

Macaluso v Ortiz

2020 NY Slip Op 34856(U)

May 5, 2020

Supreme Court, Suffolk County

Docket Number: Index No. 17-600267

Judge: George M. Nolan

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SHORT FORM ORDER

INDEX No. 17-600267
CAL. No. 19-01304MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 55 - SUFFOLK COUNTY

PRESENT:

Hon. GEORGE M. NOLAN
Justice of the Supreme Court

MOTION DATE 8-15-19
ADJ. DATE 10-17-19
Mot. Seq. # 001 - MG; CASEDISP

-----X
THOMAS P. MACALUSO,

Plaintiff,

- against -

LEONEL A. ORTIZ,

Defendant.
-----X

LITE & RUSSELL, PLLC
Attorney for Plaintiff
212 Higbie Lane
West Islip, New York 11795

LEWIS JOHS AVALONE AVILES, LLP
Attorney for Defendant
One CA Plaza, Suite 225
Islandia, New York 11749

Upon the following papers read on this e-filed motion for summary judgment: Notice of Motion/Order to Show Cause and supporting papers by defendant, dated July 24, 2019; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers by plaintiff, dated October 3, 2019; Replying Affidavits and supporting papers by defendant, dated October 16, 2019; Other ; (and after hearing counsel in support of and opposed to the motion) it is,

ORDERED that the motion by defendant for summary judgment dismissing the complaint on the ground that plaintiff did not sustain serious injuries as defined in Insurance Law § 5102 (d) is granted.

This is an action to recover personal damages for injuries allegedly sustained by plaintiff when his vehicle collided with a vehicle owned and operated by defendant. The accident allegedly occurred on October 7, 2016, on Veterans Memorial Highway, in Islandia, New York. By his bill of particulars, plaintiff alleges that, as a result of the subject accident, he sustained serious injuries and conditions, including a tear of the articular sides of the supraspinatus and infraspinatus tendons, an interstitial tearing along the posterior infraspinatus tendon, a tear of the superior subscapularis tendon, and a tear of the long head of the biceps tendon.

Defendant moves for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a “serious injury” as defined in Insurance Law § 5102 (d).

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 Toure v Avis Rent A Car Sys.,*

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98 NY2d 345, 746 NYS2d 865 [2002]; *Gaddy v Eycler*, 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]; *Faroze v Kamran*, 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]).

Here, defendant made a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) through the affirmed report of defendant's examining physician (see *Bailey v Islam*, 99 AD3d 633, 953 NYS2d 39 [1st Dept 2012]; *Sierra v Gonzalez First Limo*, 71 AD3d 864, 895 NYS2d 863 [2d Dept 2010]). On April 15, 2019, approximately two years and six months after the subject accident, moving defendant's examining orthopedist, Dr. Lopez Steuart, examined plaintiff and performed certain orthopedic tests, including the apprehension test, the Clunk test, the Sulcus test, the AC Shear test, the empty can test, the drop arm test, and the liftoff test. Dr. Steuart found that all the test results were negative or normal, and that there was no spasm in plaintiff's left shoulder. Dr. Steuart also performed range of motion testing on plaintiff's left shoulder, using a goniometer to measure his joint movement. Dr. Steuart found that plaintiff exhibited normal joint function with only minor restriction in forward flexion of 170 degrees (175 degrees normal). Dr. Steuart opined that plaintiff had no orthopedic disability at the time of the examination (see *Willis v New York City Tr. Auth.*, 14 AD3d 696, 789 NYS2d 223 [2d Dept 2005]).

Further, at his deposition, plaintiff testified that as a result of the subject accident, he suffered injury only to his left shoulder. He testified that following the accident, he was not confined to his home, he did not miss any time from work, and there was no change in working hours. He also testified that at work, he was able to complete all the tasks he was assigned only with a "little more difficulty." He testified that there is no activity that he is unable to perform because of the accident, although he had difficulty in "sleeping, waking up, showering, driving, [and] going to work." Plaintiff's deposition testimony established that his injuries did not prevent him from performing "substantially all" of the material acts constituting his customary daily activities during at least 90 out of the first 180 days following the accident (see *Burns v McCabe*, 17 AD3d 1111, 794 NYS2d 267 [4th Dept 2005]; *Curry v Velez*, 243 AD2d 442, 663 NYS2d 63 [2d Dept 1997]).

