

Volpini v S & F Supplies, Inc.
2021 NY Slip Op 31319(U)
April 15, 2021
Supreme Court, Kings County
Docket Number: 507674/2018
Judge: Wavny Toussaint
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At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 15th day of April, 2021.

P R E S E N T:

HON. WAVNY TOUSSAINT,

Justice.

-----X

CHRISTOPHER VOLPINI,

Index No. 507674/2018

Plaintiff

-against-

DECISION AND ORDER

S & F SUPPLIES, INC. and JOHN DOE,

Defendants.

-----X

The following e-filed papers read herein:

NYSCEF Doc Nos.¹

Notice of Motion/Order to Show Cause/

Petition/Cross Motion and

Affidavits (Affirmations) Annexed _____

27-28, 31-36

Opposing Affidavits (Affirmations) _____

45-69

Reply Affidavits (Affirmations) _____

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Upon the foregoing papers, defendants, S & F Supplies, Inc. (S & F) and John Doe (collectively, defendants) move, in motion sequence three, for an order, pursuant to CPLR 3212, granting them summary judgment dismissing the complaint of plaintiff, Christopher Volpini, on the ground that he did not sustain a serious injury within the meaning of Insurance Law § 5102 (d).²

¹

New York State Courts Electronic Filing Document Number

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Insurance Law § 5102 (d) defines “serious injury” as “a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use

Background and Procedural History

Plaintiff's complaint alleges that on May 26, 2016, he sustained serious injuries when the car he was driving was hit in the rear by a vehicle owned by S & F and operated by defendant John Doe, at Smith Street, 20 feet east of Route 110, in the Suffolk County Town of Babylon. Plaintiff seeks to recover damages for injuries attributable to the accident. Defendants answer and discovery demands were served on April 30, 2018. On September 18, 2018, plaintiff served his bill of particulars that specified his various injuries.³

Defendants' Contentions

Defendants rely on the report of Dr. David J Weissberg, who examined the plaintiff on May 28, 2019 (see NYSCEF Doc No. 35, annexed as exhibit E to defendants' moving papers) Dr. Weissberg's report references several MRI records, medical documents and other reports and notes that plaintiff stated he had received medical treatment the day after the accident at Mather Memorial Hospital and has since seen multiple orthopedic surgeons. The materials referenced by Dr. Weissberg indicated that plaintiff has herniated and bulging discs in the cervical spine, impingement syndrome and a tear in the right shoulder, supraspinatus tendinosis (i.e. a degeneration of the tendon) with a partial tear of the anterior distal tendon in the left shoulder and that plaintiff has undergone subsequent surgeries on both shoulders. Defendants' evidence references Dr. Philip Schrank, one of plaintiff's physicians and Dr. Schrank's April 27, 2017 report which indicates that the shoulder tears resulted from the accident.

of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment."

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These injuries included a right shoulder rotator cuff tear on the supraspinatus, infraspinatus, and subscapularis tendon with subacromial impingement syndrome and medical displacement of the proximal biceps tendon; full thickness tear of the subscapularis tendon of the left shoulder with subacromial impingement and a partial thickness tear of the proximal biceps tendon; cervical sprain and strain; impingement syndrome right shoulder; impingement syndrome left shoulder; neck pain radiating into both upper extremities; herniated cervical disc at C2/C3; and cervical radiculopathy.

Dr. Weissberg's report also mentions that plaintiff had a preexisting tear of his rotator cuff on both shoulders with studies and physical findings showing severe atrophy of the musculature of his right shoulder girdle consistent with a chronic tear to his rotator cuff with elevation of the humeral head and severe atrophy noted in the MRI studies. The report additionally references a previous MRI study of plaintiff's left shoulder from approximately 10 years ago that showed tearing of his rotator cuff. Dr. Weissberg opines that the tears preexisted the accident and that anybody sustaining an acute rotator cuff tear would have immediately gone to the emergency room and immediately complained about the pain.

