Amaye v Gamene
2021 NY Slip Op 32060(U)
March 19, 2021
Supreme Court, Bronx County
Docket Number: 23154-2016e
Judge: Veronica G. Hummel

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

AUSTIN AMAYE,

Plaintiff,

-against -

Index No. 23154-2016e
DECISION/ORDER
Motion Seq. 2

ADAM GAMENE and "JOHN DOE" THE NAME "JOHN DOE" BEING FICTITIOUS, THE TRUE NAME OF SAID DEFENDANT BEING UNKNOWN TO PLAINTIFF,

Defendants.

----------X

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 motion of defendant ADAM GAMENE (defendant) [Mot. Seq. 2], made pursuant to CPLR 3212, for an order dismissing the complaint on the ground that plaintiff AUSTIN AMAYE (plaintiff) has not sustained a "serious injury" as defined by Insurance Law 5102(d).

This is a negligence action to recover damages for personal injuries that plaintiff allegedly sustained as a result of a motor vehicle accident that occurred on November 16, 2015, on West 145th Street at or near the intersection with Adam Clayton Powell Jr. Blvd., New York N.Y. (the Accident).

In the bills of particulars, in relevant part, plaintiff alleges that as the result of the Accident he suffered injuries to the left knee, right knee, and lumbar spine. Plaintiff alleges that he was prevented from performing all usual and customary activities not less than 90 days during the 180 days immediately following the Accident. Plaintiff argues that these injuries

satisfy the following Insurance Law 5102(d) threshold categories: permanent loss of use; permanent consequential limitation; significant limitation; and 90/180 days. As plaintiff fails to address the ground of permanent loss of use on this motion, that ground is deemed waived (*Burns v Kroening*, 164 AD3d 1640 [4th Dept 2018]). In any event, as plaintiff does not allege a total loss of a body part, the claim is dismissed (*Oberly v Bangs Ambulance, Inc*., 96 NY2d 29 [2001]).

Defendant seeks 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. Defendant argues 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 motion is supported by the pleadings, the first and second bill of particulars, deposition transcripts, and the medical reports of Dr. John H. Buckner (orthopedic surgeon), dated March 16, 2020, and Dr. Eric Cantos, dated September 15, 2017(radiologist).

Dr. Buckner bases his opinion on the details of a physical examinations conducted on November 6, 2017 (two years post-Accident), and March 9, 2020 (approximately four years post-Accident). In the report of the March 2020 examination, the doctor states that he reviewed, among other things, the second bill of particulars, and plaintiff's medical records. Plaintiff reported that he had left knee surgery in June 2017, and right knee surgery in May 2019. Patient reported lower back pain and right knee pain, but no left knee pain. The doctor found plaintiff to be morbidly obese.

Dr. Buckner conducted range of motion tests on the cervical spine, lumbar spine and "lower extremities". The doctor cites ranges of motion, but offers no comparisons. Instead the expert refers to treaties that state, in sum and substance, that range in motion is no longer used as a basis for defining impairment. All objective tests are negative.

In the "diagnostic impressions" section, the doctor finds no objective evidence of lumbar, left knee or right knee injury. There was osteoarthritis in the right knee, shown by MRI, which is a pre-existing condition. There was surgery on the right knee on May 31, 2019, with findings of tricompartmental osteoarthritis which is unrelated to the Accident. Similarly, there was osteoarthritis in the left knee, shown on MRI and findings at surgery as pre-existing and unrelated to the Accident. The arthroscopy of the left knee was for a pre-existing, unrelated condition with residuals that include current knee swelling and tenderness unrelated to the accident. There was a prior motor vehicle accident with claimed injuries of the neck and back 2011. In conclusion, the doctor finds the right knee injury and surgery neither causally related to the Accident and plaintiff may work without causally related restrictions. He states that, in his opinion, plaintiff did not sustain any injury as the result of the Accident.

As for Dr. Cantos, in his review of the lumbar MRI (12/17/2015), he finds mild bulges and degenerative changes in the lower back region at L4-5 and L5-S1. No disc herniation or fracture visualized. The expert opines that the MRI reveals multi-level degenerative changes that are chronic in nature. Given the "very short time interval between accident and exam, the patient is felt to have had an ongoing and preexistent degenerative condition unrelated to the Accident". He saw no imagining evidence of an acute herniating or fracture that could be attributed to the Accident. He saw no significant stenosis and an optimistic long term prognosis would be anticipated.

Based on the submissions, defendant sets forth a *prima facie* showing that plaintiff did not suffer a serious injury to the relevant body parts under the permanent consequential limitation or significant limitation categories (*Stovall v N.Y.C. Transit Auth.*, 181 AD3d 486 [1st Dept 2020]; *see Olivare v Tomlin*, 187 AD3d 642 [1st Dept 2020]).

