

Correa v Ballina Cab Corp.

2020 NY Slip Op 35712(U)

January 25, 2020

Supreme Court, Queens County

Docket Number: Index No. 708754/2018

Judge: Ulysses B. Leverett

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

-----X
ORVILLE CORREA,

Plaintiffs,

-against-

BALLINA CAB CORP. AND PALJU SHERPA

Defendant(s)
-----X

Index No.:708754/2018

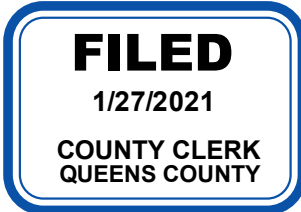
Motion Seq. No.001

Decision and Order

Present: **HONORABLE ULYSSES B. LEVERETT:**

Notice of Motion-Affirmation-Exhibits.....
Affirmation in Opposition-Exhibits
Reply Affirmation.....

Papers Numbered
EF-15-23
EF-26-30
EF-35 ✓



Upon the foregoing papers, it is ordered that defendants Ballina Cab Corp. and Palju Sherpa’s motion for an order pursuant to CPLR § 3212 granting defendants summary judgment and dismissing the complaint of the plaintiff on the grounds that there are no triable issues of fact, in that the plaintiff cannot meet the serious injury threshold requirement as mandate by Insurance Law § § 5104(a) and 5102(d) is denied.

Plaintiff Orville Correa seeks to recover for personal injuries allegedly sustained as a result of a motor vehicle accident which occurred on January 11, 2017 on 7th Avenue at or near its intersection with 34th Street, County of Queens, State of New York.

Plaintiff Orville Correa asserts that on January 11, 2017, he was a restrained driver when he was involved in a collision with a vehicle owned by defendant Ballina Cab Corp and operated by defendant Palju Sherpa. Plaintiff alleges that he sustained to his neck, low back, right shoulder and left knee.

Insurance Law § 5102(d) defines a “serious injury” as “ a personal injury which results in death; dismemberment; significant disfigurement; a fracture, loss of a fetus, permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a permanent nature which prevents the injured from performing substantially all of the material acts, which constitute such person’s usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment.”

Defendant alleges that plaintiff has not suffered a serious injury within the meaning of the No Fault Law. In support of the motion, defendants submitted an orthopedic evaluation of plaintiff dated November 2, 2019 by Dr. Thomas P. Nipper, a Board Certified Orthopedist, who examined plaintiff on September 5, 2019 using a goniometer and reviewed plaintiff’s medical records. Dr. Nipper reports that the examination of plaintiff’s cervical spine range of motion revealed flexion to 50 degrees (normal 50 degrees), extension to 60 degrees (normal 60 degrees), right/left lateral flexion 45 degrees(normal 45 degrees), right/left rotation to 80 degrees (normal 80 degrees).

Plaintiff's lumbar spine range of motion examination found flexion 50 degrees (normal 50 degrees), extension to 25 degrees (normal 25 degrees), right/left lateral bending to 25 degrees (normal 25 degrees). Heel/toe walking as well as tandem walking was performed without difficulty.

Plaintiff's right shoulder range of motion examination revealed flexion to 180 degrees (normal 180 degrees), abduction to 180 degrees (normal 180 degrees), adduction to 30 degrees (normal 30 degrees), internal rotation was normal to the L1 level, external rotation was to 90 degrees (90 degrees normal). No crepitus was found on range of motion.

Plaintiff's left knee range of motion flexion to 130 degrees (normal 130 degrees), and extension to 0 degrees (normal 0 degrees). No swelling or effusion was present.

Dr. Nipper's review of plaintiff's MRI's left knee, lumbar spine, left shoulder, and cervical spine revealed no evidence of an acute traumatic injury and sated that the findings were all consistent with degenerative changes. Dr. Nipper opines that plaintiff's injuries have fully resolved and that plaintiff did not sustain any significant or permanent injuries as a result of the motor vehicle accident.

Defendants submitted a sworn report dated June 5, 2019 by Dr. Mark J. Decker, a board certified radiologist who reviewed plaintiff's 1/26/2017 MRI of the lumbar spine and compared it with the prior study of 12/22/2015. The review revealed stable degenerative disease at L5-S1 with broad bulge and facet hypertrophy resulting in inferior foraminal encroachment, stable epidural lipomatosis, stable bulge and facet hypertrophy at L4-L5, stable epidural lipomatosis, stable facet hypertrophy at L3-L4. Dr. Decker states that there is no evidence that a traumatic injury was sustained.

Dr. Decker's radiological review of plaintiff's 1/27/2017 cervical spine MRI revealed straightening of lordosis secondary degenerative disc disease as demonstrated by multilevel bulging. No soft tissue injury and no fracture or vertebral bony subluxation.

Dr. Decker's radiological review of plaintiff's 1/15/2018 right shoulder MRI revealed AC joint arthropathy, rotator cuff tendinopathy and fraying that is degenerative and not causally related to the subject accident. Degenerative tear of superior labrum and anterior inferior labrum, biceps tendinopathy, also degenerative as well as capsular thickening which can be seen with adhesive capsulitis that is longstanding and not causally related to the subject accident.

