Beretervide v Paulino
2020 NY Slip Op 34507(U)
November 9, 2020
Supreme Court, Bronx County
Docket Number: 22837/2017E
Judge: Mary Ann Brigantti

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART __15___

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JOHN JOSEPH BERETERVIDE, et al. Index №. 22837/2017E

-against- **Hon. MARY ANN BRIGANTTI**

KELVIN PAULINO, et al. Justice Supreme Court

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#003

The following papers numbered 1 to __3___ were read on this motion (Seq. No. __003___)
for __**VACATE ORDER/JUDGMENT**_____ noticed on ____March 26, 2020_____.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s).	1,2
Answering Affidavit and Exhibits	No(s).	3
Replying Affidavit and Exhibits	No(s).	

Motion is Respectfully Referred to Justice: _____
Dated: _____

Upon the foregoing papers, the plaintiffs John Joseph Beretervide ("Beretervide ") and Michael O. Cunningham ("Cunningham") move for an order pursuant to CPLR 2221(a), 2221(e), and 5015(a), vacating and/or renewing an order of this Court dated June 6, 2019, and entered on June 10, 2019, served with notice of entry on June 18, 2019, which granted the defendants' motion for summary judgment without opposition, and upon vacatur and/or renewal, an order denying summary judgment to defendants, reinstating the plaintiffs' causes of action, and restoring this case to the trial calendar. The defendants Rafael D. Diaz and American United Transportation Inc. ("Defendants") oppose the motion.

In order to vacate an order entered on default, the moving party must demonstrate a reasonable excuse for their default as well as a meritorious defense to the prior motion (CPLR 5015(a)(1); *Rodgers v. 66 East Tremont Heights Housing Development Fund Corp.*, 69 A.D.3d 510 [1st Dept. 2010]). In this case, Plaintiffs' counsel alleges that by the time Defendants made their motion for summary judgment in November 2018, Plaintiffs' treating physician Dr. Seon Han had retired, closed his office, and left no forwarding address. Counsel claims that it was not possible to obtain any other affirmed reports from other physicians, who were unfamiliar with Plaintiffs' injuries, history and treatment. Counsel affirms to this Court that his office was unable to locate Dr. Han and arrange for a re-examination and narrative report in time to oppose Defendants' motions, and accordingly those motions were granted on default.

While these contentions are not compelling, as Plaintiffs do not explain why they did not seek further adjournments of the original motion, and they lack specificity in detailing what happened and when, vacatur may nevertheless by ordered "for sufficient reason and in the interests of substantial justice" (see *Smith v. Pataki*, 150 A.D.3d 460, 461 [1st Dept. 2017], quoting *Woodson v. Mendon Leasing Corp.*, 100 N.Y.2d 62, 68 [2003]; see also *Marbru Associates v. White*, 143 A.D.3d 560 [1st Dept. 2016]), "and public policy favors resolving cases on their merits" (*Genao v. Salcedo Maintenance Corp.*, 168 A.D.3d 528, 529 [1st Dept. 2019]). For the reasons stated below Plaintiffs have supplied a meritorious defense to

the prior motion thus their motion to vacate this Court's June 9, 2019 order is granted, and the motion is decided on its merits.

When a defendant seeks summary judgment alleging that a plaintiff does not meet the "serious injury" threshold required to maintain a lawsuit, the burden is on the defendant to establish through competent evidence that the plaintiff has no cause of action (Franchini v. Plameri, 1 NY3d 536 [2003]). "Such evidence includes 'affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim'" (*Spencer v. Golden Eagle, Inc.*, 82 A.D.3d 589, 590 [1st Dept. 2011][internal quotations omitted]). A defendant may also meet his or her summary judgment burden with sufficient medical evidence demonstrating that the plaintiff's injuries are not causally related to the accident (see *Farrington v. Go On Time Car Service*, 76 A.D.3d 818 [1st Dept. 2010], citing *Pommels v. Perez*, 4 N.Y.3d 566, 572 [2005]). Once this initial threshold is met, the burden shifts to the plaintiff to raise a material issue of fact using objective, admissible medical proof (see *Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d 345, 350 [2002]).

Beretervide

As noted in the prior decision, Defendants carried their initial burden with respect to Beretervide on the issue of causation, by submitting a report from emergency medicine physician Dr. Nicholas Caputo who examined the police accident report and emergency room records generated on the date of the accident. He opined that those records showed that Plaintiff had no evidence of significant injury and no range-of-motion limitations to the extremities. He states that the injuries to the spine and to the left knee found in the bill of particulars are unsupported by Plaintiff's own complaints in the emergency room. Had there been any significant injury, Plaintiff would be been referred to x-rays CT scan or MRIs. He avers that since this was not done, there was no suspicion or evidence of a significant injury. Thus, the doctor opined that the reviewed records are inconsistent with the claimed injuries, and show that the injuries have no acute traumatic origin and are unrelated to the accident (see *Pastora L. v. Diallo*, 167 A.D.3d 424, 424-25 [1st Dept. 2018]).

Defendants, however, failed to show the absence of a significant or permanent injury in their initial papers. Defendants' orthopedist measured significant limitations in the spine and the knee and he did not allege that these limitations were self-imposed or voluntary (*compare Tusu v. Leone*, 2020 WL 6276976 [1st Dept. October 27, 2020]). Accordingly the doctor's ultimate opinion that Beretervide had an objectively normal orthopedic examination is belied by the limitations that he found and did not adequately explain (*Feaster v. Boulabat*, 77 A.D.3d 440 [1st Dept. 2010]; *Pineda v. Moore*, 111 A.D.3d 577 [1st Dept. 2013]).

In opposition to the motion, Plaintiffs raised a triable issue of fact as to causation. Plaintiffs submit *inter alia* sworn narrative reports from his treating physician Dr. Seo Han who alleges that he first examined Beretervide two days after the accident, when he complained of pain to the neck, shoulders, left

knee and low back. Beretervide demonstrated range-of-motion restrictions in the spine and positive objective diagnostic testing in the left knee including redness and swelling. Dr. Han notes that the plaintiff followed up on several occasions until August 2017. The doctor states that he reviewed MRIs of the spine which revealed positive findings including disc herniation and bulges in the cervical spine and "suspicions" of tears in the left knee. Plaintiff eventually underwent a left knee arthroscopy on March 10, 2017. Dr. Han asserts that Plaintiff has developed significant limitations that are related to the subject accident, that Plaintiff remained grossly symptomatic for eight months following his accident, and that his various restrictions prevented him from performing substantially all of the material acts which constituted his usual and customary activities for no less than 90 of the 180 days immediately following the accident. The foregoing submissions sufficiently refute Defendants' expert opinions as to causation (*see Streety v. Toure*, 173 A.D.3d 462 [1st Dept. 2019]). The Court notes that Defendants did not present evidence that plaintiff's own records showed the existence of prior injuries or degeneration (*Gordon v. Reyes Hernandez*, 181 A.D.3d 424 [1st Dept. 2020]).

Beretervide also raised a triable issue of fact as to his "90/180 day" injury claim. As noted above, there after fact issues as to causation. In addition, Beretervide testified that he remained confined to his bed and home for 5-6 months following the accident, and Dr. Han opined that plaintiff was substantially symptomatic, and his restrictions prevented him from performing his usual and customary activities for no less than 90 out of the first 180 days following the accident (*Massillon v. Regalado*, 176 A.D.3d 600, 602 [1st Dept. 2019]).

Defendants, however, are entitled to dismissal of Bertervide's claim that he sustained a "permanent loss of use," as their submissions establish that the plaintiff did not sustain a "total" loss of use of any body part (*Swift v. New York City Transit Authority*, 115 A.D.3d 507, 509 [1st Dept. 2014]).

Cunningham

Defendants carried their initial burden of demonstrating that plaintiff Cunningham did not sustain a "permanent loss of use," a "permanent consequential" or a "significant "limitation as a result of this accident. While Defendants' orthopedist Dr. Ronald Mann found range-of-motion restrictions in the cervical and lumbar spine, he concluded that these decreases carried no medical significance as it was the degree that was allowed by the claimant (see *Tusu*, 2020 WL 6276976; *Moreira v. Mahabir*, 158 A.D.3d 518 [1st Dept. 2018]). Dr. Mann's ultimate impressions were "resolved" sprains and strains to the lumbar, cervical and thoracic spine, and he opined that Cunningham had an objectively normal examination with no orthopedic limitations. Defendants further provided a sworn report from a neurologist also found no evidence of an ongoing neurological injury. Defendants also submitted the sworn report from radiologist Darren Fitzpatrick, M.D., who reviewed Plaintiff's cervical and lumbar spine MRIs and found moderate to

severe cervical degenerative disc disease, and mild, multilevel facet hypertrophy in the lumbar spine with no evidence of a traumatic injury (see *Khanfour v. Nayem*, 148 A.D.3d 426, 427 [1st Dept. 2017]).

