

Simms v Bloodman

2020 NY Slip Op 35634(U)

May 15, 2020

Supreme Court, Bronx County

Docket Number: Index No. 30913/2017E

Judge: Mary Ann Brigantti

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 15

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Michael Simms,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 30913/2017E

Hesketh A. Bloodman,

Defendants.

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Mary Ann Brigantti, J.

Upon the foregoing papers, the defendant moves for summary judgment dismissing the complaint for plaintiff’s failure to satisfy the “serious injury” threshold as defined by New York Insurance Law § 5102 (d). Plaintiff opposes the motion.

On or about December 20, 2017, plaintiff commenced this action for personal injuries allegedly sustained as a result of a July 21, 2017 motor vehicle accident that occurred on the grounds of Kennedy Airport in Queens County.

Plaintiff alleges that he sustained injuries to his lumbar spine, cervical spine, and left hip. Plaintiff alleges “serious injuries” under the categories of permanent consequential limitation, significant limitation, and 90/180-day injury.

When a defendant seeks summary judgment alleging that a plaintiff does not meet the “serious injury” threshold required to maintain a lawsuit, the burden is on the defendant to establish through competent evidence that the plaintiff has no cause of action (*Franchini v Plameri*, 1 NY3d 536 [2003]). “Such evidence includes affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff’s claim” (*Spencer v Golden Eagle, Inc.*, 82 AD3d 589, 590 [1st Dept 2011]). If the defendants fails to meet their prima facie burden, the burden does not shift to plaintiff and the motion for summary judgment can be denied without the need to consider plaintiff’s showing in opposition (*see Karounos v Doulalas*,

153 AD3d 1166, 1167 [1st Dept 2017]). However, once defendant's initial threshold is met, the burden shifts to the plaintiff to raise a material issue of fact using objective, admissible medical proof (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350 [2002]).

Dr. Joseph C. Elfenbein performed an orthopedic examination on April 25, 2019. Examination of plaintiff's cervical spine range of motion revealed absence of spasm or tenderness. He measured flexion at 80 degrees (50 degrees normal), extension at 60 degrees (60 degrees normal), right lateral flexion at 45 degrees (45 degrees normal), left lateral flexion at 45 degrees (45 degrees normal), right rotation at 80 degrees (80 degrees normal), and left rotation at 80 degrees (80 degrees normal). Other objective tests (distraction, compression, Jackson's, Soto-Hall) were negative. A prima facie showing was therefore made as to plaintiff's cervical spine.

As to the thoracic spine, Dr. Elfenbein measured range of motion of flexion at 45 degrees (45 degrees normal), extension at 0 degrees (0 degrees normal), right lateral flexion at 45 degrees (45 degrees normal), left lateral flexion at 45 degrees (45 degrees normal), right rotation at 25 degrees (30 degrees normal), and left rotation at 25 degrees (30 degrees normal).

As to the lumbar spine, range of motion testing revealed flexion at 50 degrees (60 degrees normal), extension at 20 degrees (25 degrees normal), right lateral flexion at 20 degrees (25 degrees normal), and left lateral flexion at 20 degrees (25 degrees normal). A prima facie showing was therefore made as to plaintiff's lumbar spine. Objective testing (Fabere, Ely's, Kemp's, Lasegue's) was negative.

As to plaintiff's left hip, forward flexion was 80 degrees (100 degrees normal), extension was 30 degrees (30 degrees normal), abduction was 30 degrees (40 degrees normal), adduction to 20 degrees (20 degrees normal), external rotation to 40 degrees (50 degrees normal), and internal rotation to 30 degrees (40 degrees normal).

Dr. Elfenbein concluded that plaintiff had suffered only resolved sprains of the cervical and

lumbar spine, and left hip.¹ He further opined that the restrictions in range of motion were not supported by any positive, objective, correlative findings.

As to plaintiff's cervical spine, Dr. Elfenbein measured normal ranges of motion, and his findings, supported by objective testing, established a prima facie case. As to the plaintiff's lumbar spine and left hip, however, he found significant motion deficits in various planes of motion, ranging from 16% to 25%. As to these findings, Dr. Elfenbein stated that the range of motion findings as to these parts of the body were not supported by any positive, objective, correlative findings. Dr. Elfenbein adequately explained and substantiated his belief that the limitations of motion in the lumbar region of the plaintiff's spine was self-imposed. (*Johnson v Salaj*, 130 A.D.3d 502, 502 [1st Dept 2015] [found limitations in range of motion which he did not otherwise explain]; compare *Swift v New York Tr. Auth.*, 115 A.D.3d 507, 507 [1st Dept 2014] [neurologist's explanation that the limitations in plaintiff's lumbar spine were subjective and secondary to her body habitus, the absence of spasms, and the negative straight leg raising bilaterally, establish prima facie the absence of permanent consequential or significant limitation in that part of the spine].)

Defendant further argues that there was a gap in treatment in that plaintiff stopped all treatment after six months. However, plaintiff's expert, Dr. Zeren, states in his affidavit that plaintiff had reached his maximum medical improvement from conservative management and was advised to continue therapy via home exercise program, thus raising an issue of fact as to any alleged cessation of treatment.

