

Roth v McLaughlin

2021 NY Slip Op 32407(U)

November 22, 2021

Supreme Court, New York County

Docket Number: 152640/2016

Judge: Lisa Headley

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LISA HEADLEY PART 22

Justice

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FRANK ROTH, BARBARA ROTH

Plaintiff,

- v -

KEVIN MCLAUGHLIN, THREE SPEED DESIGN, LLC,

Defendant.

-----X

INDEX NO. 152640/2016

MOTION DATE N/A

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, it is hereby ORDERED that defendants Kevin H. McLaughlin’s and Three Speed Design, LLC.’s (hereinafter “defendants”) motion for summary judgment dismissing the complaint on the ground that the plaintiff, Frank Roth’s (hereinafter, “plaintiff”), claimed injuries do not satisfy the “serious injury” threshold under New York Insurance Law §§ 5102(d) is denied. Plaintiff filed opposition papers, and defendants submitted a reply affirmation.

Plaintiff, Frank Roth, commenced this action to recover damages for personal injuries sustained as a result of a motor vehicle accident that occurred on February 6, 2015. Plaintiff Barbara Roth, the spouse of Plaintiff Frank Roth, filed a loss of consortium claim. Plaintiff alleges that the motor vehicle operated by defendant McLaughlin collided with the vehicle operated by plaintiff at the intersection of McGuinness Boulevard and Greenpoint Avenue in Brooklyn, New York. As a result, plaintiff Frank Roth alleges that he sustained serious injuries as defined under New York Insurance Law § 5102(d), including injuries to his cervical and lumbar spines, shoulders, knees, and hips.

In support of their motion, defendants submit the objective findings of expert independent medical examiners: orthopedic surgeon Dr. Andrew N. Bazos, orthopedic spine surgeon, Dr. Jeffrey D. Klein, and radiologist Dr. David A. Fisher, as well as the plaintiff’s sworn deposition testimony.

After examination of the plaintiff, Dr. Bazos concluded, inter alia, that plaintiff sustained at most, minor, self-limited soft tissue strain injuries to the cervical spine as a result of the accident. Dr. Bazos found normal ranges of motion for the cervical spine, lumbar spine, both shoulders, both knees, and hips. Dr. Bazos found that multiple soft tissue injuries resolved, and that there were no injuries to the lumbar spine, right shoulder, right hip, or right knee as a result of the accident. Dr. Bazos further found that the right hip, cervical spine, and right shoulder surgeries served to address MRI findings that were incidental and unrelated to the subject accident. Dr. Bazos opined that plaintiff made a complete recovery within a few weeks of the

accident, and thus, plaintiff has no disability as a result of the accident and does not require additional medical treatment. Further, Dr. Bazos found that the plaintiff's past medical history is substantial and includes prior trauma, including hip and pelvic fractures. The plaintiff's alleged ongoing hip, knee, and lumbar spine complaints are related to his pre-existing condition and to nothing causally related to the subject accident.

Dr. Klein's examination and record review found, *inter alia*, that plaintiff had a cervical spine condition that was established and characterized prior to the subject accident, and that any cervical spine condition present, and any treatment that followed, was due in large part to a prior injury. Dr. Klein opined that as to the cervical spine, the multilevel and degenerative radiographic features of the thoracic and lumbar spines are the "hallmark of preexisting radiographic findings." Dr. Klein also found that it would be impossible to state, with reasonable medical certainty, that any one of these radiographic findings was caused by the subject accident.

Dr. Fisher's radiology review of plaintiff's cervical spine images found moderate degenerative changes but did not find neither disc herniations nor fractures. Upon reviewing plaintiff's right knee MRIs, Dr. Fisher found mild cartilage wear and a subtle horizontal degenerative-type tear of the posterior horn of the lateral meniscus. Dr. Fisher further found that plaintiff's lumbar spine studies showed mild/moderate degenerative changes and no herniations. Dr. Fisher found no radiographic evidence of traumatic or causally related injury to the lumbar spine, right knee, cervical spine, or right shoulder. Dr. Fisher's review of plaintiff's pelvis and right hip x-rays found evidence of mild hip osteoarthritis, prior fixation surgery of the right acetabulum, and that plaintiff underwent total hip replacement.

In addition, defendants argue that plaintiff does not meet the 90/180 threshold for serious injury based on plaintiff's sworn deposition and lack of contemporaneous medical examination records. Specifically, defendants assert that the plaintiff testified that he returned to work immediately, and continued to work for one year following the accident.

In opposition, plaintiff submits medical reports, including the medical report of orthopedic surgeon, Dr. Alexandre De Moura. Dr. De Moura's report indicates that plaintiff denies any prior history of motor vehicle accidents, with past medical history of torn meniscus and minor neck soreness. Dr. De Moura opined that plaintiff is experiencing range of motion limitations to his cervical and lumbar spines due to ongoing symptoms which are within a reasonable degree of certainty permanent and progressive in nature, including radiculopathy of the cervical and lumbar regions. According to Dr. De Moura, plaintiff is 100% totally disabled from gainful employment due to his neck injury sustained as a result of the subject accident.

