

Tsibadze v Torim

2021 NY Slip Op 32911(U)

July 26, 2021

Supreme Court, Orange County

Docket Number: Index No. EF002529-2018

Judge: Robert A. Onofry

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SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. ROBERT A. ONOFRY, J.S.C.

SUPREME COURT : ORANGE COUNTY

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AMIRANI TSIBADZE,

Plaintiff,

- against -

To commence the statutory time period 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.

Index No. EF002529-2018

SHOLOM TORIM, LIPA TORIM and JOHN DOES 1-5,
Defendants.

DECISION AND ORDER

Motion #3- June 8, 2021

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The following papers numbered 1 to 3 were read and considered on a motion by the Defendants, pursuant to CPLR § 3212, for summary judgment dismissing the complaint for lack of a serious injury.

Notice of Motion - Nasser Affirmations- Exhibits A-D 1-3

Upon the foregoing papers, it is hereby,

ORDERED, that the motion is granted.

Factual/Procedural Background

The Plaintiff commenced this action to recover damages allegedly arising from an automobile accident in which the vehicle was driving was struck from the rear.

In his bill of particulars, the Plaintiff alleges the following "serious injuries":

- Post-Traumatic Headache, not intractable.
- Unspecified chronicity pattern.
- Head injuries, initial encounter.
- Whiplash Injury, initial encounter.
- Anxiety.

Neck Pain.
Back Pain.
Left arm pain numbness.
Head Pain.
Chest Pain

The Defendants Sholom Torim and Lipa Torim (hereinafter referred to collectively as the “Torims”) move for summary judgment dismissing the complaint insofar as asserted against them on the ground that the Plaintiff did not suffer a “serious injury” within the meaning of the no-fault law. In support of their motion, the Torims submit, *inter alia*, an affirmed report of Bradley D. Wiener, M.D., FAAOS, FIAIME.

In his report, Dr. Wiener states as follows.

He performed an independent medical evaluation on the Plaintiff on November 9, 2020.

The Plaintiff stated that he was a restrained driver of a motor vehicle that was struck from behind, while stopped, on February 9, 2016. He stated that he made no frontal impact to his vehicle, that the airbags did not deploy, and that he did not lose consciousness.

After the accident he felt pain in his neck and back, and was transported via ambulance to the emergency department at Orange Regional Medical Center. There he was evaluated, treated, and released. Diagnostic imaging studies were negative for acute bony injury. He denied any injury to the left upper extremity as a consequence of the accident.

The Plaintiff was referred for physical therapy, and participated in the same for approximately six months.

He was not referred for MRI studies, electrodiagnostic testing, or interventional pain management treatment.

He occasionally took Advil medication, but otherwise did not then participate in any

active treatments.

His past medical history was negative, and he denied any prior or subsequent injuries to his spine.

The Plaintiff was unemployed at the time of the motor vehicle accident. At the time of the examination, he worked as a truck driver in a full-duty capacity. His job involved both loading and unloading the vehicle.

The Plaintiff had no ongoing symptoms.

Upon examination, Dr. Wiener found as follows.

On gross inspection of the Plaintiff's cervical spine, there is no obvious muscular asymmetry.

There was no tenderness to palpation along the bony structures nor trapezial musculature.

Active range of motion, as measured with an inclinometer, included 50 degrees of flexion (normal = 50-60), 50 degrees of extension (normal = 50-60), 70 degrees of lateral rotation to both the right and left side (normal = 70-80), 40 degrees of tilt to both the right and left side (normal = 40-50).

There was a negative compression test and a negative Spurling test. Distally in the upper extremities, there was no motor or sensory dysfunction in the radial, median, or ulnar nerve distributions.

Examination of the lumbar spine demonstrated no obvious muscular asymmetry. Active range of motion at the waist, as measured with an inclinometer, is possible to 80 degrees of flexion (normal = 70-90) and 20 degrees of extension (normal = 20-30).

Trunk rotation test was negative. Tilt was symmetrical to 30 degrees to both the right and left side (normal = 25-45).

When seated on the edge of the examining table, there was 5/5 strength in hip flexion, knee extension, ankle dorsiflexion and plantar flexion. Deep tendon reflexes are +2 and symmetric in the lower extremities. There was no sensory dysfunction distally in the lower extremities in the L4, L5, or S1 distributions. There was a negative straight leg raise, both seated and supine, to 80 degrees. There was no dysfunction with heel or toe ambulation or stance.

Examination of the upper extremities demonstrated no gross muscular asymmetry.

Active range of motion for the left shoulder, as measured with a goniometer, is possible to 175 degrees of forward elevation (normal = 170-180), 175 degrees of abduction (normal = 170-180), internal rotation is possible to T7 (normal = T7). There was 80 degrees of external rotation (normal = 80-90). There was no weakness on resisted internal rotation. There was no restriction to adduction or extension. Distally in the extremity, there was no motor or sensory dysfunction in the radial, median, or ulnar nerve distributions.

Upon review, Dr. Wiener found the following relevant information in the Plaintiff's medical files.

From the February 9, 2016, admission at the Orange Regional Medical Center:

An x-ray report of the Plaintiff's lumbar spine showed no acute pathology identified.

A CT scan report of his brain showed no acute pathology or significant degenerative changes.