Plaintiff opposes the motion, submitting an attorney affirmation, caselaw, plaintiff's affidavit, and the affirmation and medical report of Dr. Felix Almentero (pain management),

and the medical records of Dr. Demetrios Mikelis (spine specialist) and Dr. Kolb (radiologist)[1]. Of note plaintiff uploads most of these documents under two labels as "exhibits" in NYSCEF as document numbers 46 and 47. Individual exhibits should be uploaded separately as set forth in the rules governing e-filing in NYSCEF. Bulk uploads are inappropriate and make it unnecessarily difficult to locate documents.

Dr. Almentero first examined plaintiff on November 20, 2015, and last examined plaintiff on October 1, 2020. Based on the treatment records and 2020 examination, the expert opines that plaintiff sustained a significant limitation and permanent loss of use of the right knee, left knee, and lumbar spine as the result of the Accident. The expert finds significant limitations of range of motion as to the knees, and the lumbar spine. He finds that the surgeries to the knees were necessary and the necessity for the surgeries was caused by the injuries sustained in the Accident. The expert opines that the trauma to the lumbar spine caused post-traumatic sprains and scar tissue. He states that "the absence of prior trauma to the bilateral knees and the asymptotic nature of his lower back immediately prior to the accident suggest that the [knee] injuries did not preexist the accident." Similarly, the lack of symptoms before the Accident with regards to the lumbar spine suggest that the Accident aggravated an existing condition and created new trauma. In terms of all of the degenerative findings, the expert states that the degeneration was not the cause of plaintiff's pain. He states that the injuries to the lumbar spine and the knees are the result of the Accident, are progressive and permanent, are causing plaintiff to be disabled and that plaintiff's condition will continue to worsen. All of the injuries to the lumbar and knees were caused by the accident.

In total, plaintiff's evidence raises triable issues of fact as to his claims of "serious injury" as to the lumbar spine, and knees (*Morales v Cabral*, 177 AD3d 556 [1st Dept 2019]). Plaintiff's submissions demonstrate that he received medical treatment for the claimed injuries after the

[1] *Dr. Mikelis served as plaintiff's workers compensation physician managing his treatment for his back. Dr. Kolb reviewed an MRI of the lumbar spine taken on September 24, 2018, three years post-Accident. He found, in sum and substance, disc herniations at L4- L5 and L5-S-1. He makes no finding as to causation.*

Accident, including surgery, and that he had substantial limitations in motion in the relevant body parts after the Accident and at the recent examination by plaintiff's expert in 2020 (*see Perl v Meher*, 18 NY3d 208 [2011]). Plaintiff's expert finds that, as a result of the Accident, and not degeneration, plaintiff suffered bulges and herniations in the lumber spine and injuries to the knees resulting in a decreased range of motion and the need for surgery. The MRI report shows bulges and herniation. The expert opines that these injuries are significant and causally related to the Accident and permanent in nature and the Accident was the primary competent cause of the injuries (*Morales v Cabral, supra*; *see Aquino v Alvarez*, 162 AD3d 451, 452 [1st Dept 2018]). Under the circumstances, plaintiff's submissions generate a question of fact as to whether plaintiff suffered a serious injury under threshold categories of permanent consequential limitation and significant limitation as to the lumber spine, left knee, and right knee injuries. 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]).

In contrast, defendant established *prima facie* that there was no 90/180 day injury by submitting plaintiff's own testimony that he returned to work within a month after the Accident. Plaintiff's submissions fail to raise an issue of fact (*Morales v Cabral, supra).*

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

ORDERED that the motion of defendant ADAM GAMENE (defendant) [Mot. Seq. 2], made pursuant to CPLR 3212, for an order dismissing the complaint on the ground that plaintiff AUSTIN AMAYE (plaintiff) has not sustained a "serious injury" as defined by Insurance Law 5102(d) under the threshold categories of 90/180 days is granted; and it is further

ORDERED that the part of the motion of defendant [Mot. Seq. 2], made pursuant to CPLR 3212, that seeks an order finding that plaintiff has not sustained a "serious injury" as defined by Insurance Law 5102(d) under the threshold categories of permanent consequential limitation and significant limitation is denied as to the alleged injuries to the left knee, right knee, and lumbar spine; and it is further

ORDERED that the clerk shall schedule this matter for a compliance conference on May 13, 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: March 19, 2021

E N T E R,

s/Hon. Veronica G. Hummel/signed 03/19/2021

Hon. Veronica G. Hummel