Glover v Hunte
2020 NY Slip Op 34842(U)
August 10, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 612273/17
Judge: Carmen Victoria St. George
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SUPREME COURT – STATE OF NEW YORK
TRIAL TERM, PART 56 SUFFOLK COUNTY

PRESENT:

Hon. Carmen Victoria St. George
Justice of the Supreme Court

RONALD GLOVER,

Plaintiff,

-against-

ELIZA HUNTE,

Defendant.

Index No.
612273/17

Motion Seq:
002 Mot D

Decision/Order

The following electronically filed papers were read upon this motion:

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The defendant moves this Court for an Order dismissing the complaint because the plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102 (d). Plaintiff opposes the requested relief. The Court determines that defendant's summary judgment motion is granted as to two categories of injury: 1)permanent loss of use and 2) a medically determined injury or impairment of a non-permanent nature which prevented plaintiff from performing substantially all of the material acts which constituted plaintiff's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment [90/180 claim]); however, defendant's motion is denied based on her failure to establish a *prima facie* case as to the 1) permanent consequential limitation of a body organ or member and 2) significant limitation of use of a body function or system categories of injury.[1]

[1] The remaining categories of injury (death, dismemberment, significant disfigurement, fracture, loss of a fetus) are not alleged by plaintiff, nor is there any support in the record for these types of injuries.

As a result of the motor vehicle accident that occurred on October 7, 2016, the plaintiff claims that he suffered injuries to his cervical spine and right shoulder as outlined in his Bill of Particulars dated November 7, 2017. The injuries include bulging and herniated discs in his cervical spine, cervical spine strain and aggravation and/or exacerbation of degenerative changes in his cervical spine, right shoulder sprain and tendinopathy of the right shoulder, permanently resulting in, *inter alia*, pain, swelling, stiffness, weakness, restriction of motion, limitation of movement, and loss of use and function of those portions of his body.

As a proponent of the summary judgment motion, the defendant herein has the initial burden of establishing that plaintiff did not sustain a causally related serious injury under the categories of injury claimed in the Bill of Particulars (*see* ***Toure v Avis Rent a Car Sys.***, 98 NY2d 345, 352 [2002]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact (***Cauthers v. Brite Ideas, LLC,*** 41 AD3d 755 [2d Dept 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the plaintiff (***Makaj v. Metropolitan Transportation Authority***, 18 AD3d 625 [2d Dept 2005]).

A defendant can satisfy the initial burden by relying on the sworn statements of defendant's examining physician and plaintiff's sworn testimony, or by the affirmed reports of plaintiff's own examining physicians (***Pagano v Kingsbury***, 182 AD2d 268, 270 [2d Dept 1992]). A defendant can demonstrate that plaintiff's own medical evidence does not indicate that plaintiff suffered a serious injury and that the alleged injuries were not, in any event, causally related to the accident (***Franchini v Palmieri***, 1 NY3d 536, 537 [2003]). Defendant's medical expert must specify the objective tests upon which the stated medical opinions are based and, when rendering an opinion with respect to plaintiff's range of motion, must compare any findings to those ranges of motion considered normal for the particular body part (***Browdame v. Candura***, 25 AD3d 747, 748 [2d Dept 2006]).

The Court notes that, a tear in tendons, as well as a tear in a ligament or bulging disc is not evidence of a serious injury under the no-fault law in the absence of objective evidence of the extent of the alleged physical limitations resulting from the injury and its duration (***Little v. Locoh***, 71 AD3d 837 [2d Dept 2010]; ***Furrs v. Griffith***, 43 AD3d 389 [2d Dept 2007]; ***Mejia v. DeRose***, 35 Ad3d 407 [2d Dept 2006]). Thus, regardless of an interpretation of an MRI study, plaintiff must still exhibit physical limitations to sustain a claim of serious injury within the meaning of the Insurance Law. Furthermore, to qualify as a serious injury within the meaning of the statute, "permanent loss of use" must be total (***Oberly v. Bangs Ambulance Inc.***, 96 NY2d 295, 299, [2001]).