Additionally, Dr. Weissberg's range of motion testing with a goniometer showed some restrictions,⁴ and he notes that plaintiff stated he had pain in his lower back, but no shoulder problems before the accident. The report indicates that plaintiff works for the postal service and missed approximately six months of work after his right shoulder surgery and four months after his left shoulder surgery. Dr. Weissberg concludes that at the time of examination plaintiff could work and perform all activities of daily living and that no further orthopedic care is required. He further states there is no evidence of any permanence as a result of the May 26, 2016 accident.

Defendants also rely upon the May 24, 2019 report of their psychiatry and neurology expert, Dr. Matthew M. Chacko, who, upon reviewing several medical records, notes that Mr. Volpini claimed that he experienced pain in his upper back and shoulders following the accident (see NYSCEF Doc No. 36, annexed as exhibit F to defendants' moving papers). Plaintiff is said to have undergone physical therapy, chiropractic treatment and surgery on both shoulders and is reported as saying that his upper back symptoms had resolved. He was not undergoing any treatments at that time of this examination. Plaintiff is also said to have denied a history of other injuries, accidents or similar symptoms in the past, except that he had lower back pain before the accident. The report states that plaintiff works for United Parcel Service (UPS) as a

⁴ More specifically, Dr. Weissberg's findings regarding plaintiff's cervical spine showed flexion at 50 degrees (50 degrees being normal); extension at 50 degrees (60 degrees being normal); right and left rotation at 70 degrees (80 degrees being normal); and right and left tilt at 40 degrees (45 degrees being normal).

customer associate.

Dr. Chacko's recounts that all neurological tests performed at the examination were normal. He found normal tone and strength in both upper and lower extremities in proximal and distal muscle groups, and, using a goniometer, the cervical and lumbar range of motion testing was also found normal.⁵ Mr. Volpini is said to have walked with a normal gait and no sign of cerebellar dysfunction (i.e. balance problems) was noted. Dr. Chacko opines that there is no objective clinical evidence of any neurological permanency or residuals at the time of the examination and that Mr. Volpini is capable of performing his usual and customary activities. The report concludes that his cervical strain was resolved and that he has no objective evidence of any neurological disability. Dr. Chacko states that Mr. Volpini's only complaint concerns his shoulders and defers any comments regarding shoulders to the appropriate specialty.

Defendants argue that Mr. Volpini cannot establish that he suffered a serious injury from the May 26, 2016 accident because their physicians established that the only injuries sustained were insignificant and nonpermanent soft tissue injuries. Defendants further argue that the records demonstrate degenerative and chronic findings in plaintiff's left and right shoulder and highlight that Mr. Volpini waited four months to seek medical treatment. They also note that Mr. Volpini's motion limitation in his cervical spine is minimal; that his cervical sprain was resolved; that loss in range of motion is not enough to establish serious injury; and that Mr. Volpini has failed to establish a claim under the 90/180 category as he admits returning to work the day of the accident.

Plaintiff's Contentions

In opposition Mr. Volpini,, asserts that defendants failed to make a prima facie

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More specifically, Dr. Chacko's findings regarding plaintiff's cervical spine showed flexion at 50 degrees (50 degrees being normal); extension at 60 degrees (60 degrees being normal); right and left rotation at 80 degrees (80 degrees being normal); and right and left flexion at 45 degrees (45 degrees being normal). As to plaintiff's lumbosacral spine, Dr. Chacko found flexion as 60 degrees (60 degrees being normal); lateral flexion as 25 degrees (25 degrees being normal); and extension as 25 degrees (25 degrees being normal).

showing. Specifically, he alleges that defendants' physicians did not conduct their examinations until three years after the May 26, 2016 accident and thus cannot establish his condition during the 90/180-day period. He highlights that neither of defendants' physicians stated when his injuries were resolved and submits that the physicians' statement that the injuries were resolved is an insufficient showing. Plaintiff also stresses that defendants' own expert found a 17 percent deficiency in his cervical spine's range of motion.

Plaintiff also relies on some of the medical records and documents reviewed and referenced by defendants and highlights their concession that such medical records, including MRIs, confirm herniation in his cervical spine at C2/C3 and show range of motion testing of his cervical spine with abnormal results reflecting at least 50% deficiencies.⁶

He further notes that his medical treatment included surgery on both shoulders; cites findings showing reduced range of motion and tears in each shoulder; and asserts that these conditions resulted from the May 26, 2016 accident, as his physician, Dr. Schrank attests (*see* NYSCEF Doc No. 58, Dr. Schrank's affidavit at ¶¶ 3, 10, annexed as exhibit L to plaintiff's opposition papers).⁷ Dr. Schrank also opines, that the shoulder injuries are permanent and that plaintiff faces increased risk of posttraumatic arthritis which could potentially necessitate bilateral shoulder replacements.

Mr. Volpini also presents the September 10, 2020 affidavit of Dr. Jeffrey M. Block, who had examined and treated him on October 7, 2016 and November 23, 2016

⁶ More specifically, relevant findings of both Dr. Hargovinal DeVal on October 4, November 15, and December 7, 2016 and Dr. Arjang Abbasi on January 4, 2017 regarding plaintiff's cervical spine showed flexion at 30 degrees (50 degrees being normal) and extension at 10 degrees (60 degrees being normal) (*see* NYSCEF Doc No. 49, Long Island Spine records, 8th, 11th, 14th and 17th pages therein, annexed as exhibit C to plaintiff's opposition papers).

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Dr. Schrank also noted that he performed arthroscopic surgery, first on Mr. Volipini's right shoulder on June 12, 2017 and then on his left shoulder on April 23, 2018, in connection with addressing tears in each shoulder and subacromial impingement, i.e. inflammation and irritation of the rotator cuff tendons that causes restricted shoulder range of motion which, as mentioned, he attributed to the May 26, 2016 accident (*id.* at ¶¶ 3,8).

(see NYSCEF Doc No. 50, annexed as exhibit D to plaintiff's opposition papers). Dr. Block recounts that, using a goniometer on October 7, 2016, he found Mr. Volpini's cervical spine showed restricted range of motion.⁸ In addition, Dr. Block reported several orthopedic tests, such as right and left lateral compression tests and the head distraction and spring tests were positive. He found Mr. Volpini's injuries "traumatically induced, permanent in nature and causally related to the accident of May 26, 2016" (*id.* at 3).

Mr. Volpini also highlights his orthopedic no-fault examinations, which all found a causal relationship between his sustained injuries and the May 26, 2016 accident (see NYSCEF Doc Nos. 63-68) and cites these findings to assert that his condition was neither caused by degeneration nor preexisted the accident. He further explains that a four-month gap in treatment occurred when he was being treated for unrelated conditions (see NYSCEF Doc No. 61, plaintiff's examination before trial (EBT), at 80 line 23 through 82, line 20, annexed as exhibit O to his opposition papers).

Mr. Volpini separately submits that defendants' reliance upon his deposition testimony is insufficient to demonstrate that he was not prevented from performing his usual and customary daily activities during the requisite 90-day period as he testified that he cannot lift his grandchildren, anything heavy, or over his head. He further testified that he has experienced disrupted sleep and can no longer pursue his gardening hobby (*id.* at 107, line 16 through 109, line 4).

Defendants' Reply

Defendants, in reply maintain that plaintiff's failure to seek contemporaneous treatment is entirely unexplained, and his explanation for his four-month gap in treatment, i.e. he was already treating for prior unrelated injuries, is inadequate.

Defendants further argue that Mr. Volpini's records refute his claim that there was no prior shoulder injury, as it is conceded that a record showing plaintiff's prior medical history includes "Scapula [shoulder blade] fracture" (see NYSCEF Doc No. 49, annexed as exhibit C to plaintiff's opposition papers). Defendants additionally argue

⁸ More specifically, Dr. Block's relevant findings showed flexion at 41 degrees (50 degrees being normal) and extension at 18 degrees (60 degrees being normal).

that plaintiff's own records confirm multiple findings of degeneration, osteoarthritis and osteophyte formations; that his testimony confirms prior injuries; and that the no-fault examinations are insufficient to establish serious injury as these examinations are conducted for business purposes, solely to approve treatment, and generally with minimal medical records and without a diagnosis.