In opposition, plaintiff submits the affidavit of chiropractor Dr. Zeren, D.C., who examined the plaintiff soon after the accident on July 21, 2017. His examination of plaintiff's cervical

¹ The deficits noted by Dr. Elfenbein with respect to the plaintiff's lumbar spine and left hip, representing limitations of less than 20% to 25% as compared to normal in various planes of motion, if not otherwise explained, are "significant" within the meaning of the statute (*Style v Joseph*, 32 AD3d 212, 214, n [1st Dept 2006] [minor restriction of motion of 160 degrees out of 180 degrees in forward elevation and abduction in her left shoulder]; *Sellitto v Casey*, 268 AD2d 753 [2000] [10% loss of use of shoulder not a significant limitation]).

spine and lumbar spine included range of motion studies performed with an inclinometer and protractor. Dr. Zeren's examination of the cervical spine revealed tenderness of the joints in the mid and lower cervical spine, inflammation, and muscle spasm. Cervical Compression Test and Jackson's Test were positive. Spurling's Test was also positive on the left producing paresthesia. Cervical range of motion testing revealed the following significant restrictions: cervical flexion to 40 degrees (normal 60 degrees); extension to 25 degrees (normal 50 degrees); left rotation to 55 degrees (normal 80 degrees); right rotation to 50 degrees (normal 80 degrees), left lateral flexion to 10 degrees (normal 45 degrees); and right lateral flexion to 15 degrees (normal 45 degrees). Dr. Zeren's initial examination of plaintiff's lumbar spine revealed inflammation and posterior spasms. Ely's Test was positive bilaterally and Kemp's Test produced lower back pain bilaterally. Braggard's Test was positive on the left. The Straight Leg Raising Test was also positive on the left producing paresthesia. Plaintiff's lumbar ranges of motion were extension to 5 degrees (normal 30 degrees); flexion to 45 degrees (normal 90 degrees), left lateral flexion to 10 degrees (normal 30 degrees); and right lateral flexion to 10 degrees (normal 30 degrees). Dr. Zeren causally related the injuries to plaintiff's cervical spine and lumbar spine to the to the motor vehicle accident of July 21, 2017.

Dr. Zeren's conclusions are supported by sworn MRI reports of July 26, 2017 of plaintiff cervical and lumbar spine, which indicate numerous herniated and bulging discs.

Dr. Zeren also performed a recent examination on August 15, 2019, which showed significant limitations in range of motion of plaintiff's lumbar and cervical spine as compared to stated norms, the presence of spasms, and positive objective tests.

Plaintiff's evidence raises triable issues of fact as to whether plaintiff sustained significant or permanent consequential limitations in the use of his cervical and lumbar spine based on a contemporaneous and recent examination (*see Streety v Toure*, 173 AD3d 462, 462 [1st Dept 2019]);

Hayes v Gaceur, 162 AD3d 437, 438 [1st Dept 2018]; *Moreira v Mahabir*, 158 AD3d 518, 518 [1st Dept 2018]; *Frias v Gonzalez-Vargas*, 147 AD3d 500, 501 [1st Dept 2017]). With respect to plaintiff's alleged hip injury, neither the contemporaneous examination nor the recent examination demonstrated any limitation in use, and thus fails to raise an issue of fact as to a serious injury.

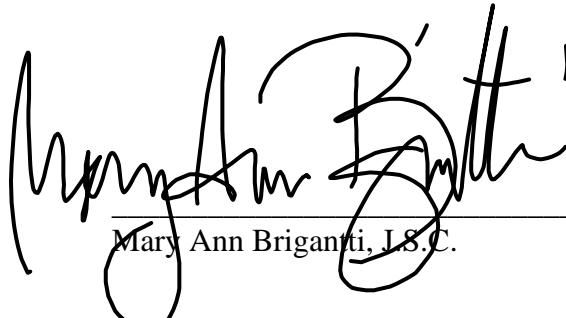
With respect to plaintiff's claim of "serious injury" under the 90/180-day category, defendant does not clearly point to evidence in plaintiff's deposition which would establish as a matter of law that plaintiff did not sustain a 90/180-day injury (*cf. Abreu v NYLL Mgt. Ltd.*, 107 AD3d 512, 513 [1st Dept 2013] [90/180-day injury claim dismissed where plaintiff did not allege that she was disabled for the minimum duration necessary to state such a claim].) Plaintiff testified that he did not work post-accident, and was confined to bed and home for over three months. Defendant's reliance solely on an examination made years after the injury, which did not dispute causation, were insufficient. (*Steinbergin v Ali*, 99 A.D.3d 609 [1st Dept 2012]; *Singer v Gae Limo Corp.*, 91 A.D.3d 526 [1st Dept 2012]; *Quinones v Ksieniewicz*, 80 A.D.3d 506 [1st Dept 2011]; *but see, Coley v. DeLarosa*, 105 A.D.3d 527 [1st Dept 2013] [defendant's doctors relied on contemporaneous medical records].)

Accordingly, it is hereby,

ORDERED, that the motion is granted only to the extent of finding that plaintiff has not sustained a serious injury with respect to his left hip.

This constitutes the Decision and Order of this Court.

Dated: 5/15/20



Mary Ann Briganti, J.S.C.