

Pascal v McGowan

2021 NY Slip Op 31290(U)

April 13, 2021

Supreme Court, Kings County

Docket Number: 512664/2019

Judge: Lillian Wan

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

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DERICK PASCAL,

Index No.: 512664/2019
Motion Date: 04/07/2021
Motion Seq.: 05

– against –

Plaintiff,

DECISION AND ORDER

JAMES MCGOWAN,

Defendant.

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The following e-filed documents, listed by NYSCEF document number 70-81 and 94-99 were read on this motion for summary judgment.

In this action to recover damages for personal injuries, the defendant moves for an Order 1) granting summary judgment pursuant to CPLR § 3212 on the ground that the plaintiff has not suffered a serious injury pursuant to Insurance Law § 5102(d); or, in the alternative; 2) an Order pursuant to CPLR § 3212 dismissing any sub-portions of Insurance Law § 5102(d) that are not viable as a matter of law. For the reasons set forth below, the motion is denied.

This action arises out of a motor vehicle accident that occurred on January 9, 2018. In his verified bill of particulars, the plaintiff claims that he suffered injuries including, inter alia, a severe post traumatic intrasubstance tear in the left shoulder of the supraspinatus at the distal insertion without full thickness component; severe post traumatic disc bulge in the cervical spine at C2-C3 and C5-C6 with thecal sac indentation; and severe neck pain and stiffness with restriction of motion and radiation to bilateral upper and lower extremities and left shoulder. Plaintiff states that these injuries resulted in a permanent consequential limitation of use of a body organ or member, a significant limitation of use of a body function or member, and a medically determined injury or impairment of a non-permanent nature which prevented him from performing substantially all the material acts which constituted his usual and customary activities for 90 of the first 180 days after the accident.

In support of its motion, the defendant offers the pleadings, the bill of particulars, an orthopedic exam report by Dr. Edward Toriello, a neurological exam report by Dr. Daniel J. Feuer, a radiological review report by Dr. Melissa Sapan Cohn, and the plaintiff’s deposition testimony. In a report dated June 15, 2020, Dr. Toriello, a board certified orthopedist, stated that he examined the plaintiff and measured ranges of motion through visual assessment and with the use of a handheld goniometer or inclinometer. Dr. Toriello compared these ranges of motion with the guidelines found in the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition; Mosby's Guide to Physical Examination, 6th Edition, Seidel 2006; and A Guide to Physical Examination by Barbara Bates, M.D., 9th Edition, 2007. In the plaintiff’s cervical spine, Dr. Toriello found lateral bending of 45 degrees (normal is 40-45 degrees); bilateral rotation of 80 degrees (normal is 70-80 degrees); flexion of 50 degrees

(normal is 45-50 degrees); and extension of 30 degrees (normal is 55-60 degrees). Dr. Toriello also examined the plaintiff's left shoulder and found abduction and flexion of 150 degrees (normal is 150-180 degrees); internal rotation of 80 degrees (normal is 80-90 degrees); external rotation of 90 degrees (normal is 90 degrees); extension of 40 degrees (normal is 40-50 degrees); and adduction of 30 degrees (normal is 30-50 degrees) with complaints of pain at the extremes of motion. Dr. Toriello also found normal ranges of motion in the plaintiff's elbows, wrists and hands, lumbosacral spine, and hips. Dr. Toriello also reviewed MRIs of the left shoulder and cervical spine, noting that the MRI of the left shoulder showed a partial rotator cuff tear, a circumferential labral tear, and degenerative changes in the rotator cuff and AC joint. Notably, Dr. Toriello states that the degenerative changes in the left shoulder were exacerbated by the subject accident, and that the resolved injuries are causally related to the accident.

The defendant also submits the report of board certified neurologist Dr. Feuer, who examined the plaintiff and set forth his findings in a report dated June 9, 2020. Dr. Feuer measured the plaintiff's ranges of motion with the use of a goniometer and compared the ranges to those found in the American Medical Association "Guidelines to the Evaluation of Permanent Impairment," 5th Edition. In the plaintiff's cervical spine, Dr. Feuer found flexion of approximately 50 degrees (50 degrees normal); extension of approximately 60 degrees (60 degrees normal); right lateral flexion of approximately 45 degrees (45 degrees normal); left lateral flexion of approximately 45 degrees (45 degrees normal); right rotation of approximately 80 degrees (80 degrees normal); and left rotation of approximately 80 degrees (80 degrees normal). In the lumbar spine, Dr. Feuer found flexion of approximately 60 degrees (60 degrees normal); extension of approximately 25 degrees (25 degrees normal); right lateral flexion of approximately 25 degrees (25 degrees normal); and left lateral flexion of approximately 25 degrees (25 degrees normal). Dr. Feuer also noted that the straight leg raise test was negative bilaterally in the sitting position.