Next, defendants contend that Mr. Volpini failed to submit medical proof in admissible form to raise a triable factual issue. They note in this regard that the reports of defendants' physicians do not authenticate or render Mr. Volpini's records admissible because defendants only reviewed and did not rely on Mr. Volpini's records. Defendants in other words seek to prevent Mr. Volpini and his expert physicians from utilizing unsworn documents (e.g., uncertified hospital records) that defendants' experts simply reviewed, without relying upon such documents, and add that plaintiff's experts failed to attach the documents to their reports. Defendants further argue that range of motion measurements from Dr. Block, plaintiff's chiropractor cannot be considered objective because Dr. Block fails to identify the authoritative guideline utilized (such as AMA Guidelines or another accredited source) for the standard of normal ranges in making comparisons. Consequently, defendants regard the measurements as lacking objectivity and thus speculative.

Additionally, defendants argue that the MRI reports are insufficient because a radiologist is required to have the MRI taken under his supervision and must be the physician to interpret the MRI. Defendants assert that plaintiff's radiologists failed to causally relate the results of the MRI study to the May 26, 2016 accident. Defendants further submit that the gaps in Mr. Volpini's medical treatment bar his experts from testifying as to the cause of any limitations noted on any recent examination. Consequently, defendants characterize any limitations allegedly caused by the May 26, 2016 accident after plaintiff ceased treatment as mere speculation.

Defendants also argue that plaintiff's experts, by addressing neither Mr. Volpini's injuries before or after the May 26, 2016 accident nor the degenerative findings, have thus failed to overcome defendants' threshold showing. Defendants contend that surgery itself neither necessarily establishes "serious injury," nor by itself raises factual

issues as to whether an injury qualifies as a serious injury. Defendants also argue that a labral tear, a tendon tear, even a ligament tear, are not evidence of serious injury in the absence of limitations and their duration resulting from the injury. They further argue that proof Mr. Volpini sustained a bulging or herniated disc is not evidence of a serious injury without objective evidence of physical limitations resulting from the disc injury.

Discussion

"A defendant can establish that the plaintiff's injuries are not serious within the meaning of Insurance Law 5102 (d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (*Nuñez v Teel*, 162 AD3d 1058, 1059 [2d Dept 2018], quoting *Grossman v Wright*, 268 AD2d 79, 83-84 [2d Dept 2000]). A defendant can also use plaintiff's own medical evidence to establish that plaintiff did not suffer a serious injury and, that the injuries were not causally related to the accident (*see Franchini v Palmieri*, 1 NY3d 536, 537 [2003]). A defendant can also rely on plaintiff's sworn testimony to demonstrate that the injuries were not serious (*see Arjona v Calcano*, 7 AD3d 279, 280 [1st Dept 2004]).

After the defendant has established a prima facie showing, the burden shifts to plaintiff to present objective evidence to overcome defendant's expert's affirmation by demonstrating there is a triable issue of fact on the question of serious injury within the meaning of the Insurance Law (*see Grossman*, 268 AD2d at 84). A plaintiff seeking to recover under the "permanent loss of use" category, must demonstrate a total loss of use of a body organ, member, function or system (*Oberly v Bangs Ambulance*, 96 NY2d 295, 299 [2001]). Where a plaintiff claims injury within the "permanent consequential limitation" or "significant limitation" of use categories of the statute their complaints of pain must be substantiated with objective medical evidence demonstrating the extent or degree of the limitation of movement caused by the injury and its duration (*see Schilling v Labrador*, 136 AD3d 884, 885 [2d Dept 2016]; *Rovelo v Volcy*, 83 AD3d 1034, 1035 [2d Dept 2011]).

