Diaz v Khalimzoda
2021 NY Slip Op 30469(U)
February 18, 2021
Supreme Court, Kings County
Docket Number: 515586/2017
Judge: Lillian Wan
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 17
---X
ULRIC A. DIAZ JR.,

Plaintiff,

– against –

NASIMI KHALIMZODA,

Defendant.
---X

Index No.: 515586/2017
Motion Date: 02/10/2021
Motion Seq.: 03

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 03) 53-65 and 78-86 were read on these motions for summary judgment.

In this action to recover damages for personal injuries, defendant Nasimi Khalimzoda moves for an Order pursuant to CPLR § 3212 granting summary judgment and dismissing the complaint pursuant to Insurance Law § 5104(a) on the ground that the plaintiff did not sustain a serious injury as defined under Insurance Law § 5102(d). For the reasons set forth below, Motion 03 is denied.

This action arises out of a motor vehicle accident that occurred on or about December 16, 2016 in Kings County, New York. In his Verified Bill of Particulars, the plaintiff claims that he has suffered permanent injuries that include, *inter alia*: disc herniation at L4-5 with bilateral neural foraminal narrowing/lateral recess stenosis; disc herniation at L5-S1 with bilateral neural foraminal narrowing/lateral recess stenosis and bilateral facet arthropathy; disc bulge at L3-4 with bilateral neural foraminal narrowing/lateral; interspace narrowing and dehydration at L4-L5 and L5-S1; lumbar radiculopathy; and injuries to his ankles. The plaintiff also states in his Bill of Particulars that he was confined to his home for three months and to his bed for three months. The plaintiff asserts that, as a result of the accident, he has sustained a permanent consequential limitation of use of a body member, a significant limitation of the use of a body function or system, and a medically determined injury that has prevented him from performing substantially all of the material acts which constitute his actual and customary daily activities for at least 90 days during the 180 days immediately following his injury.

In support of the motion, the defendant offers the pleadings, the unsigned deposition transcript of the plaintiff, and the medical reports of Dr. Alan Zimmerman and Dr. Jessica Berkowitz. The March 13, 2020 affirmed report of board-certified orthopedist Dr. Zimmerman was prepared following an examination of the plaintiff. Dr. Zimmerman states that he only reviewed the Bill of Particulars and police accident report prior to the examination. With the assistance of a goniometer, Dr. Zimmerman found a normal range of motion when testing for sciatic nerve inflammation and radiculopathy, noting also that there was no spasm or tenderness. Dr. Zimmerman also found normal ranges of motion in the lumbar spine, with flexion of 60 degrees (60 degrees normal), extension of 25 degrees (25 degrees normal), lateral bending to the right and left of 25 degrees each (25 degrees normal), and right and left rotation of 30 degrees

each (30 degrees normal). Dr. Zimmerman also found normal ranges of motion in the plaintiff's ankles and feet with regard to dorsiflexion, plantar flexion, inversion, and eversion. Dr. Zimmerman further noted that there is no disability and no permanency.

The defendant also offers the affirmed report of board-certified radiologist Dr. Berkowitz, which is dated May 11, 2020. Dr. Berkowitz reviewed an MRI of plaintiff's lumbar spine taken on January 24, 2017, and found disc desiccation and minimal disc bulge at L4-5. Dr. Berkowitz states that these findings are chronic and degenerative in origin, and that there is no evidence of acute traumatic injury to the lumbar spine.

