

Panarese v Alexander

2020 NY Slip Op 35503(U)

June 30, 2020

Supreme Court, Bronx County

Docket Number: Index No. 33455/2018E

Judge: Ben R. Barbato

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must establish that a “serious injury” has been sustained. *Licari v Elliot*, 57 NY2d 230 (1982). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to judgment as a matter of law. *Alvarez v Prospect Hospital*, 68 NY2d 320 (1986). In the motion currently before the court, the burden rests on defendant to establish that plaintiff has not suffered a “serious injury” by the submission of evidentiary proof in admissible form. *Lowe v Bennet*, 122 AD2d 728 (1st Dept. 1986), *affd* 69 NY2d 701 (1986). When a defendant’s motion is sufficient to raise the issue of whether a “serious injury” has been sustained, the burden shifts and it is then incumbent upon the plaintiff to produce prima facie evidence in admissible form to support the claim of “serious injury.” *Licari v Elliot*, 57 NY2d 230 (1982).

Defendants satisfied their initial burden through the submission of the affirmed report of Dr. Peter Ross, M.D. coupled with plaintiff’s deposition transcript and excerpts from the medical records provided by plaintiff. In his affirmed report, dated September 6, 2019, Dr. Ross indicates that he conducted an independent radiology review of plaintiff’s cervical and lumbar spine MRIs which were both taken on October 9, 2018. Dr. Ross opined in his report that plaintiff’s cervical MRI revealed degenerative and vertebral discogenic changes which are all chronic in nature and pre-existing to the accident which occurred on August 30, 2018. Dr. Ross also opined that plaintiff’s MRI of the lumbosacral spine shows no evidence of focal lumbar disc herniations caused by the accident on August 30, 2018, and that the degenerative vertebral and discogenic changes are all chronic in nature and pre-existing to the accident on August 30, 2018.

In opposition to the motion, plaintiff submits medical records and reports and doctor affirmations as evidence that he sustained serious injury under the law. Plaintiff submits

Westchester Square Emergency Room records from the day of the accident noting that Mr. Panarese complained of neck and right lower back pain as a result of his vehicle being rear ended. Plaintiff contends that defendants' radiology expert, Dr. Ross, did not examine plaintiff or review any of his hospital and medical records besides the MRIs. Plaintiff also argues that Dr. Ross summarily concludes that all of plaintiff's herniations and bulges in both his cervical and lumbar spine are solely the result of degeneration which are findings that fail to comport with the findings made by Thomas Kolb, M.D., the radiologist plaintiff was referred to by his own treating physicians. Dr. Kolb, in his affirmation, avers that he supervised the taking of plaintiff's cervical spine MRI and his impression was: (1) large posterior disc herniations at C3-4 and C4-5 impinging directly upon the spinal cord deviating it posteriorly. The herniating impinge upon the thecal sac, bilateral recesses and the bilateral neural foramina at both levels; and (2) disc herniating at C2-3 and C5-7 with central foramina narrowing. Dr. Kalb also avers that he supervised the taking of an MRI of plaintiff's lumbar spine and his impression was: (1) disc herniating at L4-5 and L5-S1 with central, bilateral recess and foramina narrowing; (2) herniation at L5-S1 impinging directly upon the right greater than left extra theca S1 nerve roots; (3) grade 1 anterolisthesis of L4 upon L5; (4) smaller posterior disc herniation at L1-2 and L2-3 with central and foraminal narrowing and (5) disc bulge at L3-4.

Plaintiff also submits the affidavit of Dr. Dominic Rubino, a chiropractor who treated plaintiff at the rate of three (3) times per week since September 10, 2018 to the present, as well as a copy of all his reports and records including objective medical tests evincing substantial limitations in plaintiff's range of motion. Upon initial examination, Dr. Rubino diagnosed plaintiff with cervical strain/sprain, possible disc pathology, cervical radiculopathy, back pain,

muscle spasms and right shoulder joint pain. After treating plaintiff, Dr. Rubino opines that plaintiff's injuries are a direct result of the motor vehicle accident of August 30, 2018 and that this type of trauma to the spine creates muscular and ligamentous instabilities with resultant acute asymmetrical misalignments and nerve irritation which will in turn result in premature hypertrophic degenerative changes that lead to further decreased range of motion and functional limitations.

In addition, plaintiff submits the affirmation and reports/records of Dr. Eial Faierman, an orthopedist who evaluated plaintiff and initially opined that plaintiff sustained a cervical and lumbar spine strain and concluded that there is a causal relationship between the accident and his injuries. Plaintiff continued his chiropractic and physical therapy regimen and follow-up evaluations with objective testing by Dr. Faierman. Dr. Faierman noted that plaintiff's disability is partial, permanent and has resulted in chronic pain with progressive remission and exacerbation during over use of the neck and low back. Dr. Faierman concluded that plaintiff had decreased range of motion of upper and lower extremities, weakness and sensory disturbances which injuries were caused by the accident of August 30, 2018, and that any degenerative changes noted in his MRIs are not the cause of his pathology and symptoms.

Although plaintiff also submits the medical records of Dr. Patrick Prepetit, a pain management specialist who has been treating plaintiff since July 17, 2019, the records are not certified and are not accompanied by an affirmed report of Dr. Prepetit and cannot be considered by the court.

Notwithstanding, plaintiff has come forward with sufficient evidence to defeat defendants' motion for summary judgment. *See Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d

345, 352 (2002). The conflicting findings between plaintiff's treating physicians and defendants' radiologist raise issues of fact, including the credibility of expert witnesses which cannot be decided on a motion for summary judgment. However, with respect to the category of 90/180, plaintiff has failed to set forth medical proof that there was a causally related, non-permanent, medically determined injury that prevented performance of his usual and customary daily activities for 90 out of 180 days immediately subsequent to injury. In addition, in his deposition testimony, plaintiff stated that directly after the accident he did not miss many days from work and he returned to full duty.

Therefore, plaintiff, in opposing the motion, has set forth sufficient proof to establish the existence of material issues of fact regarding the extent and seriousness of the injuries which plaintiff sustained regarding the permanent consequential and significant limitation categories of serious injury. These facts must be resolved at a trial.

Accordingly, defendants' motion for summary judgment is denied in part and granted in part only to the extent that plaintiff's 90/180 serious injury claim is dismissed. The cross motion by plaintiff for partial summary judgment on the issue of liability is denied with leave to renew before the Hon. Mary Ann Brigantti as a working copy of the cross motion was not in the file before this court.

This constitutes the decision and order of the court.


BEN R. BARBATO, J.S.C.

Dated: June 30, 2020