Galatro v Kwintner
2020 NY Slip Op 34736(U)
December 7, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 616639/18
Judge: Vincent J. Martorana
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SHORT FORM ORDER **INDEX NO: 616639/18**

Supreme Court of the State of New York
IAS Part 23 - County of Suffolk

PRESENT: Hon. Vincent J. Martorana

CHARLES M. GALATRO, JR.,

Plaintiff,

- against-

SOHIA N. KWINTNER and KIM C. KWINTNER,

Defendants.

ORIG. RETURN DATE: 7/23/20
ADJOURNED DATE: 9/24/20
MOTION SEQ. NO.: 002- MotD

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Upon the following papers read on this motion seeking summary judgment ;Notice of Motion and supporting papers by defendants dated April 28, 2020 ; Notice of Cross-Motion and supporting papers__; Affirmation/affidavit in opposition and supporting papers by plaintiff dated September 10, 2020 ;Affirmation/affidavit in reply and supporting papers by defendants dated September 21, 2020 ; Other_; ~~(and after hearing counsel in support of and opposed to the motion)~~ it is,

ORDERED that Defendant's motion seeking summary judgment dismissing Plaintiff's complaint based upon Plaintiff's failure to meet the "serious injury" threshold defined in Insurance Law §5102(d) is granted in part and denied in part.

The within action was commenced by filing of a summons and complaint seeking to recover damages for injuries allegedly sustained as a result of a motor vehicle accident which occurred on May 20, 2016. Issue was joined and discovery commenced. Defendants now move for summary judgment dismissing the complaint on the ground that Plaintiff did not sustain a "serious injury" as defined in Insurance Law §5102 (d). 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."

Plaintiff's injuries as set forth in his bill of particulars are as follows:

Cervical Spine
C5/6 Broad Posterior Disc Herniation Impressing on the Ventrtal [Sic] Cord and There Are Peripheral Components of the Disc Herniation Extending into and Narrowing the Foramen Bilaterally with Bilateral C6 Nerve Root Impressions;

C4/5 Broad Posterior Disc Herniation Having an Eccentric Left Posterolateral Component That Impresses on the Left Ventral Cord and Extends into the Left Anterior Recess and Proximal Left Neural Foramen. There is Also a Right Lateral Component to the Disc Herniation Encroaching into the Right Foramen;

Posterior Disc Bulging Impressing on the Thecal Sac at C2-3, C3-4 and C6-7. At C3-4 the Ventral Margin of the Cord Is Nearly Abutted;

Cervical Curvature Demonstrates Kyphotic Angulation at C4-5;

Lumbar Spine
Subligamentous Posterior and Peripheral Disc Bulging at L2/3;
Posterior Subligamentous Disc Bulging at L5/S1 Is Present;
Diffuse Straightening of the Lumbar Lordosis with Mild Left Convexity of the Lumbar Curvature. Findings are Indicative of Muscular Spasm;

Headaches;

Radiculitis Throughout the Entire Spine;
(Plaintiff's Bill of Particulars dated February 6, 2019 paragraph 4)

In order to recover under the "permanent loss of use" category of Insurance Law §5102(d), plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance***, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed, or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (*see* ***Perl v Meher***, 18 NY3d 208, 936 NYS2d 655 [2011]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Cebron v Tuncoglu***, 109 AD3d 631, 970 NYS2d 826 [2d Dept 2013]).

A plaintiff claiming injury within the "limitation of use" categories must substantiate his or her complaints of pain with objective medical evidence showing the extent or degree of the limitation of movement caused by the injury and its duration (*see* ***Ferraro v Ridge Car Serv.***, 49 AD3d 498, 854 NYS2d 408 [2d Dept 2008]; ***Mejia v DeRose***, 35 AD3d 407, 825 NYS2d 772 [2d Dept 2006]; ***Laruffa v Yui Ming Lau***, 32 AD3d 996, 821 NYS2d 642 [2d Dept 2006]; ***Cerisier v Thibiu***, 29 AD3d 507, 815 NYS2d 140 [2d Dept 2006]). To prove significant physical limitation, a plaintiff must present either objective quantitative evidence of the loss of range of motion and its duration based on a recent examination of the plaintiff or a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (*see* ***Perl v Meher***, *supra*; ***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2002]; ***Rovelo v Volcy***, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*see* ***Licari v Elliott***, *supra*; ***Cebron v Tuncoglu***, *supra*). Furthermore, a plaintiff claiming serious injury who ceases treatment after the accident must offer a reasonable explanation for having done so (***Pommells v Perez***, 4 NY3d 566, 574, 797 NYS2d 380 [2005]; *see* ***Vasquez v John Doe #1***, 73 AD3d 1033, 905 NYS2d 188 [2d Dept 2010]; ***Rivera v Bushwick Ridgewood Props., Inc.***, 63 AD3d 712, 880 NYS2d 149 [2d Dept 2009].

