

Oldham v Green

2021 NY Slip Op 30790(U)

March 12, 2021

Supreme Court, Kings County

Docket Number: 500728/2019

Judge: Lillian Wan

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 17

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CARLOS OLDHAM,

Index No.: 500728/2019
Motion Date: 03/10/2021
Motion Seq.: 01

Plaintiff,

– against –

DECISION AND ORDER

JORDAN ROGER GREEN and JACINTH
CAMPBELL,

Defendants.
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The following e-filed documents, listed by NYSCEF document number 10-16, 20-29, and 32 were read on this motion for summary judgment.

In this action to recover damages for personal injuries, the defendants move for an Order pursuant to CPLR §§ 3211(a)(7) and 3212 and Insurance Law §§ 5102 and 5104 dismissing the plaintiff’s complaint on the ground that he did not suffer a serious injury. The plaintiff filed an opposition. For the reasons set forth below, the motion is denied.

This action arises out of a motor vehicle accident that occurred while the plaintiff was traveling eastbound on the Belt Parkway in Brooklyn, New York on March 30, 2018. In his verified bill of particulars, Mr. Oldham claims that he suffered injuries to the lumbar spine, including: L2-L3, disc bulge; the bulge narrows the bilateral neuroforamina; L3-L4, disc bulge; the bulge causes moderate bilateral neuroforaminal stenosis; L4-L5, broad-based posterior disc herniation impinging the ventral thecal sac and causing moderate central spinal canal stenosis; the herniation is superimposed on a bulge which causes moderate bilateral neuroforaminal stenosis. Plaintiff also alleges that he has suffered a limitation of range of motion in the affected areas along with difficulty in daily activities such as lifting items and sleeping. Plaintiff alleges that these injuries have resulted in, inter alia, a permanent consequential limitation of use of a body function or system.

In support of its motion, the defendants offer the pleadings, the deposition transcript of the plaintiff, the bill of particulars, and the medical report of Dr. Alan Zimmerman. Dr. Zimmerman, a board certified orthopedist, examined the plaintiff approximately two years after his accident. Dr. Zimmerman states that he reviewed, inter alia, the verified bill of particulars, Kings County Hospital records, and MRIs of the lumbar spine taken on March 7, 2013 and May 25, 2018. In a report dated February 25, 2020, Dr. Zimmerman stated that he performed range of motion testing with the use of a goniometer and used normal ranges of motion as per the AMA "Guidelines to the Evaluation of Permanent Impairment." Dr. Zimmerman found greater than normal ranges of motion in the lumbar spine, with flexion of 100 degrees (60 degrees normal); extension of 30 degrees (25 degrees normal); lateral bending to the right and left of 30 degrees (25 degrees normal); and rotation to the right and left of 30 degrees (30 degrees normal). Dr.

Zimmerman concluded that there is no disability, no permanency, and that any symptoms had resolved.

In opposition, the plaintiff submits the supplemental bill of particulars, an affidavit of the plaintiff, the uncertified police report, uncertified medical records from Brookdale Hospital, the medical records and affirmation of physician Dr. A. Shusterman, and the affirmation of radiologist Dr. Priyesh Patel. Dr. Shusterman, in his affirmation, states that he tested Mr. Oldham multiple times with the use of a goniometer and compared his normal ranges of motion to those in the AMA "Guidelines to the Evaluation of Permanent Impairment." See NYSCEF Doc. No. 27. Dr. Shusterman states that he tested Mr. Oldham on April 3, 2018, and that he found restrictions in flexion of 45 degrees (90 degrees normal, a 50% reduction); in extension of 10 degrees (30 degrees normal, a 67% reduction); and in lateral flexion of 20 degrees (40 degrees normal, 50% reduction), and that these reductions were causally related to the accident. In Dr. Shusterman's most recent evaluation on July 8, 2020, he found similar results with limitations in flexion, lateral flexion, and extension, and that these injuries represent a significant limitation and a permanent partial disability that is causally related to the accident. Dr. Shusterman also stated that the straight leg raise test performed on July 8, 2020 was positive, with 55 degrees on the right and 45 degrees on the left (90 degrees normal).