Thus, defendant met his initial burden of establishing that plaintiff did not sustain a permanent consequential limitation of use of a body organ or member or significant limitation of use of a body function or system, and that he was not prevented from performing substantially all of his usual and customary daily activities for 90 of the first 180 days following the accident within the meaning of Insurance Law § 5102 (d) (see *Gonzalez v Green*, 24 AD3d 939, 805 NYS2d 450 [3d Dept 2005]).

The burden, therefore, shifted to plaintiff to raise a triable issue of fact (see *Gaddy v Eycler*, *supra*). 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

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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 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]).

Plaintiff opposes the motion, arguing defendant’s expert report is insufficient to meet his burden on the motion. Plaintiff also argues that the medical reports prepared by his treating physicians raise a triable issue as to whether he suffered injury within the “significant limitation of use” category of Insurance Law § 5102 (d). Plaintiff submits, inter alia, the unsworn medical report of Dr. Michael Lastihenois and the unsworn MRI report of Dr. Michael Setton. The unsworn or uncertified medical reports submitted by plaintiff are insufficient to raise a triable issue of fact, as they are not in admissible form (*see Grasso v Angerami*, 79 NY2d 813, 580 NYS2d 178 [1991]; *Ramirez v Elias-Tejada*, 168 AD3d 401, 405, 92 NYS3d 188 [1st Dept 2019]).

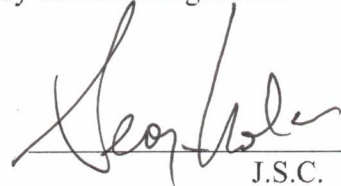
In any event, even assuming that the medical reports of Dr. Lastihenois and Dr. Setton were admissible, Dr. Lastihenois failed to provide any admissible medical proof that was contemporaneous with the subject accident that showed range of motion limitations in plaintiff’s left shoulder (*see Espinosa v Melendez*, 40 AD3d 912, 837 NYS2d 208 [2d Dept 2007]; *Felix v New York City Tr. Auth.*, 32 AD3d 527, 528, 819 NYS2d 835 [2d Dept 2006]). Dr. Lastihenois stated that he first examined plaintiff on October 21, 2016, two weeks after the subject accident. During the consultation, he administered range of motion testing on plaintiff’s left shoulder and found that “[n]o limitation was noted with range of motion” without providing any specific range of motion testing results, although there are positive results on the impingement sign and the Speed test. When Dr. Lastihenois subsequently examined plaintiff on November 1, 2016, November 8, 2016, November 14, 2016, December 2, 2016, December 28, 2016, and January 26, 2017, he administered range of motion testing on plaintiff’s left shoulder without providing specific testing results. Based on his review of MRI films of plaintiff’s left shoulder, Dr. Setton found that there were an articular surface tearing of the conjoined tendons, an interstitial tearing along the posterior infraspinatus tendon, a surface tearing of the superior subscapularis tendon, and a partial tearing of the long head of the biceps tendon. The mere existence of a tear is not a serious injury without objective evidence of the extent and duration of the alleged physical limitations resulting from the injury (*see Bamundo v Fiero*, 88 AD3d 831, 931 NYS2d 239 [2d Dept 2011]; *McLoud v Reyes*, 82 AD3d 848, 849, 919 NYS2d 32 [2d Dept 2011]).

Finally, plaintiff failed to offer competent evidence that he sustained nonpermanent injuries that left him unable to perform his normal daily activities for at least 90 of the 180 days immediately following the accident (*see John v Linden*, 124 AD3d 598, 1 NYS3d 274 [2d Dept 2015]; *Strenk v*

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Rodas, 111 AD3d 920, 921, 976 NYS2d 151 [2d Dept 2013]). Thus, defendant's motion for summary judgment based on plaintiff's failure to meet the serious injury threshold is granted.

Dated: May 5, 2020



J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION