

Sawaked v Sawaked
2020 NY Slip Op 34847(U)
January 6, 2020
Supreme Court, Dutchess County
Docket Number: Index No. 52529/17
Judge: Maria G. Rosa
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

Present:

Hon. Maria G. Rosa, Justice

YOUSEF SAWAKED,

Plaintiff,

DECISION AND ORDER

Index No. 52529/17

-against-

MAJID M. SAWAKED and VERNERVIA L. HICKS,

Defendant.

The following papers were read on Defendant's motion for summary judgment:

NOTICE OF MOTION
AFFIRMATION IN SUPPORT
EXHIBITS A - F

AFFIRMATION IN OPPOSITION
EXHIBITS 1 - 2

REPLY AFFIRMATION

This is a negligence action in which Plaintiff seeks damages for injuries allegedly sustained in a motor vehicle accident on December 22, 2014. Defendant Majid Sawaked ("Defendant") moves for summary judgment asserting the plaintiff did not sustain a "serious injury" under Insurance Law §5102(d). The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law. Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986). If a movant has met this threshold burden, to defeat the motion the opposing party must present the existence of triable issues of fact. See Zuckerman v. New York, 49 NY2d 557, 562 (1980). In deciding a motion for summary judgment, the court is required to view the evidence presented "in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof submitted in favor of the opponent to the motion." Yelder v. Walters, 64 AD3d 762, 767 (2nd Dept 2009).

Plaintiff's bill of particulars alleges he suffered injuries to the cervical and thoracic spine and both shoulders. He did not claim an exacerbation or aggravation of any pre-existing condition. It asserts that he has sustained a permanent loss of a use of 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 and a non-permanent injury under the 90/180 category. See Insurance Law §5102(d). Under the “permanent loss of use” exception to the no-fault remedy, a plaintiff must demonstrate a total loss of use. Oberly v. Bangs Ambulance, Inc., 96 NY 2d 295 (2001). To qualify as a “permanent consequential limitation of use of a body organ or member,” the limitation must be important or significant, as well as permanent. See Countermine v. Galka, 189 AD2d 1043 (3rd Dept 1993). To establish a “significant limitation of use of a body function or system,” a plaintiff must demonstrate that the injury alleged has limited the use of the afflicted area in a significant way rather than a mild one. Licari v. Elliot, 57 NY2d 230 (1982). Mild, slight, or minor limitations are insufficient to constitute a serious injury under the Insurance Law. Id. To be “significant” the injury must relate to medical significance which involves a comparative determination of the degree or qualitative nature of an injury based on normal function, purpose and use of the body part. Toure v. Avis Rent A Car Systems, Inc., 98 NY2d 345 (2002).

In support of his motion Defendant has submitted copies of the pleadings, Plaintiff's deposition testimony, medical records of orthopedic treatment Plaintiff received in 2005 and 2011 and a report of an independent medical examination held in June 2019. Plaintiff testified at his deposition that following the motor vehicle accident he was taken by ambulance to Vassar Brother's Hospital for complaints of neck and shoulder pain. He asserted that his head hit the window during the accident and that a magnetic resonance imaging (“MRI”) scan was performed of his head at the hospital. He was treated with pain medication and discharged with a neck brace and directions to follow up with his primary care physician. He stated that after discharge from the emergency room he treated with Dr. Gabriel Dassa for neck and shoulder injuries and that Dr. Dassa sent him for MRIs of his neck and shoulder. He did physical therapy for a three week period but it did not provide any relief. He was unable to recall how many times he treated with Dr. Dassa but asserted that he also made complaints to his primary care physician Dr. Lee Isabell about pain in his neck and shoulder. Plaintiff denied sustaining any previous injury to his neck or shoulder but acknowledged having severely injured his back in a work place accident when a rack of tires fell on him. Plaintiff stated that he had been taking pain medication including methodone and oxycodone ever since that workplace accident.

Defendant has submitted records of treatment Plaintiff received from Orthopedic Associates of Dutchess County on August 22, 2005 and December 28, 2011. The 2005 record shows that Plaintiff made complaints of left shoulder pain that had persisted since his 2005 work place injury. A physical examination of the left shoulder revealed a full range of motion with a positive impingement range and some weakness of the cuff on the left. X-rays of the shoulder were within normal limits and no fractures, dislocations or other abnormalities were identified. He was diagnosed with impingement syndrome and a possible rotator cuff tear. The treatment record from December 2011 states that Plaintiff woke up approximately one month earlier and could not get out of bed. Plaintiff recounted that he could not walk, had acute and severe weakness in his left leg, numbness, tingling and burning in his feet and difficulty standing. The record further mentions that Plaintiff had gone to the hospital where he was diagnosed with some paraspinal muscle edema consistent with either denervation or possible rhabdomyolysis. A review of MRI imagining studies

revealed some degenerative disc change, small disc protrusions at C2-3, mild spinal stenosis due to disk osteophyte complex at C6-7, a left-side disc herniation at T6-7 and mild spinal stenosis at T11-12. The treating physician's impression was Plaintiff was suffering from degenerative disc disease of the lumbar spine, mild spinal stenosis and cervical degenerative disc disease with mild to moderate stenosis. He was also diagnosed with gait disturbance and it was recommended that he use a wheelchair. He was diagnosed as temporarily totally disabled, the causation being unknown. The treating physician could not determine whether his condition was related to his previous work injury or due to degenerative changes.