An emergency department record from Orange Regional Medical Center on February 14, 2016, showed that the Plaintiff presented for evaluation of headache, neck, and upper back pain.

The Plaintiff did not follow up with a spine specialist after his discharge on February 9, 2016.

The Plaintiff attended physical therapy at Access Physical Therapy beginning February 22, 2016, with additional treatment notes through March 2, 2016.

Dr. Wiener, based upon the Plaintiff's medical records and his physical examination, concluded as follows as to the Plaintiff's injuries from the accident:

1. Cervical strain, now resolved.
2. Thoracolumbar strain, now resolved.
3. Normal examination, left shoulder.

Dr. Wiener opined that, at the time of examination, the Plaintiff did not demonstrate the need for any additional treatment, did not have any orthopaedic disability, was able to work without restrictions; and did not have any limitations for work or recreational activities.

Overall, Dr. Wiener opined, to a reasonable degree of medical certainty, the Plaintiff did not sustain a serious or significant injury to the cervical spine, thoracic spine, lumbar spine, or left shoulder from the accident at issue. Further, the Plaintiff did not demonstrate evidence of a permanent limitation in function or use of a body system, part, or organ.

The Plaintiff submitted no opposition to the motion.

Discussion/Legal Analysis

Under New York's No-Fault regulatory scheme, a party may commence an action to recover non-economic loss only in the event of a "serious injury," which is defined as:

death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use 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.

Insurance Law § 5102(d). The legislative intent underlying the No-Fault Law is to weed out frivolous claims and limit recovery to significant injuries. As such, the courts have required objective proof of a plaintiff's injury in order to satisfy the statutory serious injury threshold. *Toure v. Avis Rent A Car Systems, Inc.*, 98 N.Y.2d 345 (2002). Subjective complaints of pain and limitations will not suffice unless supported by competent, admissible medical evidence, based on a recent examination and objective findings, that such subjective complaints of pain and limitation have a medical basis. *Perl v. Meher*, 18 N.Y.3d 208 (2011); *Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d 345, 350 (2002); *Oliva v Gross*, 29 AD3d 551 [2nd Dept. 2006].

The “permanent consequential limitation” category requires proof that the body organ or member does not operate at all, or operates only in some limited way. It is not necessary to find that there has been a total loss of the use, but the limitation of use must be consequential, which means that it is significant, important or of consequence. A minor, mild or slight limitation of use is not significant, important or of consequence. *Decker v. Rassaert*, 131 A.D.2d 626 [2nd Dept. 1987].

The “significant limitation” category requires proof that a body function or system does not operate at all or operates only in some limited way. It is not necessary there has been a total loss or that the limitation of use is permanent. However, the limitation of use must be significant, meaning that the loss is important or meaningful. A minor, mild or slight limitation of use is not significant. *Licari v. Elliott*, 57 N.Y.2d 230 (1982); *Estrella v. Geico Ins. Co.*, 102 A.D.3d 730

[2nd Dept. 2013].

Whether a limitation of use or function is “significant” or “consequential” (*i.e.*, important) for purposes of the No-Fault Law relates to medical significance, and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part. *Toure v. Avis Rent A Car Systems, Inc.*, 98 N.Y.2d 345 (2002). Some injuries can be so minor, mild or slight as to be considered insignificant within the meaning of the No-Fault Law. *Toure v. Avis Rent A Car Systems, Inc.*, 98 N.Y.2d 345 (2002).

The 90/180 day category requires proof of a medically determined injury or impairment of a non-permanent nature that prevented a plaintiff from performing substantially all of the material acts that constituted his or her usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the accident. A medically determined injury is one that is supported by testimony by an appropriate medical professional. *Toure v. Avis Rent A Car Systems, Inc.*, 98 N.Y.2d 345 (2002).

A “significant limitation” need not be permanent in order to constitute a serious injury. *Estrella v. Geico Ins. Co.*, 102 A.D.3d 730 [2nd Dept. 2013]. Thus, any 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. *Estrella v. Geico Ins. Co.*, 102 A.D.3d 730 [2nd Dept. 2013].

An expert’s qualitative assessment of a plaintiff’s condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff’s limitations to the normal

function, purpose and use of the affected body organ, member, function or system. *Perl v. Meher*, 18 N.Y.3d 208 (2011). The tests used must have an objective basis. They cannot be simply a recording of the patients' subjective complaints. *Perl v. Meher*, 18 N.Y.3d 208 (2011).

Here, in support of its motion, the Torim Defendants demonstrated a *prima facie* entitlement to judgment as a matter of law dismissing the complaint as against them.

In opposition, the Plaintiff did not raise a triable issue of fact. Rather, as noted *supra*, the Plaintiff submitted no opposition to the motion.

Thus, the motion is granted.

The Court notes that although John Does Defendants are named, there is no evidence any further Defendants have been identified or served, etc. Thus, the grant of Torims' motion resolves the matter, and the complaint is dismissed.

Accordingly, and for the reasons cited herein, it is hereby,

ORDERED, that the motion is granted and the complaint is dismissed.

This constitutes the decision and order of the Court.

Dated: July 26, 2021
Goshen, New York

ENTER



HON. ROBERT A. ONOFRY, J.S.C.

VIA NYSCEF

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