On a motion for summary judgment, the defendant has the initial burden of making a prima facie showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) (*see* ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992];

Akhtar v Santos, 57 AD3d 593, 869 NYS2d 220 [2d Dept 2008]). The defendant may satisfy this burden by submitting the plaintiff's deposition testimony and the affirmed medical report of the defendant's own examining physician (*see* ***Moore v Edison***, 25 AD3d 672, 811 NYS2d 724 [2d Dept 2006]; ***Farozes v Kamran***, 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, *supra*; ***Boone v New York City Tr. Auth.***, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]).

Defendants offer Plaintiff's deposition testimony in support of their motion. Plaintiff testified that he treated with a Chiropractor, Walter F. Priestly, D.C., three to four times per week for six to eight months. After that he terminated treatment. He did not treat with any other specialists. MRIs revealed cervical and lumbar bulging and herniated discs. Plaintiff missed one week of work and worked intermittently during a second week. He then went back to work on limited duty. He further testified that his participation in other activities such as going to the gym, playing tennis, cleaning, carrying groceries, walking up and down stairs, bending to wash his face and doing laundry is now limited as a result of the injuries. Defendants base their argument that Plaintiff did not sustain a serious injury, as defined by Insurance law §5102(d), upon an affirmed Independent Medical Examination report by Orthopedic Surgeon Joseph Y. Margulies, MD, PhD and an affirmed MRI review by Radiologist Steven M. Peyser, MD. Dr. Margulies examined Plaintiff, a then 46 year old male, on August 22, 2019. Based upon physical examination and review of medical records, Dr. Margulies concluded that Plaintiff's symptoms and injuries, which he diagnosed as cervical and lumbar sprain, were causally related to the May 20, 2016 accident; however, he also determined that Plaintiff had no functional disability, that his conditions had resolved and that no further treatment was necessary. Plaintiff's ranges of motion were assessed visually and with the use of a handheld goniometer. His findings were, in part:

> Examination of the cervical spine reveals full, active range of motion to all directions tested including flexion 45°/45°, extension 45°/45°, right and left lateral flexion 45°/45°, right and left rotation 80°/80°with no paraspinal muscle spasm or tenderness. Neurovascular status of the upper limbs is intact. There is no spasticity in the limbs. There is no trapezius muscle tenderness. There is good motor and sensory function without deficits in the upper extremities. Deep tendon reflexes are normal and equal. There are no pathological reflexes. There is no dermatome sensitivity. Examination of the lumbosacral spine revealed full, active range of motion to all directions tested including flexion 90°/90°, extension 30°/30°, right and left lateral bending 30°/30°, right and left rotation 30°/30° with no paraspinal muscle spasm or tenderness. There is no leg length discrepancy. Gluteal muscles are normal and equal. There is no sciatic notch tenderness. Straight leg raise and Lasegue's tests are negative and equal. Neurovascular status of the lower limbs is intact. There is good motor and sensory function without deficits in the lower extremities. Deep tendon reflexes are normal and equal. There are no pathological reflexes.

The Court presumes that the fractional references in Dr. Marguiles' affirmation are intended to indicate the measured range of motion to the left of the slash and either a maximum or a normal range of motion on the right of the slash. This is not explained. if this is the intent, it must also be noted that no basis for comparison or source for guideline "normal" values is provided. Without a clear comparison to credible, accepted normal values, Dr. Marguiles' findings may not be considered as a basis for summary judgment (***Mondi v. Keahon***, 32 AD3d 506, 820 NYS2d 625 [2d Dept. 2006]; ***Benitez v. Mileski***, 31 AD3d 473, 818 NYS2d 555 [2d Dept. 2006]; ***Chiara v. Dernago***, 70 AD3d 746, 894 NYS2d 129 [2d Dept. 2010]; ***Schmidt v. Meehan***, 97 AD3d 940, 948 NYS2d 736 [2d Dept. 2012]; ***Spektor v. Dichy***, 34 AD3d 557, 824 NYS2d 403[2d Dept. 2006]; ***Page v Belmonte***, 45 AD3d 825, 846 NYS2d 351 [2d Dept. 2007]; ***Starkey v. Curry***, 94 AD3d 866, 941 NYS2d 882, (Mem)–883 [2d Dept. 2012]).