Plaintiff in opposition to defendants motion for summary judgment asserts that there are issues of fact as to whether plaintiff sustained a serious injuries within the meaning of Insurance Law 5102(d). In support of his motion, plaintiff submitted a sworn medical report dated September 23, 2019 of Dr. David Weisberg. Dr. Weisberg's 9/23/2019 examination of plaintiff's right shoulder showed flexion to 170 degrees (normal 180 degrees), abduction to 170 degrees (normal 180 degrees), adduction to 35 degrees (normal 50 degrees), internal rotation at 60 degrees (normal 90 degrees), external rotation at 45 degrees (normal 90 degrees) and extension to 35 degrees (normal 50 degrees). Dr. Weisberg found no swelling, no tenderness, normal external rotation and abduction strength.

Plaintiff's back examination revealed flexion to 170 degrees (normal 180 degrees),

extension to 5 degrees (normal 20 degrees), lateral right/left rotation 10 degrees (normal 30 degrees), right rotation to 30 degrees (normal 45 degrees) left rotation to 20 degrees (normal 45 degrees). Tenderness noted and right side spasms.

Plaintiff's neck examination revealed flexion 20 degrees (normal 50 degrees), extension to 40 degrees (normal 60 degrees), left lateral rotation to 15 degrees (normal 45 degrees), right lateral rotation to 10 degrees (normal 45 degrees), right rotation to 40 degrees (normal 60 degrees), left rotation to 30 degrees (normal 60 degrees). Tenderness noted and spasms noted on right side.

Plaintiff submitted a sworn report dated March 11, 2020 from Dr. Mare J Katzman, a board certified orthopedist who performed an independent radiology interpretation on 3/11/2020 of plaintiff's lumbar, cervical, and right shoulder MRI's. Dr. Katzman states that plaintiff's 1/26/2017 MRI lumbar spine findings revealed normal lumbar lordosis in the sagittal plane, no spondylolisthesis, bone marrow signal is within normal limits, at L5-S1, there is minimal peripheral disc bulging with mild encroachment on the neural foramina.

The 1/27/2017 MRI of the cervical spine revealed straightening of the normal cervical lordosis, no compression fracture or traumatic subluxation, cervical cord normal in caliber and signal characteristics. At C3-4 and C4-5, there are subligamentous disc bulges abutting the ventral thecal sac, disc herniation at C5-6 and C6-7.

The 1/15/2018 right shoulder MRI revealed no evidence of recent fracture or dislocation. The bone marrow signal is within normal limits, no muscle sprain or tear and evaluation of the rotator cuff reveals moderate sprain/tenderness of the supraspinatus.

Dr. Katzman concluded that plaintiff's MRI examinations of the cervical spine, lumbar spine and right shoulder revealed that plaintiff suffered the following recent-appearing traumatic injuries due to the subject accident within a reasonable degree of certainty: a recent appearing traumatic disc herniation with annular tear at the C5-6 disc level of the cervical spine with spinal cord compression, recent appearing traumatic disc herniation with annular tear at the C6-7 disc level of the cervical spine, recent appearing traumatic right foraminal disc herniation with annular tear at the L5-S1 disc level of the lumbar spine, worsened right foraminal stenosis at the L5-S1 disc level of the lumbar spine, worsened impingement of the exiting right L5 nerve root at the L5-S1 disc level of the lumbar spine, a SLAP tear of the glenoid labrum of the right shoulder, a partial thickness tear of the biceps anchor, biceps tenosynovitis, a posttraumatic glenohumeral joint effusion, glenohumeral capsular edema, reactive bursitis, a moderate sprain of the rotator cuff tendons, a partial thickness tear of the supraspinatus tendon of the rotator cuff, and a partial thickness tear of the infraspinatus tendon of the rotator cuff.

A motion for summary judgment shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party, and the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. See *Zuckerman v City of New York*, 49 NY 2d 557 (1980). The function of the Court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. See *Pearson v Dix McBride, LLC*, 63 AD 3d 895 (2009).

The Court finds that the medical evidence submitted by defendants in support of their

motion for summary judgment failed to satisfy their burden that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d). Plaintiff's proffered evidence raises issues of material facts as to whether plaintiff sustained cervical/lumbar spine injuries as a result of the subject accident. Here, the affirmed medical reports of the parties' doctors directly contradict each other. Where parties offer conflicting medical evidence on the existence of a serious injury, the existence of such injury is a matter for a jury's determination. See *Cracchiolo v Omerza*, 87 AD 3d 674 (2011).

Accordingly, defendants Ballina Cab Corp. and Palju Sherpa's motion for an order pursuant to CPLR § 3212 granting defendants summary judgment and dismissing the complaint of the plaintiff on the grounds that there are no triable issues of fact, in that the plaintiff cannot meet the serious injury threshold requirement as mandate by Insurance Law § § 5104(a) and 5102(d) is denied.

This is the decision and order of this Court.

Dated: January 25, 2020


Ulysses B. Leverett, JSC

