinative (*id.*; see also *Ortiz v. Ash Leasing, Inc.*, 63 AD3d 556 [1st Dept 2009]).

Here, it is undisputed that plaintiff missed two days of work due to the accident. A plaintiff's 90/180-day claim is properly dismissed where the plaintiff returned to work within the 90-day period (*Correa v. Saifuddin*, 95 AD3d 407 [1st Dept 2012]; see also *Byong Yol Yi v. Caneia*, 70 AD3d 584 [1st Dept 2010]). Consequently, such return supports "a legitimate inference that the plaintiff must have been able to perform at least most of his usual and customary daily activities" (*Correa v. Saifuddin*, 95 AD3d at 409). Thus, plaintiff's 90/180-day claim is dismissed due to his return to work within the same period.

Likewise, and as an alternative basis for dismissing plaintiff's 90/180-day claim, plaintiff's affidavit and deposition claiming he was unable to play sports for a period following the accident, and continues to have difficulty playing sports for lengthy periods, is insufficient to raise a triable issue of fact to defeat summary judgment "because the activities listed therein do not constitute substantially all of his activities," and are not supported by medical evidence (*Blake v. Portexit Corp.*, 69 AD3d at 427; see also *Pinkhasov v. Weaver*, 57 AD3d 334 [1st Dept 2008]). The medical reports submitted by plaintiff do not provide an opinion as to plaintiff's alleged disability in performing his daily tasks or employment (NYSCEF Doc. Nos. 42 and 43). Consequently, plaintiff has not raised a triable issue of fact to avoid summary judgment and the claim must be dismissed (see *Abreu v. Miller*, 181 AD3d 435 [1st Dept 2020]).

Accordingly, it is

ORDERED that defendant MTA Bus Company's motion is granted to the extent of awarding it summary judgment on plaintiff's claims of significant disfigurement, fracture, loss of bodily organ, 90/180-day claim; and it is further

ORDERED that plaintiff's significant disfigurement, fracture, loss of bodily organ, 90/180-day claims are dismissed; and it is further

ORDERED that defendant MTA Bus Company's motion is denied with respect to plaintiff's limitation of use of body organ, member, function, or system claims and such claims shall continue.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: October 30, 2020

Enter:



Hon. Frank P. Nervo, J.S.C.