A defendant may also establish her *prima facie* entitlement to summary judgment as to a plaintiff's 90/180 claim by submitting plaintiff's deposition transcript (***Kuperberg v. Montalbano***, 72 AD3d 903 [2d Dept 2010]; ***Sanchez v. Williamsburg Volunteer of Hatzolah, Inc.***, 48 AD3d 664 [2d Dept 2008]).

The plaintiff's deposition testimony establishes that he was involved in a prior motor vehicle accident that occurred on September 18, 2016 wherein his vehicle was struck in the rear.[2] As a result of that prior accident, his own car was "totaled," and he was taken to a local hospital by ambulance where he was treated and released after complaining of neck and back pain. According to the plaintiff, he hit his head on the steering wheel during that accident. He visited an Urgent Care facility one or two days later and received pain medication. Plaintiff had also begun to treat with a chiropractor and was receiving physical therapy for that prior accident when the subject accident occurred on October 7, 2016.

On October 7, 2016, the plaintiff was operating a rental vehicle. When police responded to the scene of the accident, the officer asked the plaintiff if he needed medical attention and plaintiff apparently did not request medical attention. When asked if he was feeling pain following the accident, the plaintiff answered that he did not remember, but he later acknowledged that he was feeling neck and back pain prior to the subject accident, and that the subject accident increased his neck and back pain. The plaintiff also testified that he experienced pain to his right shoulder as a result of the subject accident, which he did not experience after the prior accident. The plaintiff stated that he was not bleeding or bruised as a result of the subject accident. He was able to drive the rental car after the October 7, 2016 accident.

After the subject accident, according to the plaintiff, his treatment with the chiropractor increased from approximately two times per week to four times per week, and he treated for his neck, back and right shoulder four times per week for eighteen (18) months. The treatment consisted of adjustments, physical therapy, electrical stimulation, massage and hot and/or cold packs. Plaintiff also apparently underwent a nerve conduction study that he testified revealed a "pinched nerve leading to [his] back." Plaintiff could not remember what he was told about the results of his MRI studies. The last time plaintiff treated for his neck or back as the result of either of the accidents was 18 months after October 2016, which would be approximately April 2018. Plaintiff, who was deposed on March 13, 2019, testified that he was still treating for his right shoulder, but at a different facility, and using his own medical insurance instead of no-fault insurance. Regarding the pain in his neck, he testified that he experiences pain there "every now and then," and that his entire back still hurts "once in a while." He rated the pain in his neck as a "7" on a scale of 1-10, with 10 being most painful.

The plaintiff testified that, at the time of the subject accident, he was self-employed as a car detailer. He would go to his customers' homes and clean their cars inside and out, and he would buff the exterior of the cars with a buffing machine. The demand for his detail work is weather-dependent, with inclement weather and the fall and winter months being slow for business. At the time of his deposition on March 13, 2019, plaintiff testified that there had hardly been any work since it was still wintertime, but that when the weather is good, he can detail ten to fifteen cars per week. Only "a few times" was he unable to detail cars as a result of the two accidents, but he could not remember how long he could not detail cars. Although he testified that he experienced pain when he detailed cars and wore a back brace "just to be on the

[2] That matter identified by Suffolk County Supreme Court Index No. 612290/17 was apparently settled and a stipulation of discontinuance filed on October 1, 2019.

safe side," especially when he used the buffing machine, plaintiff was unsure of how many days he was confined to bed, nor could he remember how many days he was confined to home as a result of the October 7, 2016 accident. He also could not remember the confinement periods related to the prior accident of September 18, 2016. Plaintiff's Bill of Particulars alleges that he was confined to bed and home from October 7, 2016 "up to or about October 10, 2016," for a total of approximately three days.

When asked if there were any household, leisure or recreational activities that he could no longer do at all because of the accidents, the plaintiff answered, "no." The plaintiff also testified that he was not limited in performing those types of activities as a result of the accidents.

