

Carpenito v Jenkins

2020 NY Slip Op 35120(U)

September 9, 2020

Supreme Court, Westchester County

Docket Number: Index No. 53381/2019

Judge: William J. Giacomo

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.**

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ANTHONY N. CARPENITO and DOROTHEA
CARPENITO,

Plaintiffs,

Index No. 53381/2019

– against –

DECISION & ORDER

TAMARA M. JENKINS and LENWOOD E. MORTON,
Defendants.

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In an action to recover damages for personal injuries, etc., the defendants move for summary judgment dismissing the complaint on the grounds that plaintiff Anthony N. Carpenito did not sustain a serious injury within the meaning of Insurance Law 5102:

Papers Considered NYSCEF Doc. No. 15-28; 33-39

1. Notice of Motion/Affirmation of Christien A. Hilcken, Esq./Exhibit A-L;
2. Affirmation of Philip A. DeCaro, Esq. in Opposition/Affirmation of Michael Cushner, M.D./Exhibits A-D;
3. Reply Affirmation of Grace Cho, Esq.

Factual and Procedural Background

The plaintiffs commenced this action against the defendants seeking damages for personal injuries allegedly sustained by Anthony N. Carpenito on May 11, 2017, in a motor vehicle accident on Grasslands Road near the intersection with Virginia Road in the Town of Mount Pleasant. Plaintiffs allege Anthony Carpenito sustained a tear to the medial and lateral meniscus of the left knee and that the injuries are permanent.

Defendants move for summary judgment, pursuant to CLPR 3212, on the grounds that the injured plaintiff did not sustain a serious injury within the meaning of Insurance Law 5102(d).

In support of the motion, defendant submits an affirmed report of Alan B. Greenfield, M.D., D.A.B.R., dated December 23, 2019, who reviewed an MRI taken of plaintiff's left knee. Dr. Greenfield opines that there is intrasubstance mucoid degenerative signal within the peripheral posterior horn of the medial meniscus however no meniscal tears were present. This, according to Dr. Greenfield represents

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intrasubstance degenerative signal within the meniscus unrelated to trauma and unrelated to the motor vehicle accident. There is degenerative narrowing and thinning of articular cartilage in all joint compartments which represent chronic degenerative changes that have existed for years and are unrelated to the motor vehicle accident. Dr. Greenfield states that there is no evidence of fracture, ligament or tendon tear and no findings which can be attributed to the motor vehicle accident.

Defendants also submit an affirmed IME report of George Burak, M.D., dated February 19, 2020. During the IME plaintiff complained of mild discomfort to his left knee with difficulty squatting and kneeling. He was not receiving any active treatment or care to his left knee. He stopped physical therapy in November 2017. Plaintiff performs all his activities of daily living and drives without any difficulty. He works out at a gym twice a week. He has continued working full time without restriction and had not missed any work as a result of the accident.

Dr. Burak performed a range of motion test of, inter alia, the left knee which was 0 to 135 degrees with 0 to 140 degrees being normal. There was no evidence of redness, heat, swelling, or any type of deformity. No instability was noted on the left knee. He had a negative anterior drawer sign, negative Lachman test, and a negative pivot shift test. Meniscal maneuvers reproduced slight medial joint discomfort.

Based upon the orthopedic examination and review of medical records, Dr. Burak opines that plaintiff sustained an acute sprain of his left knee which has not fully resolved and which is causally related to the accident.

Defendants argue that a sprain of the left knee does not qualify as a serious injury within the meaning of the Insurance Law.

In opposition, plaintiffs argue that defendants failed to demonstrate entitlement to summary judgment on the 90/180 category arguing that they failed to eliminate all triable issues of fact. Plaintiffs also argues that triable issue of fact exist as to whether the injured plaintiff sustained a permanent consequential limitation or a significant limitation of use of his left knee.

Plaintiffs submit an affirmation of Michael Cushner, M.D. in opposition. Dr. Cushner avers that the injured plaintiff was under his care since June 6, 2017. Plaintiff received physical therapy between June 30, 2017, and January 31, 2018. Dr. Cushner notes that he treated plaintiff for a right knee injury in 2016.

At the time of the examination in June 2017, Dr. Cushner performed a range of motion test which revealed flexion of 125° with 135° being normal; and extension of 5° with 0 being normal.

Dr. Cushner initially diagnosed plaintiff with a left knee meniscus tear, left knee internal derangement, and lumbar pain. However, Dr. Cushner acknowledges that the MRI of the plaintiff's left knee did not confirm his diagnosis of a left knee meniscal tear. He stated however, that a surgeon's observations in the course of surgery are the "gold

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standard” for diagnosing the existence and etiology of a condition within a patient’s body. Therefore, Dr. Cushner opines that his diagnosis is that “the plaintiff sustained a left knee meniscal tear that would have been observed during an arthroscopic surgery”.

Dr. Cushner also states that plaintiff was asymptomatic at the time of the accident, and therefore, the degenerative changes noted on the MRI were activated or aggravated by the motor vehicle accident and predisposed him to the injuries he sustained to his left knee.

On May 26, 2020, plaintiff was re-evaluated by Dr. Cushner. However, due to Covid-19, this was a virtual visit and therefore, Dr. Cushner could not perform any range of motion testing.

Dr. Cushner opines that plaintiff’s left knee injury was proximately caused by the motor vehicle accident, and is permanent, consequential, and significant in nature. Plaintiff’s inability to move his left knee in the full normal range is causally related to the motor vehicle accident and will persist and worsen with age. His prognosis remains guarded.

Discussion

On a motion for summary judgment in a personal injury action arising from a motor vehicle accident, the defendant is required to establish that the plaintiff did not sustain a serious injury within the meaning of Insurance Law 5102(d) (see *Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d 345 [2002]; *Gaddy v. Eyler*, 79 N.Y.2d 955 [1992]; *Licari v. Elliott*, 57 N.Y.2d 230 [1982]). Here, the defendant met her prima facie burden.

The defendants submitted competent medical evidence establishing, prima facie, that the plaintiff’s injury to his left knee does not constitute a serious injury within the meaning of Insurance Law § 5102 (d) and were degenerative in nature (see *Il Chung Lim v Chrabaszczy*, 95 AD3d 950, 951 [2d Dept 2012]; *McLoud v Reyes*, 82 AD3d 848 [2d Dept 2011]). The defendants also demonstrated, prima facie, that the plaintiff did not sustain a serious injury under the 90/180-day category of Insurance Law § 5102(d) (see *Bong An v Villas-Familia*, 183 AD3d 582, 583 [2d Dept 2020]).

In opposition, plaintiff failed to raise a triable issue of fact. The limitation noted by plaintiff’s treating physician was insignificant within the meaning of the Insurance Law (see *Il Chung Lim v Chrabaszczy*, 95 AD3d at 951; *McLoud v Reyes*, 82 AD3d 848). Moreover, even plaintiff’s expert acknowledged that the MRI did not confirm his diagnosis of a meniscus tear and that the injuries were degenerative. Dr. Cushner’s conclusion that despite the fact that no tear was found on the MRI a tear would have been observed by a surgeon had the plaintiff had surgery is entirely speculative and insufficient to raise a triable issue of fact.

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Accordingly, it is

ORDERED that defendants' motion for summary judgment dismissing the complaint is **GRANTED** and the complaint is dismissed.

Dated: White Plains, New York
September 9, 2020



HON. WILLIAM J. GIACOMO, J.S.C.