

Tenecela v Williams
2020 NY Slip Op 34040(U)
November 30, 2020
Supreme Court, Kings County
Docket Number: 519657/2018
Judge: Lillian Wan
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 17

Index No.: 519657/2018
Motion Date: 9/23/20
Motion Seq.: 01 & 03

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JUAN M. SALTO TENECELA,

Plaintiff,

DECISION AND ORDER

-against-

SEDLEY A. WILLIAMS, BERTRAM B. STAPLE
and JARED D. REYNOLDS,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motions 01 and 03) 16-22, 35-37, 50-51, 55 were read on this motion by defendants for summary judgment.

In this action the plaintiff seeks to recover damages for personal injuries arising out of a motor vehicle accident that occurred on May 21, 2018 when plaintiff’s vehicle was struck in the rear by a vehicle operated by defendant Sedley A. Williams (hereinafter Williams). After the initial accident, the plaintiff exited the vehicle but remained in close proximity to it. Another rear-end impact occurred as the plaintiff was reentering the vehicle, causing him to fall to the ground. The second vehicle was operated by defendant Bertram B. Staple and owned by Jared D. Reynolds (hereinafter Staple and Reynolds). Williams seeks an order, pursuant to CPLR § 3212, granting summary judgment on the grounds that the injuries sustained by the plaintiff, Juan M. Salto Tenecela, fail to meet the serious injury threshold of Insurance Law § 5102(d). The defendants, Staple and Reynolds, cross move for summary judgment, pursuant to CPLR § 3212, asserting that plaintiff’s injuries fail to meet the serious injury threshold of Insurance Law § 5102(d). For the reasons set forth below, the motion of defendant Williams and cross-motion of defendants Staple and Reynolds are denied.

According to the bill of particulars the plaintiff’s injuries include, *inter alia*, wedge compression fracture of T11-T12 and “lost” range of motion of the lumbar and thoracic spine. Based on his injuries, the plaintiff received two lumbar epidural steroid injections and one sacroiliac joint injection. The bill of particulars alleges that the plaintiff was unable to work for eight months after the accident.

Defendants Reynolds and Staple adopt and incorporate by reference all arguments contained within defendant Williams’ summary judgment motion. In support of their motion, the defendants submit the pleadings, the plaintiff’s deposition testimony, the affirmed narrative report of Dr. Richard Levitt, a board certified orthopedic surgeon, and the affirmed reports of Dr. Jonathan S. Luchs, a board certified radiologist. Dr. Levitt examined the plaintiff on February 3, 2020. His report indicates that he reviewed the plaintiff’s medical records pertaining to the

accident, including the radiological reports. Those records include the progress notes of Dr. Gary Thomas and Dr. Patrick Johnson, the plaintiff's treating physicians, who performed the lumbar epidural injections and sacroiliac injection with fluoroscopy.

With the use of a goniometer, Dr. Levitt performed range of motion examination of plaintiff's cervical, thoracic and lumbar spine, right and left shoulder and elbows, right and left wrists, right and left knees, right and left hip, right and left ankles and feet, right and left thumbs and the second, third fourth and fifth digits of the right and left hand. The objective findings of Dr. Levitt revealed decreased range of motion of the cervical, thoracic and lumbar spine, decreased range of motion of the right and left elbow (forearm) and left wrist, and decreased range of motion of flexion of the right knee. He performed a host of other medical tests which did not generate any positive findings. Dr. Levitt opined that there were no objective findings on examination, and the report lists a diagnosis of resolved lumber spine sprain. He did not render an opinion as to whether the plaintiff's injuries were causally related to the accident, or whether the plaintiff was capable of functional use of the examined body parts for normal activities of daily living.

The report of Dr. Jonathan S. Luchs, dated March 4, 2020, indicates that he reviewed the MRI and x-rays of the plaintiff's lumbar spine taken at New York Hospital Queens. Upon review of the MRI of the plaintiff's lumbar spine taken on June 3, 2018, he opined that the film showed no evidence of fracture, and that the lumbar spine had chronic and degenerative changes. Dr. Luchs noted the presence of Schmorl nodes in the MRI films. Dr. Luchs further opined that there were no posttraumatic findings evident on the exam, that the findings predate the alleged injury, and that the alleged injuries were not causally related to the accident. Likewise, upon review of the x-rays of the lumbar spine taken on May 21, 2018 and June 3, 2018, Dr. Luchs found no evidence of fracture, and he concluded that the findings were chronic in nature and not secondary to the plaintiff's alleged injury.

The defendants also submit the deposition testimony of the plaintiff, and conclude that his testimony did not establish that he could not perform substantially all of the material acts which constitute his usual and customary activities for 90 of the 180 days immediately following the occurrence. According to the plaintiff's testimony, he was referred for physical therapy by New York Presbyterian Hospital in Flushing, which he attended twice per week. The plaintiff also treated at New York Ortho Sports Medicine and Trauma on two occasions, and as of the date of the deposition on December 10, 2019, he was still receiving physical therapy at a facility in Rego Park that he began sometime that year.

