Wiley v Queen
2021 NY Slip Op 33544(U)
September 30, 2021
Supreme Court, Rockland County
Docket Number: Index No. 032996/2019
Judge: Sherri L. Eisenpress
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND
---X
ANDREW M. WILEY,

Plaintiff,

-against -

LAURA E.QUEEN,

Defendant.
---X

DECISION/ORDER

Index No. 032996/2019

(Motion #4)

HON. SHERRI L. EISENPRESS, A.J.S.C.

The following papers, numbered 1- 4, were read in connection with Defendant Laura E. Queen's("Defendant") motion for summary judgment and dismissal of the Complaint on the ground that there are no triable issues of fact, in that the plaintiff cannot meet the serious injury threshold requirement as mandated by Insurance Law Sections 5104(a) and 5102(d):

PAPERS	**NUMBERED**
NOTICE OF MOTION/AFFIRMATION IN SUPPORT/EXHIBITS A-L	1-2
AFFIRMATION IN OPPOSITION/EXHIBITS A-L	3
AFFIRMATION IN REPLY	4

Plaintiff Wiley commenced the instant action on June 7, 2019 which arises out of a two-vehicle automobile accident that occurred on August 18, 2017, on State Highway 28, in the Town of Olive, Ulster county, New York. Andrew Wiley was driving eastbound and Laura Queen was driving westbound, when Queen attempted to make a left hand turn into a gas station, resulting in a collision between the two vehicles. Issue was joined as to Defendant Queen with the service of an answer on August 7, 2019. Plaintiff, 44 years old at the time of the accident, alleges that as a result of the accident, he sustained bulges and herniated discs to his lumbar spine with radiculopathy; left knee joint effusion and patellar chonromalacia; left ankle contusion and osteochondral injury; right rotator cuff and labral tear; with shoulder impingement and tendonitis. Defendant moves for summary judgment and dismissal of the

Complaint on the ground that there are no triable issues of fact, in that the plaintiff cannot meet the serious injury threshold requirement as mandated by Insurance Law Sections 5104(a) and 5102(d).

In support of her summary judgment motion, Defendant annexes the Plaintiff's examination before trial transcript and the affirmed expert report of radiologist John T. Rigney, M.D., who upon review of Plaintiff's MRI's and x-rays, opines that there is no evidence of any injury being causally related to the subject accident in Plaintiff's cervical spine, lumbar spine, left knee, left ankle, or right shoulder. Also submitted is the affirmed medical report of Dr. Robert C. Hendler, who upon examination finds normal range of motion in Plaintiff's cervical spine, lumbar spine, left knee, left ankle and right shoulder, and no causally related injuries to these body parts. Defendant submits various medical records in support of its motion including a report from Dr. Barry Kraushaar, Plaintiff's treating orthopedist, authored one month after Dr. Hendler saw Plaintiff, in which he finds the same ranges of motion and largely agrees with Dr. Hendler's findings. Lastly, Defendant argues that Plaintiff's 90/180 day category claim must be dismissed because Plaintiff's proof fails to show that he was medically prevented from performing "substantially all" of his usual and customary activities for the requisite period and the time.

In opposition to the instant motion, Plaintiff submits his properly certified medical records which show treatment undertaken contemporaneous to the accident and for several years thereafter. Plaintiff also submits the affirmed report of Dr. Charles DeMarco, an orthopaedic surgeon, who examined him on July 9, 2020. Dr. DeMarco finds limitations of range of motion in Plaintiff's lumbosacral spine including a finding of 60 degrees flexion (normal 90); extension limited to 15 degrees (normal 25); supine straight leg raise to 30 degrees (normal 90); lateral bending to 15 degrees (normal 25) and extension of 15 degrees (normal 25). Dr. DeMarco finds the left knee to motion to be 0-120 degrees (normal 0-140) He also found the Lachman and Anterior Draw to be 1 to 2+. With respect to the left ankle, Dr. DeMarco also finds

limitation in motion with respect to dorsiflexion of 10 degrees (normal 20 degrees); plantar flexion of 25 (normal 40); inversion 10 degrees (normal 30) and eversion of 10 degrees (normal 20). He further noted a positive talar tilt test and positive anterior drawer test. Dr. Charles opines that as a result of the accident, Plaintiff sustained cervical and lumbar derangement with radiculopathy, as well as injuries to his right shoulder, left ankle and left knee.

The proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a Court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. Giuffrida v Citibank Corp., et al., 100 N.Y.2d 72 (2003) (citing Alvarez v Prospect Hosp., 68 N.Y.2d 320 (1986). The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. Lacagnino v Gonzalez, 306 A.D.2d 250 (2d Dept 2003). However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. Gonzalez v. 98 Mag Leasing Corp., 95 N.Y.2d 124 (2000). Mere conclusions or unsubstantiated allegations unsupported by competent evidence are insufficient to raise a triable issue. Gilbert Frank Corp. v. Federal Ins. Co., 70 N.Y.2d 966 (1988); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).

In order to be entitled to summary judgment it is incumbent upon the defendant to demonstrate that plaintiff did not suffer from any condition defined in Insurance Law §5102(d) as a serious injury. Healea v Andriani, 158 A.D.2d 587, 551 N.Y.S.2d 554 (2d Dept 1990). In the instant matter, Defendant's examining physicians found full range of motion in Plaintiff's cervical and lumbar spine and no causally related injuries. As such, Defendant has met her burden on summary judgment with respect to lack of a "serious injury" and the burden shifts to Plaintiff to demonstrate a triable issue of fact.

A plaintiff must come forward with sufficient evidentiary proof in admissible form

to raise a triable issue of fact as to whether the plaintiff, suffered a "serious injury" within the meaning of the Insurance Law. Zoldas v St. Louis Cab Corp., 108 A.D.2d 378, 489 N.Y.S.2d 468 (1st Dept 1985); Dwyer v Tracey, 105 AD2d 476, 480 N.Y.S.2d 781 (3d Dept. 1984). One way to substantiate a claim of serious injury is through an expert's designation of a numeric percentage of a plaintiff's loss of range of motion, i.e., quantitatively. McEachin v. City of New York, 137 A.D.3d 753, 756, 25 N.Y.S.3d 672 (2d Dept. 2016). However, 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. Id. By establishing that any one of several injuries sustained in an accident is a serious injury within the meaning of Insurance Law §5102(d), a plaintiff is entitled to seek recovery for all injuries incurred as a result of the accident. Bonner v Hill, 302 AD2d 544, 756 N.Y.S.2d 82 (2d Dept 2003); O'Neill v O'Neill, 261 AD2d 459, 690 N.Y.S.2d 277 (2d Dept 1999).

In the instant matter, Plaintiff has demonstrated a triable issue of fact requiring denial of the summary judgment motion based upon his lumbar spine, right shoulder, left ankle and left knee limitations, which the Court finds sufficiently significant. The Court notes that Plaintiff also satisfied his burden with respect to the production of medical records for treatment contemporaneous to the subject occurrence. See Perl v. Meher, 28 N.Y.3d 208, 216, 936 N.Y.S.2d 655 (2011). Where conflicting medical evidence is offered on the issue as to whether the plaintiff's injuries are permanent or significant, and varying inferences may be drawn, the question is one for the jury. Martinez v Pioneer Transportation Corp., 48 A.D.3d 306, 851 N.Y.S.2d 194 (1st Dept 2008). Further, when discrepancies between the competing reports of the physicians create issues of credibility, those issues of fact should not be resolved on summary judgment and require a trial. Francis v Basic Metal, Inc., 144 AD2d 634 (2d Dept 1981); Cassagnol v Williamsburg Plaza Taxi, 234 AD2d 208, 651 N.Y.S.2sd 518 (1st Dept 1996). This is so even with respect to Plaintiff's treating physician, Dr. Kraushaar. As such,

triable issues of fact require denial of Defendant's summary judgment motion with respect to the categories of significant limitation of use and permanent consequential limitation of use.

However, Defendant is entitled to summary judgment with respect to the 90/180 day category. Defendant submits Plaintiff's examination before trial transcript which demonstrates that Plaintiff had some restrictions with regard to her work and/or everyday activities but not that he was prevented from performing all of his usual activities for 90 out of the 180 days following the occurrence. This, coupled with Plaintiff's failure to submit medical evidence which documents that he was prevented from performing "substantially all" of his usual and customary activities for the requisite period, requires the grant of summary judgment with respect to this category. See Rubin v. SMS Taxi Corp.,

Accordingly, it is hereby

ORDERED that Defendant Laura Queen's motion for summary judgment, pursuant to CPLR § 3212, is DENIED, except with respect to Plaintiff's claim based upon the 90/180 no-fault category, which is dismissed; and it is further

ORDERED that this matter is scheduled for a settlement conference on **November 5, 2021, at 10:30 a.m. via Microsoft Teams.** Link to be provided the day prior. Counsel is advised to have settlement authority and be able to contact their client/adjuster if requested to do so by the Court.

The foregoing constitutes the Opinion, Decision & Order of the Court on Motion #4.

Dated: New City, New York
September 30, 2021

HON. SHERRI L. EISENPRESS, A.J.S.C.

TO:
All Parties (by e-file)