The plaintiff opposes the motion and submits the pleadings, plaintiff's affidavit and deposition transcript, and the affirmed reports of Dr. Gabriel Dassa, Dr. Daniel Schlusselberg, Dr. Aditya Patel, and Dr. Sukdeb Datta. Dr. Dassa states in his affirmation that it is his opinion, with a reasonable degree of medical certainty, that the plaintiff suffered significant limitations of the use of a body function or system, that these limitations resulted from injuries caused by the subject accident, and that they continue to affect his everyday activities and cause him pain. Dr. Dassa initially examined the patient on January 17, 2017, and found limited ranges of motion in the lumbrosacral spine, with flexion of 75 degrees (90 degrees normal), extension of 10 degrees (30 degrees normal), lateral bending of 20 degrees (40 degrees normal), and lateral rotation of 30 degrees (40 degrees normal). Dr. Dassa also initially found tenderness on palpation over the posterior medial arch over the plantar fascia region. In a follow-up examination dated February 15, 2017, Dr. Dassa found similar range of motion deficiencies, including even less flexion in the lumbrosacral spine at 50 degrees (90 degrees normal). Dr. Dassa also examined the plaintiff on October 13, 2020, and found limitations in range of motion in the plaintiffs lumbar spine, with flexion of 55 degrees (90 degrees normal), extension of 20 degrees (30 degrees normal), lateral bending of 20 degrees (40 degrees normal), and lateral rotation of 20 degrees (30 degrees normal).

Dr. Sukdeb Datta also evaluated the plaintiff on March 13, 2017, March 27, 2017, May 3, 2017, and June 29, 2017, finding identical losses in range of motion on each date and affirming that plaintiff's injuries were directly caused by the accident. Dr. Aditya Patel also examined the patient on August 14, 2017, finding the same range of motion losses.

Plaintiff also submits an affidavit and his deposition testimony. At his deposition, plaintiff stated that he treated with a physical therapist two times per week for about nine or ten months. *See* NYSCEF Doc. No. 61. Plaintiff testified that he ended physical therapy because insurance stopped paying for it. Plaintiff also testified that he did not miss any time from work as a result of the subject accident, and that his job duties did not change at all. Plaintiff further states that he was only confined to his bed for one day and was not confined to his home following the accident. Plaintiff testifies that he still has difficulty performing daily activities such as exercising and household chores like washing clothes or dishes, and that he can no longer play sports such as basketball or football. Plaintiff further testifies that, as of the date of the deposition, his daily back pain remains an eight or nine out of ten.

A motion for summary judgment is granted in favor of the moving party where there are no material issues of fact, and as a result, the moving party is entitled to judgment as a matter of

law. *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986). As the proponent of the summary judgment motion, the defendant has the initial burden of establishing that the plaintiff did not sustain a serious injury under the categories of injury claimed in his Bill of Particulars. *See Toure v Avis Rent A Car Sys.*, 98 NY2d 345 (2002). A defendant can satisfy the initial burden by relying on statements of defendant's examining physician(s), or plaintiff's sworn testimony, or by the affirmed reports of plaintiff's own examining physicians. *See Pagano v Kingsbury*, 182 AD2d 268 (2d Dept 1992). The defendant's medical expert must specify the objective tests upon which the medical opinions are based, and when rendering an opinion as to the range of motion measurement, must compare the range of motion findings to those that are considered to be normal for the particular body part. *See Browdame v Candura*, 25 AD3d 747 (2d Dept 2006).

Defendant's submissions demonstrated defendant's prima facie entitlement to summary judgment on the ground that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident. *See Toure v Avis Rent A Car Sys.*, 98 NY2d 345 (2002); *Gaddy v Eyler*, 79 NY2d 955 (1992). In this regard, the defendant submitted competent medical evidence establishing, *prima facie*, that the alleged injuries to the plaintiff's lumbar spine and ankles did not constitute a serious injury within the meaning of Insurance Law § 5102(d) (*see Hayes v Vasilios*, 96 AD3d 1010 (2d Dept 2012)) and that, in any event, his alleged lumbar spine injuries were not caused by the subject accident, but were instead degenerative in nature. *See Kabir v Vanderhost*, 105 AD3d 811 (2d Dept 2013); *Il Chung Lim v Chrabaszcz*, 95 AD3d 950 (2d Dept 2012); *Faulkner v Steinman*, 28 AD3d 604 (2d Dept 2006).

However, the plaintiff raised a triable issue of fact as to whether he suffered a serious injury as a result of the accident through its medical records and the affirmation of Dr. Dassa. *See Lopez v Senatore*, 65 NY2d 1017 (1985); *see also Khorami v Gizmo Cab Corp.*, 240 AD2d 470 (2d Dept 1997). Dr. Dassa concluded, based on his contemporaneous examination of the plaintiff and his most recent examination that plaintiff had limitations in his lumbar spine and ankles, that these injuries were permanent, and his range of motion limitations were significant. *Dixon v Fuller*, 79 AD3d 1094 (2d Dept 2010). Nearly four years after the accident, Dr. Dassa measured a loss of flexion in the plaintiff's lumbar spine of 45% and a decrease in lateral bending of 50%. A significant limitation need not be permanent in order to constitute a "serious injury." *Partlow v Meehan*, 155 AD2d 647, 647 (2d Dept 1989) quoting Insurance Law § 5102(d) (internal quotation marks omitted). "[A]ny assessment of the significance of a bodily limitation necessarily requires consideration not only of the extent or degree of limitation, but of its duration as well, notwithstanding the fact that Insurance Law § 5102(d) does not expressly set forth any temporal requirement for a significant limitation." *Griffiths v Munoz*, 98 AD3d 997, 998 (2d Dept 2012) (internal quotation marks omitted); *see Lively v Fernandez*, 85 AD3d 981, 982 (2d Dept 2011); *Partlow* at 648.

To the extent that the defendant may argue that the plaintiff failed to address the findings of its retained radiologist, Dr. Berkowitz, that the plaintiff's injuries to his lumbar spine were degenerative in nature, that contention is incorrect. In his affirmation, Dr. Dassa stated that he reviewed the expert affirmations of Dr. Zimmerman and Dr. Berkowitz but disagreed with their contents, stating instead that it is his opinion within a reasonable degree of medical certainty that plaintiff's injuries were not the result of any preexisting degenerative condition, but instead traumatically induced and causally related to the subject accident. Thus, Dr. Dassa adequately

addressed the issue of degeneration and refuted the defendant's assertions in that respect. *See Tai Ho Kang v Young Sun Cho*, 74 AD3d 1328 (2d Dept 2010); *Whitehead v Olsen*, 70 AD3d 678 (2d Dept 2010). "[P]laintiffs' contrary evidence, while hardly powerful, was sufficient to raise an issue of fact." *Perl v Meher*, 18 NY3d 208, 218-219 (2011); *see also Diaz–Montez v JEA Bus Company, Inc.*, 175 AD3d 1384 (2d Dept 2019).

Furthermore, plaintiff averred in his affidavit that he discontinued his rehabilitation treatment approximately six months after the accident, due to the fact that Dr. Dassa, one of his treating doctors, concluded that he had achieved maximum medical benefit from continuous medical intervention and that further conservative treatment would be palliative, and that his no-fault benefits had terminated and that his doctor did not accept his private health insurance. This constitutes a sufficient explanation for the plaintiff's "gap" in treatment. *Francovig v Senekis Cab Corp.*, 41 AD3d 643 (2d Dept 2007); *Black v Robinson*, 305 AD2d 438 (2d Dept 2003).

Lastly, with regard to the unsigned transcript of the plaintiff, CPLR § 3116(a) generally requires that the party submitting a deposition transcript must establish that the transcript was either signed by the deponent or sent to the deponent for correction and not signed and returned within 60 days. However, an unsigned deposition transcript may be considered by the Court as admissible evidence under § 3116(a) when it is submitted by the party deponent and adopted as accurate. *See David v Chong Sun Lee*, 106 AD3d 1044 (2d Dept 2013). Here, the plaintiff has adopted his deposition testimony, and it is therefore admissible evidence to be used in opposition to the instant summary judgment motion.

In light of the foregoing, the defendant's motion is denied.

The remaining contentions are without merit.

Accordingly, it is hereby

ORDERED, that defendant's motion to dismiss plaintiff's complaint is DENIED.

This constitutes the decision and order of the Court.

DATED: February 18, 2021

HON. LILLIAN WAN, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020.