The plaintiff also offers the affirmation of Dr. Priyesh Patel, a board certified diagnostic radiologist, who states that he took or supervised the taking of the MRI film of the lumbosacral spine. See NYSCEF Doc. No. 25. Dr. Patel states that the MRI films annexed to his affirmation show L2/L3 disc bulge without central canal stenosis, the bulge narrows the bilateral neuroforamina; L3/L4 disc bulge without central canal stenosis and the bulge causes moderate bilateral neuroforaminal stenosis; L4/L5 broad based posterior disc herniation impinging the ventral thecal sac and causing moderate central spinal canal stenosis and the herniation is superimposed on a bulge which causes moderate bilateral neuroforaminal stenosis; L5/S1 5 mm retrolisthesis of L5 on S1; broad based posterior disc herniation impinging the ventral thecal sac and impinging the traversing S1 nerve roots and the herniation is superimposed on a bulge which narrows the bilateral neuroforamina.

The plaintiff also submits an affidavit in which he states that, even though he only missed two days from work, his entire job changed upon his return to work at DHL and the United States Postal Service. See NYSCEF Doc. No. 22. Plaintiff states he went from making 200 deliveries per week prior to the accident to about 70 deliveries per week after, and that upon his return he spent most of his time working in the office. Plaintiff further states that he only returned to work because he felt he had no choice but to support his family. Plaintiff also states that his physical therapy treatments lasted about six months, and that he has been unable to perform daily activities such as lifting heavy objects, standing for long periods of time, playing soccer, and sleeping on a bed.

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. See *Toure v Avis Rent A Car Sys.*,

98 NY2d 345 (2002). A defendant can satisfy the initial burden by relying on statements of the defendant's examining physician(s), or plaintiff's sworn testimony, or by the affirmed reports of the 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 measurements, 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).

The defendants' submissions demonstrate their prima facie entitlement to summary judgment dismissing the complaint on the ground that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d). See *Toure v Avis Rent A Car Sys.*, 98 NY2d 345; *Gaddy v Eyler*, 79 NY2d 955; *Fest v Agnew*, 68 AD3d 1051 (2d Dept 2009). The defendants have submitted competent medical evidence in the form of the affirmed report of their examining medical expert, Dr. Zimmerman, establishing that the alleged injuries do not constitute a serious injury under Insurance Law § 5102(d). See *Hayes v Vasilios*, 96 AD3d 1010 (2d Dept 2012); *Staff v Yshua*, 59 AD3d 614 (2d Dept 2009). "A defendant who submits admissible proof that the plaintiff has a full range of motion, and that she or he suffers from no disabilities causally related to the motor vehicle accident, has established a prima facie case that the plaintiff did not sustain a serious injury...despite the existence of an MRI which shows herniated or bulging discs." *Kearse v New York City Transit Authority*, 16 AD3d 45, 49-50 (2d Dept 2005).

However, the plaintiff has raised a triable issue of fact as to whether he suffered a serious injury as a result of the accident through his affidavit and the affirmations of Drs. Shusterman and Patel. See *Lopez v Senatore*, 65 NY2d 1017 (1985); see also *Khorami v Gizmo Cab Corp.*, 240 AD2d 470 (2d Dept 1997). Dr. Shusterman concluded, based on his contemporaneous examination of the plaintiff and his most recent examination, that the plaintiff had suffered significant limitations of use of the lumbosacral spine. See *Dixon v Fuller*, 79 AD3d 1094 (2d Dept 2010). Nearly two and a half years after the accident, Dr. Shusterman measured a loss of flexion in the plaintiff's lumbosacral spine of 50%, a loss in lateral flexion of 50%, and a loss in extension of 34%. Dr. Shusterman also noted that a straight leg raise test was positive. In addition, Dr. Patel reviewed the MRI of plaintiff and noted disc bulging and herniation in the plaintiff's lumbar spine. The plaintiff also averred in his affidavit that he wears a back brace and continues to have trouble performing actions such as lifting heavy objects, standing for too long a period of time, and playing soccer. A significant limitation need not be permanent in order to constitute a serious injury. *Partlow v Meehan*, 155 AD2d 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.

Furthermore, with regard to the defendant's claim that there was a gap in treatment, Dr. Shusterman noted in his affirmation that the patient's treatment stopped when he was unable to acquire authorizations for further treatment. Dr. Shusterman stated that the plaintiff continued

on a home exercise program, and that he advised the plaintiff to continue with home therapy stretching, strengthening exercises, and taking over the counter medications as needed for continued complaints. 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).

In light of the foregoing, the defendants' motion for summary judgment is granted.

The remaining contentions are without merit.

Accordingly, it is hereby

ORDERED, that defendants' motion to dismiss plaintiff's complaint on the ground that the plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102(d) is DENIED.

This constitutes the decision and order of the Court.

DATED: March 12, 2021



HON. LILLIAN WAN, J.S.C.

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