Plaintiff contends that subsequent to the accident, he began experiencing right hip and neck pain and did not have right hip pain prior to the accident. Plaintiff contends that as a result of the pain, he visited Island Musculoskeletal for treatment, and sought Dr. Kang for treatment for his hip and right knee, and Dr. De Moura for neck pain. Plaintiff submits that on a gradual basis after the accident, he began experiencing neck, right shoulder, back, right hip, and right knee pain. Plaintiff contends that he underwent right shoulder surgery in January 2017 for impingement with labrum tear. Plaintiff submits that his physical therapist informed him that he could not complete his prescribed regimen due to extreme back pain. Plaintiff further contends that Dr. Allegra determined that he sustained a meniscal tear to his right knee. Plaintiff contends that Dr. Kang performed a hip replacement and administered two or three Cortisone injections to plaintiff's right knee, and one injection after knee surgery. Following neck surgery, plaintiff was prescribed a course of physical therapy treatment, which lasted for approximately three months. Plaintiff contends that he received acupuncture for right hip pain, a nerve block injection

treatment for his right shoulder, and epidural steroid injections.

In addition, plaintiff contends that he did not sustain any injuries prior to the subject accident in 2015. Plaintiff denied being involved in any accidents, other than the subject accident and the subsequent accident. Further, plaintiff argues that he could no longer work following the accident because on one occasion, as he was transporting an actor, he looked to his right while getting off a roadway when his entire face froze and twisted due to the injuries and pain from this accident. Plaintiff asserts limitations to daily activities including baseball, hockey, ice-skating, running, and swimming, that he can only cook on rare occasions, is limited in lifting items that are over 20 pounds, requires a shower seat, was limited in personal grooming following right hip surgery for at least eight months, and required personal bathing assistance for four or five months after his neck surgery, and for approximately six months following right shoulder surgery.

In their reply affirmation, defendants argue, *inter alia*, that plaintiff has not offered objective medical evidence of a neurological injury. Defendants contend that while Dr. De Moura's narrative is sworn to, the medical reports on which he relies are unsworn, and the narrative does not discuss the plaintiff's 1999 tree fall and prior treatment to the areas of his body allegedly injured in the subject accident. Defendants contend that Dr. De Moura's narrative and the unsworn records of plaintiff's treating physicians neither draw a causal connection between the alleged injuries and surgeries nor address defendants' doctors' findings of degeneration, and do not include objective medical evidence of a recent medical examination. Defendants contend that plaintiff does not account for a significant gap in treatment.

"In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility." *Garcia v. J.C. Duggan, Inc.*, 180 A.D.2d 579, 580 (1st Dep't 1992), *citing*, *Dauman Displays, Inc. v. Masturzo*, 168 A.D.2d 204 (1st Dep't 1990). As such, summary judgment is rarely granted in negligence actions unless there is no conflict at all in the evidence. *See, Ugarriza v. Schmieder*, 46 N.Y.2d 471, 475-476 (1979).

Here, upon examination of the papers submitted to this Court, defendants Kevin H. McLaughlin's and Three Speed Design, LLC.'s motion is denied because there are issues of fact precluding summary judgment, such as conflicting medical reports pertaining to the causation of plaintiff's injuries, and whether the injuries, including those to the cervical and lumbar spines, shoulders, knees, and hips are permanent in nature, and whether the plaintiff is currently without limitation. Defendants contend that plaintiff has presented no medical evidence that prior injuries had resolved by the time of the accident, and that pre-existing conditions are a contributory factor, which interrupt the chain of causation between the subject accident and the alleged injuries and surgeries. Defendant contends that plaintiff offers neither the necessary contemporaneous examination and treatment nor a reasonable explanation for terminating therapeutic measures following the accident. Specifically, defendants' doctor, Dr. Bazos found normal ranges of motion while plaintiff's doctor, Dr. De Moura found range of motion limitations. Dr. De Moura found that plaintiff is totally disabled from gainful employment as a result of the subject accident, while Dr. Bazos found that plaintiff is left with no disability as a result of the accident. As such, defendants Kevin H. McLaughlin's and Three Speed Design, LLC.'s motion for summary judgment on the issue of whether the plaintiff sustained a serious injury must be denied as issues of fact exist.

Accordingly, it is

ORDERED that defendants Kevin H. McLaughlin's and Three Speed Design, LLC.'s,

motion for summary judgment dismissing the complaint on the ground that the plaintiff's claimed injuries do not satisfy the "serious injury" threshold under *New York Insurance Law §§ 5102(d)* is DENIED; and it is further

ORDERED that any relief sought not expressly addressed herein has nonetheless been considered; and it is further

ORDERED that within 30 days of entry, defendants shall serve a copy of this decision/order upon plaintiff with notice of entry.

This constitutes the Decision/Order of the Court.

11/22/2021

DATE



LISA HEADLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: