

Forman v Chalupa

2021 NY Slip Op 31094(U)

January 6, 2021

Supreme Court, Bronx County

Docket Number: 27330/2018E

Judge: Veronica G. Hummel

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IAS PART 31**

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CHARLES F. FORMAN, JR.,

Plaintiff,

-against -

**Index No. 27330/2018E
DECISION/ORDER
Motion Seqs. 1 & 2**

GUILLERMO CHALUPA, 1189 WESTER AVENUE, CAR WASH CORP. and HESS RETAIL STORES LLC.,
Defendants.

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VERONICA G. HUMMEL, A.S.C.J.

In accordance with CPLR 2219 (a), the decision herein is made upon consideration of all papers filed by the parties in NYSCEF in support of and in opposition to the motions by defendant GUILLERMO CHALUPA [Mot. Seq. 1], and defendant 1189 WEBSTER AVENUE CAR WASH CORP. and SPEEDWAY LLC S/H/A HESS RETAIL STORES LLC. [Mot. Seq. 2], made pursuant to CPLR 3212, for orders dismissing the complaint on the ground that plaintiff CHARLES D. FORMAN, JR. (plaintiff) has not sustained a "serious injury" as defined by Insurance Law 5102(d).

Plaintiff commenced this action to recover damages for personal injuries he allegedly sustained as a result of an April 7, 2018, motor vehicle accident ("the Accident"). At the time of the collision, plaintiff was in his vehicle as it moved through the defendant car wash in neutral. Plaintiff's vehicle was struck in rear by defendant Chalupa's vehicle.

Plaintiff alleges that as the result of the Accident he suffered injuries to the right shoulder and lower back. Plaintiff argues in the opposition that his injuries satisfy the Insurance Law 5102(d) threshold categories of significant limitation and 90/180 days [NYSCEF No. 44 p.13].

Defendants, by separate motions but shared expert reports, move for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a “serious injury” under Insurance Law 5102(d) as a result of the Accident. Defendants argue that plaintiff's claimed injuries are not “serious,” and that any injuries or conditions from which plaintiff suffers are not causally related to the Accident. The underlying motions are supported by the pleadings, the bill of particulars, plaintiff's deposition transcript, and the affirmed medical reports of Dr. Renzoni (orthopedic surgeon), and Dr. Springer (radiologist).

In his report, Dr. Springer reviews a right shoulder MRI dated September 3, 2020, taken over two years post-Accident. Dr. Springer finds no traumatic injury and finds mild degenerative changes at the rotator cuff, which are a chronic process and could not have occurred in the time interval between the incident and the examination. There are subchondral bone cysts which are degenerative and not related to trauma. The musculature is unremarkable, and the joint is intact. He finds that there are no post-traumatic changes causally related to the Accident.

Dr. Renzoni bases his opinion on the details of a physical examination on August 19, 2019 (one year and four months post-Accident), and plaintiff's bill of particulars. He does not rely on any MRIs. In terms of the cervical spine, the lumbar spine, the thoracic spine, and the left shoulder, the range of motion tests were normal. The results of all of the objective tests were negative as to these body parts and he finds that thoracic spine and lumbar spine are “sprain/strain-resolved”.

In contrast, as for the right shoulder, the range of motion test revealed decreased flexion, abduction, and internal rotation. The objective tests were negative. He opines that the right shoulder is a resolved “sprain/strain”.

The expert opines that the orthopedic examinations on all objective testing is normal and indicate no findings which would result in orthopedic limitations in use of the body parts examined. Some subjective restrictions of motion in the relevant body parts were not supported by objective clinical findings. He opines that plaintiff is capable of functional use of the examined body parts for normal activities of daily living as well as usual daily activities including regular work duties.

He further opines that tenderness of the cervical and lumbar spine “carry no medical significance and are functional”. He opines that the plaintiff is capable of carrying out his occupational duties with no restrictions or limitations and plaintiff can perform all activities of daily living as he was doing prior to the Accident without restrictions.

Plaintiff opposes the motion, submitting an attorney affirmation, the affidavits and medical records of Dr. Dina Nelson (physical medicine and rehabilitation management) and Dr. R. Payne’s (radiologist) review of the right shoulder MRI dated April 13, 2018. Defendants submit a reply to plaintiff’s opposition.

In total, plaintiff’s evidence raises triable issues of fact as to his claims of “serious injury” as to the right shoulder under the threshold category of significant limitation (*Morales v Cabral*, 177 AD3d 556 [1st Dept 2019]). Plaintiff’s evidence demonstrates that he received medical treatment for his claimed injuries to the right shoulder shortly after the Accident, and that the defendants’ and the plaintiff’s experts found that he had substantial limitations in motion at the right shoulder at recent examinations (*see Perl v Meher*, 18 NY3d 208 [2011]). The MRI diagnoses plaintiff with tendinosis and labral tear to the right shoulder, injuries that the plaintiff’s

experts opine were caused by the Accident. Dr. Nelson also finds that the decrease in range of motion of the right shoulder is significant and that plaintiff suffered partial permanent injuries with a poor prognosis for recovery. In total, plaintiff's experts find, based on the MRI and examination, that the injuries to plaintiff's shoulder were caused by the Accident, were not degenerative and were permanent, causing a significant loss of use and function in the right shoulder (*see Morales v Cabral, supra*; *see Aquino v Alvarez*, 162 AD3d 451, 452 [1st Dept 2018]).

In contrast, plaintiff fails to generate an issue of fact as to the alleged lumbar spine injury. Plaintiff's only expert to opine on the issue, Dr. Nelson, provides only conclusory opinions that the Accident caused plaintiff's condition but fails to address her earlier May 15, 2018, and June 26, 2018, findings that, in essence, plaintiff's alleged lumbar spine injury was unremarkable and temporary (*see generally Santos v UM Cab Corp.*, 176 AD3d 630 [1st Dept 2019]; *Alvarez v NYLL Management Ltd.*, 120 AD3d 1043 [1st Dept 2014]; *Dellino v Puello*, 2020 N.Y. Slip Op. 07270 [1st Dept 2020]). Of course, if a jury determines that plaintiff has met the threshold for serious injury, it may award damages for any injuries causally related to the accident, including those that do not meet the threshold (*Morales v Cabral, supra*; *Rubin v SMS Taxi Corp.*, 71 AD3d 548 [1st Dept 2010]; *Vishevnik v Bouna*, 147 AD3d 657 [1st Dept 2017]).

Furthermore, in light of plaintiff's testimony that he returned to work seven days post-Accident, plaintiff fails to generate an issue of fact as to the category of 90/180 days (*Morales v Cabral, supra*; *Nunez v Motor Vehicle Accident Indemnification Corp.*, 96 AD3d 917 [2d Dept 2012]).

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the court, it is hereby denied. Accordingly, it is hereby

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ORDERED that the motions by defendant GUILLERMO CHALUPA [Mot. Seq. 1], and defendants 1189 WEBSTER AVENUE CAR WASH CORP. and SPEEDWAY LLC S/H/A HESS RETAIL STORES LLC. [Mot. Seq. 2], made pursuant to CPLR 3212, for orders dismissing the complaint on the ground that plaintiff CHARLES D. FORMAN, JR. has not sustained a “serious injury” as defined by Insurance Law 5102(d) are granted with respect to the claimed injuries to plaintiff’s cervical and lumbar spine and the 90/180 claim, but denied with respect to plaintiff’s right shoulder claimed injury.

The parties are reminded that a compliance conference is scheduled in this matter on May 12, 2021. The attorneys are expected to review the revised Part 31 rules for compliance conferences (available on the homepage of the 12th J.D.), well ahead of that date and to follow the guidelines for using NYSCEF, rather than appearing in court, to meet their compliance conference obligations.

The foregoing constitutes the decision and order of the court.

Dated: January 6, 2021

E N T E R,

s/Hon. Veronica G. Hummel/signed 1/6/2021
Hon. Veronica G. Hummel