An independent medical report of Dr. Louis Nunez from an examination in June 2019 found that Plaintiff's condition had resolved. Dr. Nunez states that any reductions in range of motion for the neck or shoulder were "simply the objective documentation of the subjective effort" of Plaintiff. His report references a January 2015 diagnosis by Dr. Dassa of a cervical and thoracic spine sprain/strain with multiligamentous injury and bilateral shoulder impingement syndrome. Dr. Nunez concluded that a 2015 MRI of the cervical spine revealing multi-level spondylitic changes of the cervical vertebrae with multi-level interspace narrowing, central and left paracentral disc herniation at C3-C4, broad-based disc bulge effacing at C4-C5 with left-side neural foraminal narrowing, central disc bulge at C5-C6, disc bulge at C6-C7 with foraminal narrowing and bilateral neural foraminal narrowing at C7-T1 did not support the reduced range of motion because the MRI findings were age-appropriate. Dr. Nunez further states that the 2015 MRI of the left shoulder revealing productive changes of the acromioclavicular joint with impingement and prominence of the supraspinatus muscle consistent with tendinosis reflected a pre-existing injury not caused by the motor vehicle accident. He concludes that Plaintiff's myofascial strain of the cervical spine had resolved and there was no permanency associated with the December 2014 motor vehicle accident.

The foregoing is sufficient to demonstrate Defendant's *prima facie* entitlement to summary judgment based upon a showing that Plaintiff did not sustain a serious injury under the Insurance Law. Dr. Nunez's report references a January 2015 diagnosis by Dr. Dassa that Plaintiff only sustained a cervical and thoracic spine sprain/strain, associated ligament and bilateral shoulder impingement. Such injuries do not constitute serious injuries within the meaning of the Insurance Law. See Scheer v. Koubek, 70 NY2d 678 (1987). While Dr. Nunez found range of motion limitations through the cervical spine and left shoulder, he opines that these limitations were due to malingering. This conclusion is supported by his objective findings of no pain to palpitations of the trapezius muscles or paracervicular musculature, a negative Hawking test, negative Neer test and negative empty can test. He further concludes that the conditions revealed in the 2015 MRI reports of the cervical and thoracic spine and left shoulder were age-appropriate and/or reflected a long standing condition. He opines that Plaintiff has recovered from the myofascial strain of his cervical and thoracic spine and there was no causation of permanency associated with the December 2014 accident. The court is cognizant that Dr. Nunez does not state Plaintiff had a pre-existing condition that stemmed from his 2005 accident. In fact, he did not review any medical records that pre-dated the 2014 accident. His report, however, does attribute a long-standing condition to certain complaints and Defendant's submission of the 2005 and 2011 orthopedic visits referencing complaints of left shoulder pain, disc protrusions at C2-3 and mild stenosis at C6-7 along with Dr. Nunez's finding of

a longstanding condition is sufficient to support his conclusion as to a lack of causation.

Defendants have further demonstrated an entitlement to summary judgment based upon a gap or cessation in treatment. Plaintiff testified as his deposition that the only medical treatment he received for injuries allegedly sustained in the 2014 accident were at the emergency room, from his primary care physician, physical therapy and from Dr. Dassa. The record reflects that Plaintiff ceased treating with Dr. Dassa in 2015 and received no further medical treatment until he was seen by Dr. Dassa in September 2019. An unexplained gap in treatment is fatal to a plaintiff's claim of serious injury. Pommells v. Perez, 4 NY3d 566 (2005). Defendants have presented evidence of a history of back and shoulder ailments that existed prior to the motor vehicle accident. Under such circumstances, Plaintiff is required to offer a reasonable explanation for suspending medical treatment for what he alleges constitutes serious injuries caused by the motor vehicle accident. Plaintiff failed to offer any such explanation at his August 2018 deposition other than to state that he had an appointment set up for the following month.

The court rejects Plaintiff's assertion that Dr. Nunez failed to address the alleged thoracic spine condition. His report references reviewing medical reports and MRIs of the thoracic spine and he expressly diagnosed Plaintiff with a mild myofascial strain of the thoracic spine that had resolved. Plaintiff's deposition testimony that he was only confined to his bed two months following the accident, and that with the exception of drinking coffee, smoking cigarettes and going to see family, his lifestyle had not substantially changed as a result of the accident is sufficient to establish a *prima facie* entitlement of dismissal of Plaintiff's 90/180 serious injury claim.

