

Adu-Gyamfi v McGirt

2020 NY Slip Op 35400(U)

July 15, 2020

Supreme Court, Kings County

Docket Number: Index No. 514663/2017

Judge: Lara J. Genovesi

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At an IAS Term, Part 34 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 15th day of July 2020.

P R E S E N T:

HON. LARA J. GENOVESI,
J.S.C.

-----X
BRIGHT ADU-GYAMFI,

Index No.: 514663/2017

Plaintiff,

DECISION & ORDER

-against-

FRANCETTA L. MCGIRT,

Defendant.

-----X

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	<u>NYSCEF Doc. No.:</u>
Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Annexed _____	19 - 33
Opposing Affidavits (Affirmations) _____	34 - 38
Reply Affidavits (Affirmations) _____	39

Defendant, Francetta L. McGirt, moves by notice of motion, sequence number two, pursuant to CPLR § 3212 for summary judgment, dismissing plaintiff's complaint on the grounds that plaintiff did not sustain a serious injury. Plaintiff, Bright Adu-Gyamfi, opposes this application.

Plaintiff allegedly sustained personal injuries on November 12, 2016, as a result of a motor vehicle accident. In his bill of particulars, plaintiff alleged, *inter alia*, injuries to the cervical spine and lumbar spine (*see* NYSCEF Doc. # 23 at ¶ 12). Additionally,

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although the bill of particulars lists “left shoulder sprain/strain and left rotator cuff tendinopathy with tendinitis and partial tear”, plaintiff later alleges that these injuries resulted in “pain, tenderness, weakness, discomfort, aching, restriction of motion, numbness, stiffness, atrophy, insomnia, deformity, the possible need for future surgery, spasm, stiffness, impairment of function, soft tissue injury, swelling partial and permanent loss of use of the *right* shoulder [emphasis added], neck and back areas, and, as a result, the entire body”.

Plaintiff alleged that he “was confined to bed and home intermittently for a period of approximately 15 weeks, except for necessary and essential excursion for required purposes” (*id.* at ¶ 14). Plaintiff further allegedly sustained permanent injuries, significant limitation, significant disfigurement, permanent consequential limitation, and “a disabling injury for a period in excess of 90 out of the first 180 days following” the accident (*id.* at ¶ 18).

Plaintiff was involved in a subsequent motor vehicle accident in October 2018. In an affidavit submitted in opposition herein, plaintiff stated that as a result of the 2016 accident he injured his right shoulder, neck and back (*see* NYSCEF Doc. # 35 at ¶ 3-4, 9, Plaintiff Affidavit). He further stated that as a result of the subsequent accident in 2018, he injured his neck and left shoulder (*see id.* at ¶ 10).

In the instant case defendant met her prima facie burden and established that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d). Defendant submitted competent medical evidence establishing, prima facie, that plaintiff did not sustain a permanent loss, a significant limitation or a permanent consequential

limitation within the meaning of Insurance Law. Defendant provided the affirmed report of Dr. Satish Kashyap. Dr. Kashyap performed an independent medical examination of plaintiff on January 28, 2019. Examination with a hand-held goniometer revealed that plaintiff has full range of motion of his cervical spine, lumbar spine and both shoulders (*see* NYSCEF Doc. # 25). Dr. Kashyap opined that there is a causal relationship between plaintiff's injuries and the accident. However, plaintiff's cervical, lumbar and left shoulder sprains/strains were resolved and "within a reasonable degree of medical certainty, the claimant has fully recovered from the injuries sustained on 11/12/16" (*id.*).