In opposition to the motion, Plaintiff failed to raise a triable issue of fact as to causation, as they submit contemporaneous treatment records and sworn reports from Dr. Han, who documented range-of-motion restrictions shortly after the accident, and opined that the positive MRI findings were related to the subject accident. While some treatment records are unsworn, they may be considered because they did not constitute the sole basis for Plaintiffs' opposition (*see Long v. Taida Orchids, Inc.*, 117 A.D.3d 624 [1st Dept. 2014]). The treatment records show ongoing significant limitations in Plaintiff's cervical, thoracic and lumbar spine that continued through June 2017, several months after the accident, thus raising an issue of fact as to whether Plaintiff sustained a "significant limitation of use" of his spine (*see Kone v. Rodriguez*, 107 A.D.3d 537 [1st Dept. 2013]).

Plaintiffs, however, fail to raise an issue of fact as to whether Cunningham sustained a "permanent consequential limitation" as a result of this accident, because it is unknown whether Cunningham's physician Dr. Han measured any recent range-of-motion limitations. The February 12, 2020 and seemingly identical July 2, 2018 reports do not make this clear. Both reports note that Cunningham was first seen on December 29, 2016. Both of these reports, under the heading "current chief complains [sic]," describe the plaintiff's complaints "at the time of the initial evaluation." Both reports thereafter describe a "physical exam" and note matching range-of-motion findings in the cervical and lumbar spine and the results of other objective diagnostic tests. Nowhere in these reports, however, does the doctor explicitly allege that these findings were made on the date of the report. Indeed, the range-of-motion findings are followed by identical "treatment plans" which include a need for MRIs of the cervical, lumbar, and thoracic spine. The reports then go on to detail the plaintiff's 2017 treatment course. While the Court appreciates plaintiff's counsel's contention that the range-of-motion measurements were made at the time the reports were generated, this is simply not evident in the reports themselves. In fact, under "degree of disability," Dr. Han states that Cunningham "remained grossly symptomatic *eight months* following his injuries," (emphasis added) and he alleges that Cunninghan was prevented from performing substantially all of the material acts which constituted he usual and daily activities for no less than 90 out of the 180 days immediately following the accident. Dr. Han does not comment on whether Cunningham has any persisting disabling permanent limitations. Indeed, under "prognosis," Dr. Han states that Cunningham "developed significant limitations" in using his cervical, lumbar, and thoracic spine, but he does not opine that the injuries are permanent in nature. Under "future treatments," the doctor states only that it is expected that plaintiff "will experience episodes of pain in the neck, mid back and lower back." In sum, Dr. Han's sworn report do not constitute admissible evidence of recent limitations in the spine and thus Cunningham's contention that he sustained a "permanent consequential limitation" is dismissed (*Kone*, 107 A.D.3d 537, 538). Cunningham's claim that he sustained a "permanent loss of use" is also dismissed since

such a claim requires a "total" loss of use (*Swift*, 115 A.D.3d at 509).

Finally, Defendants are entitled to dismissal of Cunningham's "90/180 day" injury claim. Cunningham admitted in his verified bill of particulars that he was only confined to bed and home for seven days following the accident (*Tejada v. LKQ Hunts Point Parts*, 166 A.D.3d 436 [1st Dept. 2018]), and he did not testify any differently. This admission defeats Cunningham's "90/180" claim as they demonstrate that, notwithstanding the allegations of Dr. Han, Cunningham was not prevented him from performing his usual and customary activities for the requisite amount of time immediately following this accident.

Accordingly, it is hereby

ORDERED, that Plaintiffs' motion to vacate this Court's June 9, 2019 order entered on default is granted, and that order is hereby vacated, and Plaintiffs' complaint is reinstated, it is further,

ORDERED, that upon vacatur, Defendants' motion for summary judgment is granted to the extent of dismissing plaintiff Cunningham's claims that he sustained a "permanent consequential limitation" and a "90/180 day" category of injury as a result of this accident, and dismissing both plaintiffs' claims that they sustained a "permanent loss of use" category of injury as a result of this accident, and it is further,

ORDERED, that Defendants' motion for summary judgment is otherwise denied.

This constitutes the Decision and Order of this Court.

Dated: 11/9/2020 **Hon.** Mary Ann Brigantti
MARY ANN BRIGANTTI **J.S.C.**

1. CHECK ONE.....	☐ CASE DISPOSED IN ITS ENTIRETY	☒ CASE STILL ACTIVE
2. MOTION IS.....	☐ GRANTED ☐ DENIED	☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE.....	☐ SETTLE ORDER ☐ SUBMIT ORDER	☐ SCHEDULE APPEARANCE
	☐ FIDUCIARY APPOINTMENT	☐ REFEREE APPOINTMENT