Plaintiff's own deposition testimony, plus his Bill of Particulars, fails to demonstrate that he was prevented from performing substantially all of his customary daily activities for not less than 90 days during the 180 days immediately following the subject accident (***Omar v. Goodman***, 295 AD2d 413 [2d Dept 2002]; ***Lauretta v. County of Suffolk***, 273 AD2d 204 [2d Dept 2000]), or that he has suffered a permanent loss of use of any body part. Accordingly, the defendant has established her *prima facie* entitlement to summary judgment as to plaintiff's permanent loss of use and 90/180 claims.

As to the permanent consequential limitation of a body organ or member and significant limitation of use of a body function or system categories of injury, however, the defendant has failed to sustain her *prima facie* burden.

Defendant's examining physician, Edward A. Toriello, M.D., examined plaintiff on May 6, 2019. He states that he examined plaintiff's cervical spine, shoulders, elbows, wrists and hands. In his affirmed report, he lists a number of documents that he reviewed, including medical records and the Bill of Particulars. As noted above, the Bill of Particulars alleges cervical spine injuries (herniated and bulging discs; aggravation and/or exacerbation of degenerative changes in the cervical spine); yet, Dr. Toriello wrote that plaintiff "states that he did not injure his neck or lower back in the accident dated 10/07/16." This statement authored by Dr. Toriello is contrary to the Bill of Particulars that he allegedly reviewed; it is also contradictory to the plaintiff's own deposition testimony wherein he testified that the subject accident worsened his neck and back pain from the prior (September) accident. Thus, questions of fact and credibility are raised.

Furthermore, not only did Dr. Toriello fail to also address plaintiff's claim of aggravation/exacerbation of degenerative changes in his cervical spine, Dr. Toriello found a thirty-five (35) to forty (40) degree deficit in plaintiff's cervical spine extension, which is the equivalent of a 64% to 66% limitation in that plane of movement (20 degrees compared to normal 55-60 degrees). Dr. Toriello does not opine as to the etiology of this limitation whatsoever; his diagnosis is confined to plaintiff's right shoulder about which he states, "[r]esolved right shoulder contusion" that is causally related to the subject accident. Based upon the foregoing, "[his] opinion that the claimant did not sustain any injuries to the neck . . . in the 10/07/16 accident" is rendered speculative. By failing to opine and/or address the origin of this cervical extension limitation, Dr. Toriello has not eliminated the subject accident as the cause thereof, thereby demonstrating the existence of a material question of fact as to the permanent

consequential limitation and significant limitation categories of injury. In view of the foregoing determination, it is unnecessary to determine whether the plaintiff's papers submitted in opposition are sufficient to raise a triable issue of fact as to these claims (*see* ***Levin v Khan***, 73 AD3d 991 [2d Dept 2010]; ***Kjono v Fenning***, 69 AD3d 581[2d Dept 2010]). Accordingly, the Court reviews plaintiff's opposition papers solely as to the permanent loss of use and 90/180 categories of injury.

In opposition, the plaintiff submits various medical records, including an affidavit from his chiropractor (Ramiro Pinto, D.C.) attesting to the truth and accuracy of his treatment reports ranging from November 16, 2016 through March 30, 2018. None of plaintiff's submissions, whether in admissible evidentiary form or not, contain any evidence whatsoever that the plaintiff suffered a permanent loss of use of any of his body parts, and there is also no evidence of a medically determined injury or impairment of a non-permanent nature which prevented plaintiff from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment. Accordingly, summary judgment dismissal of plaintiff's claims of injury made under the permanent loss of use and 90/180 categories is granted.

Summary judgment dismissal of plaintiff's claims made under the permanent consequential limitation and significant limitation of use categories of injury is denied.

The foregoing constitutes the Decision and Order of this Court.

Dated: August 10, 2020
Riverhead, NY

CARMEN VICTORIA ST. GEORGE, J.S.C.

FINAL DISPOSITION [ ] NON-FINAL DISPOSITION [X]