Defendant further established, *prima facie*, that plaintiff did not sustain a non-permanent medically determined injury with prevented him from performing his usual and customary activities for the first 90 out of 180 days after the accident. Defendant provided the transcript of plaintiff's examination before trial (EBT) (*see* NYSCEF Doc. # 24). Contrary to the allegation in his bill of particulars, plaintiff testified that he was not restricted to bed or home after the 2016 accident (*see id.* at 71). Plaintiff testified that he was not employed on the date of the accident and was a full-time student (*see id.* at 62). Plaintiff testified that he did not miss any days of school as a result of the accident (*see id.* at 63). The 2016 accident did not affect his school in any way (*see id.* at 65). Since the accident plaintiff has not been able to go to the gym or lift boxes (*see id.* at 66-67). However, plaintiff testified earlier that he doesn't do any heavy lifting (*see id.* at 42).¹

¹ Although defendant failed to address the claim in plaintiff's bill of particulars that he sustained significant disfigurement, the evidence submitted establishes that plaintiff was not disfigured within the meaning of Insurance Law. Dr. Kashyap's report indicates that plaintiff did not sustain any lacerations as a result of the accident (*see* NYSCEF Doc. # 25). Further, plaintiff's opposition is silent as to significant disfigurement.

In opposition, plaintiff raised a triable issue of fact. As an initial matter, plaintiff's contention that defendants failed to meet their burden because they failed to address plaintiff's knee tear is without merit. The bill of particulars is silent as to a knee tear. Plaintiff did not provide a supplemental bill of particulars alleging that injury.

Further, plaintiff provided an affirmation from Rolando Chumaceiro M.D., who treated the plaintiff on December 12, 2016, soon after his accident. Dr. Chumaceiro opined that "to a reasonable degree of medical certainty... Mr. Adu-Gyamfi's injuries to his right shoulder, neck and back are causally related to his accident of November 12, 2016" (NYSCEF Doc. # 38). Dr. Chumacerio also measured loss in range of motion using an inclinometer and found losses in the cervical spine up to 93%, in the lumbar spine up to 84% and in the right shoulder up to 82% (*see id.*).

Plaintiff further provided the affirmed report of Dr. Hank Ross, who more recently examined plaintiff, on October 22, 2019 (*see* NYSCEF Doc. # 37). Dr. Ross measured plaintiff's range of motion with a goniometer and found loss in range of motion.² The loss in plaintiff's cervical spine up to 25%, in the right shoulder up to 22.23% and loss in the lumbar spine up to 66.67%. Dr. Ross measured plaintiff's range of motion as follows:

² Defendant contends that plaintiff's affidavit creates a feigned issue of fact as his statement that he still feels pain in his right shoulder allegedly conflicts with his earlier EBT testimony that he was feeling no pain "at this time" (NYSCEF Doc. # 24 at 54) and that he stopped treatment when his neck back and shoulder were "good" (*id.* at 68-69). Even assuming, arguendo, that these are conflicting, plaintiff's subjective descriptions of how he is feeling at both his EBT and in his affidavit, juxtaposed with the objective medical data showing loss in range of motion, demonstrates that questions of fact exist regarding whether he sustained a serious injury.

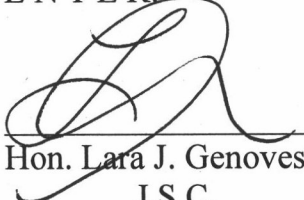
Body Function		Measured Range of Motion	Normal Range of Motion	Percentage Lost
Cervical	Flexion	35	40	12.5%
	Extension	40	45	11.11%
	Right Rotation	60	80	25%
	Left Rotation	60	80	25%
Lumbar	Flexion	60	80	25%
	Extension	10	30	66.67%
Right Shoulder	Abduction	130	150	13.33%
	Forward Flexion	150	180	16.67%
	External Rotation	80	90	11.2%
	Internal Rotation	70	90	22.23%

Dr. Ross further opined that plaintiff's injuries are permanent in nature and are causally related to the subject accident. Although Dr. Ross failed to address the subsequent accident and whether plaintiff's injuries could be attributed to that accident instead, Dr. Ross measured lost range of motion in plaintiff's right shoulder, which was not alleged to be injured in the subsequent accident. Therefore, a question of fact exists as to whether plaintiff sustained a serious injury in his right shoulder.

Accordingly, the defendant's motion for summary judgment is denied as questions of fact exist as to whether plaintiff sustained a serious injury within the meaning of Insurance Law § 5102(d).

The foregoing constitutes the decision and order of this Court.

ENTER:


 Hon. Lara J. Genovesi
 J.S.C.

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 KINGS COUNTY CLERK
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