To prove the extent or degree of physical limitation regarding the "permanent consequential limitation of use of a body organ or member" or a "significant limitation

of use of a body function or system" categories, either a specific percentage of the loss of the range of motion must be determined, or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (*see Perl v Meher*, 18 NY3d 208, 217 [2011]). A limitation in motion that is minor, mild or slight is considered insignificant within the meaning of the statute and will not suffice to demonstrate a serious injury (*Licari v Elliott*, 57 NY2d 230, 236 [1982]; *Cebron v Tuncoglu*, 109 AD3d 631, 633 [2013]).

Lastly, plaintiffs seeking to recover under the 90/180 category must submit competent objective medical evidence of "a medically determined injury or impairment of a non-permanent nature" that prevented them from performing their usual and customary activities for 90 of the 180 days following the subject accident (Insurance Law § 5102 [d]; *see also Toure v Avis Rent a Car Sys.*, 98 NY2d 345, 357 [2002], *rearg denied sub nom Manzano v O'Neil*, 98 NY2d 728 [2002] ; *Licari*, 57 NY2d at 238 [1982]).

Here, defendants have failed to meet their prima facie burden of establishing that plaintiff did not sustain a serious injury as a result of the subject accident within the meaning of Insurance Law § 5102 (d) (*see Toure*, 98 NY2d at 345; *Gaddy v Eyler*, 79 NY2d 955, 956-957 [1992]). Mr. Volpini's bill of particulars alleges that Mr. Volpini suffered a herniated cervical disc from the May 26, 2016 accident (*see* NYSCEF Doc No. 33, plaintiff's bill of particulars at ¶ 9). None of the defendant's experts address the issue of a herniated disc (*Patterson v Rivera*, 49 AD3d 337 [1st Dept 2008]; *Shumway v Bungereoth*, 58 AD3d 431 [1st Dept 2009]). Further, defendants have failed to submit competent prima facie medical evidence establishing that plaintiff did not sustain a serious injury to his cervical spine under either the permanent consequential limitation of use or significant limitation of use categories of Insurance Law § 5102 (d). The court notes that one of defendants' own experts, Dr. Weissberg, found limitations of 17%⁹ in the range of motion of plaintiff's cervical spine (*see Weiss v Durso*, 178 AD3d 880, 880-

⁹ Plaintiff's statement in his opposition papers that Dr. Weissberg found a 17% reduction in plaintiff's cervical spine range of motion is not contested.

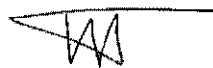
881 [2d Dept 2019]; *Singleton v F & R Royal, Inc.*, 166 AD3d 837, 838 [2d Dept 2018]). Additionally, defendants have failed to establish, that the alleged injury to the cervical regions of plaintiff's spine were not caused by the subject accident (*see Weiss*, 178 AD3d at 881; *Straussberg v Marghub*, 108 AD3d 694, 695 [2d Dept 2013]). No expert affirmation was provided to establish that the herniated disc in the cervical spine was not caused by the subject accident.

Inasmuch as the defendants failed to sustain their prima facie burden, it is unnecessary to determine whether the papers submitted by plaintiff in opposition are sufficient to raise a triable issue of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Nuñez*, 162 AD3d at 1059). Nonetheless, even if this court were to find that defendants' burden had been met, plaintiff presented objective medical evidence regarding limitations in range of motion to his cervical spine, as well as evidence of left and right shoulder tears, sufficient to raise an issue of fact to be resolved at trial (*see Walker v Esses*, 72 AD3d 938, 938-939 [2d Dept 2010]; *Yeong Hee Kwak v Villamar*, 71 AD3d 762 [2d Dept 2010]). Moreover, the court finds that plaintiff and his treating physicians adequately explained any gaps in treatment by stating that treatment for Mr. Volpini's unrelated conditions interfered and caused the gap in treatment regarding the injuries attributable to the May 26, 2016 accident (*see Abdelaziz v Fazel*, 78 AD3d 1086, 1086 [2d Dept 2010]). Accordingly, it is

ORDERED that defendants motion for summary judgment is denied.

This constitutes the decision and order of the court.

E N T E R,



J. S. C.

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