In opposition Plaintiff has submitted an affirmation of counsel, diagnostic reports of MRIs of the cervical spine and left shoulder taken in February 2015, a right shoulder MRI taken in April 2015 and a report of an orthopedic evaluation Dr. Dassa performed on September 9, 2019. Dr. Dassa's examination report from September 2019 references his examination of Plaintiff in January 2015, the MRIs of the shoulders and spine conducted thereafter and his previously referring Plaintiff to physical therapy. Dr. Dassa conducted range of motion tests to the cervical and thoracic spine using a hand held goniometer. He found significant ranges of limitation to the cervical spine with muscle spasms from C1 through C7 and noted a positive spurling test on the right. He further found significant range of motion limitations of the thoracic spine with myospasm from L1 though L5. Range of motion tests to the right and left shoulder revealed flexion of the right shoulder 160°, left shoulder 155° (normal being 170°), adduction of the right shoulder 160°, left shoulder 155° (normal being 170°), internal rotation of the right shoulder 50°, left shoulder 45° (normal 60°), external rotation right shoulder 80°, left shoulder 75° (normal 90°), extension of the right shoulder 20°, left shoulder 15° (normal 30°) and adduction of the right shoulder 30°, left shoulder 25° (normal 40°). He further found positive impingement signs for both shoulders. Dr. Dassa examined Plaintiff and found significant range of motion limitations to the cervical spine but no dysesthesia in the spinal nerve region and his examination of the upper extremities was normal. He further found range of motion limitations to the left shoulder as measured with a goniometer of 160° (180° being normal) adduction of 145° (180° being normal) and internal and external rotation of 60° (80° being normal). He diagnosed Plaintiff with musculoligamentous injury to the cervical and thoracic spine, bilateral

shoulder impingement syndrome with a partial bicep tear, disc herniation at C3-C4, bulging discs at C4-C5, C5-C6, C6-C7 and C7-C1, bulging discs at T5-T6, T8-T9 and T10-T11 with disc herniation at T6-T7 and T7-T8. Dr. Dassa concludes that his diagnosis of lumbar radiculopathy and bilateral shoulder impingement are both significant and permanent. He reached this conclusion based on the nature of the injuries and Plaintiff's report of continued subjective pain since 2014. He states that if the history provided in the medical is true and accurate that the accident of December 22, 2014 was the cause of these injuries and orthopedic impairment.

Plaintiff's submission is insufficient to create a material issue of fact as to whether he sustained a serious injury within the meaning of the Insurance Law under the significant limitation of use category. Dr. Nunez found that any range of motion limitations were either based upon a lack of effort or due to a medical condition that pre-existed the 2014 motor vehicle accident. Dr. Nunez also found that the conditions reflected in the 2015 MRI reports were due to either a pre-existing condition or a natural progression of age-based degeneration and that Plaintiff had recovered from any myofascial strain of his cervical and thoracic spine that may have been caused by the motor vehicle accident. Based on this finding and the four year gap in treatment, to defeat a summary judgment Plaintiff was required to produce competent medical evidence specifically refuting the claimed lack of causal connection to the accident. Pommells v. Perez, 4 NY3d at 579. A plaintiff does not make this showing by simply offering a conclusory expert opinion that injuries were causally related to the accident without directly addressing a defendant's theory that the injuries were from a pre-existing or degenerative condition. Id., Vaughan v. Leon, 94 AD3d 646 (1st Dept 2012). Dr. Dassa found significant range of motion limitations of the cervical and thoracic spine and left shoulder with positive impingements on both shoulders. He found the symptoms consistent with the injuries Plaintiff alleges he sustained in the motor vehicle accident. He thus concluded they were caused by the accident without specifically addressing the defendants' claim that these injuries pre-existed the motor vehicle accident or the four year gap in treatment. In fact, his ultimate conclusion that Plaintiff's injuries were caused by the motor vehicle accident is qualified. He states he reached this conclusion only "if the history provided in the medical records is true and accurate..." He fails to offer what medical records he is referring to and his report makes no mention that he reviewed any treatment records that predated the December 2014 motor vehicle accident. His failure to address Defendants' showing that Plaintiff's injuries pre-existed the motor vehicle accident and Plaintiff's failure to offer any explanation for the cessation of treatment for over four years fail to create a material issue of fact as to whether Plaintiff's injuries were causally related to the motor vehicle accident. Accordingly, Plaintiff's opposition is insufficient to create a material issue of fact as to whether he sustained a serious injury due to a significant limitation to the cervical spine, thoracic spine or left shoulder. Plaintiff also fails to offer any competent evidence demonstrating that he suffered injuries from the accident which prevented him from performing all of the material acts which constitute his usual and customary daily activities for at least 90 days during the 180 days following the accident. Based on the foregoing, it is

ORDERED that Defendants' motion for summary judgment is granted and the action is dismissed.

The foregoing constitutes the decision and order of the Court.

Dated: January 6, 2020
Poughkeepsie, New York

ENTER:



MARIA G. ROSA, J.S.C.

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Pursuant to CPLR §5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

Law Offices of Jennifer Adams
One Executive Blvd., Suite 280
Yonkers, NY 10701

Sobo & Sobo
One Dolson Avenue
Middletown, NY 10940

Manson & McCarthy
90 Crystal Run Road, Suite 405
Middletown, NY 10941