The defendant also offers the report of board certified radiologist Dr. Cohn, who reviewed the x-rays and MRIs of the plaintiff's cervical spine and left shoulder. In a report dated May 15, 2020, Dr. Cohn stated that the x-rays of the plaintiff's cervical spine and left shoulder showed mild degenerative changes but no acute fractures or traumatic injuries. Dr. Cohn also reviewed the MRI of the plaintiff's cervical spine and found, inter alia, disc desiccation at C2-C3 and C5-C6; anterior osteophytes present at C5-C6 and C6-C7; and mild disc bulging at the C2-C3 and C7/T1 level; further, Dr. Cohn attributes these changes to degeneration and long-standing disease rather than trauma. Dr. Cohn also reviewed the MRI of the plaintiff's left shoulder and found, inter alia, joint hypertrophic degenerative changes; large downward projecting osteophytes result in mass effect upon the underlying rotator cuff; supraspinatus tendinosis and interstitial tearing; and diffuse degenerative tearing of the labrum. Dr. Cohn also attributes these injuries to severe degeneration and states that there are no findings to indicate an acute, trauma-related injury in the left shoulder.

In opposition, the plaintiff submits prior reports of Dr. Toriello that are unrelated to the instant case, uncertified copies of medical records, some of which are affirmed, and the affirmation of Dr. Ronald Daly, the orthopedic surgeon who performed arthroscopic surgery on Mr. Pascal's left shoulder. Dr. Daly states in his affirmation that the surgery was made necessary by traumatic injuries to the plaintiff's left shoulder suffered in the subject automobile

accident. Dr. Daly further states that he examined the plaintiff on April 23, 2018, and upon examination of the plaintiff's left shoulder, Dr. Daly found forward flexion of 90 degrees (180 degrees normal); abduction of 105 degrees (180 degrees normal); extension of 50 degrees; external rotation of 45 degrees (90 degrees normal); and internal rotation of 40 degrees (90 degrees normal). Dr. Daly states that plaintiff's pain was consistent with a tear of the supraspinatus tendon and a labral tear, with pain (tenderness) elicited by him at the anterior glenohumeral joint (which is indicative of a labral tear, or more specifically a Bankart Tear). Dr. Daly further states that he performed arthroscopic surgery on plaintiff's left shoulder on May 11, 2018 and repaired the tears as well as other damage caused by the subject accident. Dr. Daly also rebutted the defendant's claims of degeneration, stating that these injuries were a result of the subject accident.

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 defendant's submissions demonstrate his 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 Eyer*, 79 NY2d 955; *Fest v Agnew*, 68 AD3d 1051 (2d Dept 2009). The defendant has submitted competent medical evidence in the form of the affirmed reports of its examining medical experts, Drs. Toriello, Feuer, and Cohn, 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).

However, in opposition, the plaintiff has raised a triable issue of fact as to whether he suffered a serious injury as a result of the accident through the affirmation and affirmed medical records of Dr. Daly. *See Lopez v Senatore*, 65 NY2d 1017 (1985); *see also Khorami v Gizmo Cab Corp.*, 240 AD2d 470 (2d Dept 1997). Dr. Daly performed orthopedic evaluations on the plaintiff and found limited ranges of motion in the left shoulder prior to the surgery he performed in May 2018 to repair injuries suffered as a result of the accident, and also found limited ranges of motion in the shoulder approximately two and a half years after the surgery. *See Dixon v Fuller*, 79 AD3d 1094 (2d Dept 2010). Though the defendant claims in its reply that Dr. Daly's objective tests were negative, Dr. Daly states in his affirmation that, with the use of a goniometer, he measured limited ranges of motion with a 33% deficit in the plaintiff's shoulder in his most recent examination on December 23, 2020. In addition, the defendant's own doctor, Dr. Toriello, who examined the plaintiff nearly two and a half years after the accident, noted that

there was an abnormal finding in the plaintiff's cervical spine, in which he observed only 30 degrees of extension (normal is 55-60 degrees). 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.

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

The remaining contentions are without merit.

Accordingly, it is hereby

ORDERED, that defendant's 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: April 13, 2021



HON. LILLIAN WAN, J.S.C.

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