In opposition, the plaintiff submits the August 14, 2020 affirmed report of Dr. Douglas A. Schwartz, who is board certified in physical medicine and rehabilitation, the affirmation of Dr. Schwartz dated September 14, 2020, and the plaintiff's affidavit. The plaintiff also relies on his deposition testimony. Plaintiff argues that the evidence establishes that he was incapacitated from his normal activities for over eight months from the date of the accident, and continues to have physical limitations of his daily activities. According to the plaintiff's affidavit and deposition testimony he was unable to work as a full-time construction flagger for eight months, and relied on his family for financial assistance during that period. Upon his return to work in

January 2019 he remained partially incapacitated, and was restricted to “light duty.” The plaintiff asserts that he was unable to perform his usual and customary duties, and substantially all of the material acts which constitute his daily activities for 90 of the first 180 days following the accident. He testified that he can no longer play soccer or run, and is unable to sit, dance or perform household chores, such as washing laundry and going to the supermarket to buy food.

According to the affirmation of Dr. Schwartz, he reviewed the plaintiff’s prior medical records, including the original x-rays and MRI films, as well as the report of defendants’ expert, Dr. Luchs, at the time of his examination of the plaintiff on August 14, 2020. He opined that the plaintiff sustained a traumatically induced wedge compression deformity at T-12, and disagreed with the conclusion by Dr. Luchs that the pain and decreased range of motion experienced by the plaintiff was degenerative in nature. Likewise, Dr. Schwartz disputes Dr. Luchs’ opinion that the injuries were not causally related to the plaintiff’s claimed injuries. Dr. Schwartz’s narrative report indicates that the plaintiff was examined using a goniometer, which revealed that the plaintiff had decreased range of motion of the lumbar spine upon flexion, extension and left and right lateral bending. The examination further revealed decreased muscle grade strength in the lumbosacral paraspinals, and diminished deep tendon reflexes throughout both lower extremities. Based on his examination, Dr. Schwartz arrived at a diagnosis of “lumbosacral derangement with myofascitis with probable underlying radiculopathy with mild chronic-appearing wedge deformity T12.” He further opined that the plaintiff’s condition was guarded, and that the plaintiff suffered a permanent partial disability from which he will not fully recover. He concluded that the plaintiff remains at an increased likelihood of degenerative changes, including post-traumatic arthritis. Dr. Schwartz’s report also specified numerous activities which the plaintiff will permanently have limited ability to engage in. Finally, Dr. Schwartz opined that the plaintiff “has reached maximum medical improvement” and that any further treatment would only be “palliative in nature.”

Based on the foregoing, the defendants have failed to meet their *prima facie* burden 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). Using objective testing, the defendants’ own medical expert, Dr. Levitt, recorded decreased range of motion of plaintiff’s cervical, thoracic and lumbar spine, decreased range of motion of the right and left elbow (forearm) and left wrist, and decreased range of motion of flexion of the right knee. Significantly, Dr. Levitt did not offer an opinion whether the injuries were causally related to the accident. To the extent that the defendants argue, through the report of their retained radiologist, Dr. Luchs, that the injuries to the plaintiff’s lumbar spine are degenerative in nature, the affirmation and report of plaintiff’s medical expert, Dr. Schwartz, sufficiently dispute that argument. See *Tai Ho Kang v Young Sun Cho*, 74 AD3d 1328 (2d Dept 2010); *Whitehead v Olsen*, 70 AD3d 678 (2d Dept 2010); *Modeste v Mercier*, 67 AD3d 871 (2d Dept 2009).

Even assuming *arguendo* that the Court was to find that the defendants have met their *prima facie* burden, the plaintiff’s submissions raise triable issues of fact as to whether he sustained a serious injury under the 90/180 category of Insurance Law § 5102(d). Plaintiff submitted admissible evidence that the plaintiff was unable to work for eight months after the accident, and upon his return to work his activities were limited to “light duty.” See *Nicholson v*

Bader, 105 AD3d 719 (2d Dept 2013); *Refuse v Magloire*, 83 AD3d 685 (2d Dept 2011). Moreover, the plaintiff's deposition testimony raises issues of fact concerning whether his alleged physical limitations interfere with his usual and customary day-to-day activities, such as playing soccer, running, dancing and doing household chores. The affirmed narrative report of Dr. Schwartz set forth quantitative findings, through the use of a goniometer, which revealed range of motion limitations of the plaintiff's lumbar spine that Dr. Schwartz opined were causally related to the accident, traumatic in nature and permanent in duration. *Dixon v Fuller*, 79 AD3d 1094 (2d Dept 2010). To the extent that the defendants argue that the quantitative findings made by Dr. Schwartz were made too long after the accident, there is no such requirement concerning quantitative measurements to determine the seriousness of the injuries. *Perl v Meher*, 18 NY3d 208 (2011).

The plaintiff also raised a triable issue of fact as to the category of limitation of use of a body function or system under Insurance Law § 5102(d). A significant limitation need not be permanent in order to constitute a "serious injury." *Partlow v Meehan*, 155 AD2d 647, 647 (2d Dept 1989) quoting Insurance Law § 5102(d) (internal quotation marks omitted). "[A]ny assessment of the significance of a bodily limitation necessarily requires consideration not only of the extent or degree of limitation, but of its duration as well, notwithstanding the fact that Insurance Law § 5102(d) does not expressly set forth any temporal requirement for a significant limitation." *Griffiths v Munoz*, 98 AD3d 997, 998 (2d Dept 2012) (internal quotation marks omitted); see *Lively v Fernandez*, 85 AD3d 981, 982 (2d Dept 2011); *Partlow* at 648.

The defendants' remaining contentions are without merit.

Accordingly, it is hereby

ORDERED that the defendants' motion for summary judgment is denied.

This constitutes the decision and order of the Court.

Dated: November 30, 2020


HON. LILLIAN WAN, J.S.C.

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