The affirmation of Radiologist Steven M. Petser, M.D. is made upon review of a July 11, 2016 MRI taken of Plaintiff. No physical examination was conducted. Dr. Peyser, in his April 10, 2019 report, determined that

Review of MRI of the cervical spine reveals straightening of the normal cervical lordosis. This is a non-specific finding which may be positional in nature or related to spasm. Cervical spondylosis with a left paracentral disc osteophyte at C4-5 with impingement and a posterior central disc osteophyte at C5-6 with impingement and resulting mild bilateral foraminal stenosis. These findings are most consistent with pre-existing degenerative disc disease. No post traumatic-type etiology related to the accident date of May 20, 2016 can be determined. The described bulging at C2-3, C3-4 and C6-7 by Dr. Winter cannot be appreciated on this review. The described disc herniations at C4-5 and C5-6 on this review are more consistent with disc osteophyte formation and not simple disc herniations. Again, these findings are consistent with degenerative-type change.

Dr. Peyser was unable to make any determination with respect to C2-3, C3-4 and C6-7. He conclusorily asserts that foraminal stenosis, cervical spondylosis and osteophyte formations in C4-C5 and C5-C6 are more consistent with pre-existing degenerative disc disease and that the disc herniations in those areas are more consistent with osteophyte formation and not "simple disc herniations." Dr. Peyser also states that C2-3, C3-4, C6-7 and C7-1 reveal no herniation or stenosis. He asserts that "No post-traumatic etiology related to the accident date of May 20, 2016 can be determined." The report contains no conclusive assertion of lack of causal relation of the asserted conditions to the accident and no discussion as to the factors considered in his analysis.

Upon the evidence presented, Defendants have failed to make a *prima facie* case of entitlement to judgment as a matter of law with respect to permanent consequential limitation of use of a body organ or member or significant limitation of use of a body function or system. The affirmations of Defendants' medical experts were of insufficient character to warrant the requested relief. As Defendants have failed to make a *prima facie* case of entitlement to judgment as a matter of law with respect to the permanent consequential limitation or significant limitation categories of Insurance Law §5102(d), the sufficiency of Plaintiff's papers need not be examined with respect to these factors (***Starkey v. Curry***, 94 AD3d 866, 866–67, 941 NYS2d 882, (Mem)–883 [2d Dept. 2012]; ***Page v Belmonte***, 45 AD3d 825, 846 NYS2d 351 [2d Dept. 2007]). However, Defendants also seek summary judgment on Plaintiff's claim (alleged in his bill of particulars) that Plaintiff could not substantially perform his usual activities within 90 days following the 180 day period following the accident. Plaintiff's own deposition testimony supports Defendants' position that Plaintiff's injuries did not prevent him from performing substantially all of his customary daily activities for 90 of the first 180 days post-accident (***Villalta v. Schechter***, 273 AD2d 299, 710 NYS2d 87 [2d Dept. 2000]; ***Mohamed v. Siffrain***, 19 AD3d 561, 797 NYS2d 532 [2d Dept. 2005]; ***Curry v Velez***, 243 AD2d 442, 663 NYS2d 63 [2d Dept 1997]). Plaintiff has failed to present any competent medical evidence to raise a triable issue of fact on this issue. Accordingly, summary judgment is granted with respect to the 90/180 category only.

Based upon the foregoing, Defendants' motion seeking summary judgment is granted with respect to dismissal of Plaintiff's claim that he could not substantially perform his usual activities within 90 days following the 180 day period following this accident. Defendants' motion is denied in all other respects. To the extent that Plaintiff seeks summary judgment, as seems to be indicated in language contained in Plaintiff's opposition, such relief is denied as there is no cross-motion before the Court.

Dated: Riverhead, New York
December 7, 2020

VINCENT J. MARTORANA, J.S.C.

CHECK ONE: ____ FINAL DISPOSITION XX NON-FINAL DISPOSITION