

Rosario v Arce

2021 NY Slip Op 33688(U)

October 29, 2021

Supreme Court, Bronx County

Docket Number: Index No. 29501/2018E

Judge: Bianka Perez

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX**

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JOSE ROSARIO,

Plaintiff,

Index No. 29501/2018E

-against-

DECISION AND ORDER

ANDRE N. ARCE, and “JOHN DOE”,

Defendants.

Hon. Bianca Perez

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The following papers numbered 1 to 6 were read on this motion (Seq. No. **003**) for **SUMMARY JUDGMENT** noticed on October 5, 2020.

Notice of Motion – Affirmation in Support - Exhibits Annexed	No(s). 1-3
Affirmation in Opposition and Exhibits	No(s). 4-5
Replying Affidavit and Exhibits	No(s). 6

Plaintiffs, who were involved in an automobile accident, brought this action seeking to recover for injuries allegedly sustained in a motor vehicle accident. Defendant Andre N. Arce moves for summary judgment, pursuant to CPLR § 3212 contending that plaintiffs cannot meet the serious injury threshold requirement mandated by Insurance Law § 5102(d). Plaintiff opposes.

Standard of Review

In a motor vehicle case, a defendant moving for summary judgment on the issue of whether the plaintiff sustained a serious injury has the initial burden of presenting competent evidence establishing that the injuries do not meet the threshold. See, Linton v. Nawaz, 62 A.D.3d 434 (1st Dept 2009). It is well established that the legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries, and as such, objective proof of a plaintiff's injury is required in order to satisfy the statutory serious injury threshold. See, Toure v. Avis Rent a Car Sys., 98 N.Y.2d 345 (2002).

Insurance Law § 5102(d) defines the term “serious injury” as “a personal injury which results in 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.”

An affirmed report concerning the lack of evidence of disability establishes defendant's prima facie burden that plaintiff did not suffer a serious injury as defined by Insurance Law

5102(d), and shifts the burden to plaintiff to raise an issue of fact. See, Quinones v. Ksieniewicz, 80 A.D.3d 506 (1st Dept 2011).

To prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion can be used to substantiate a claim of serious injury. See, Toure v. Avis Rent a Car Sys., 98 N.Y.2d 345 (2002). 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. See, Id.

Procedural History

This action is for personal injuries allegedly sustained by plaintiffs in a motor vehicle accident which occurred on October 29th, 2017. The action was commenced on August 13th, 2018. Plaintiff's bill of particulars alleges permanent injuries to the cervical, thoracic, and lumbar spine, namely several sprain/strains, disc herniations, and disc bulges. The Defendant now moves this Court for summary judgment alleging that the plaintiffs have failed to sustain serious injury within the meaning of the Insurance Law. Defendant argues that it is evident from a review of the plaintiff's Verified Bill of Particulars, affirmed medical reports of Dr. René Elkin, and the plaintiff's deposition transcript that the plaintiffs did not sustain serious injuries and should not be allowed compensation outside of the No-Fault system.

In support of defendants motion they provided a report from Dr. Elkin (Exh. D), which stated there are no objective findings on the neurological physical examination for any structural neurologic injury incurred due to this accident. She further notes there are no objective findings for cervical or lumbar radiculopathy, no evidence for carpal tunnel syndrome, and MRI examinations of the cervical, thoracic, and lumbar spines reveal no evidence for acute traumatic injury. Dr. Elkin performed range of motion test through visual inspection, self-demonstration, and a goniometer. According to Dr. Elkin, Mr. Rosario's neck has a forward flexion 50/50, retroflexion is 60/60, and lateral rotation on either side 80/80. His lower back has a forward flexion 30/60, retroflexion 20/25, lateral bending 25/25, and lateral rotation to be 25/25.

Defendants further submit plaintiff's deposition transcript (Exh. C). Plaintiff testified that after the accident, he went to the hospital with complaints of pain in his chest, but the EMT suggest he go to the hospital. After roughly 4.5 hours Mr. Rosario was discharged and was told everything was normal and he should seek his medical doctor if anything bothered him. At the hospital they only took his blood pressure and an x-ray of his chest. Plaintiff further testified that he received treatment for his alleged injuries starting two weeks after the accident. Plaintiff was attending physical therapy everyday for roughly three months then it became three times per week and eventually twice a week before stopping entirely. His last time at physical therapy was early 2018. Plaintiff also stated that there is no activity he can no longer perform entirely as a result of the injuries from the accident. However, plaintiff claims he has pain when moving his head quickly, sitting for long periods of time, walking, and carrying weight but can still perform

each task just not as efficiently. Plaintiff further testified that he has traveled to visit family since the accident.

Plaintiff opposes the motion, contending defendant failed to meet its burden of establishing prima facie entitlement to summary judgment and failed to eliminate all triable issues of fact. First, plaintiff submits medical records from Dr. Paulus who first examined the plaintiff on November 15th, 2017. (Exh. D). Dr. Paulus performed range of motion tests on Mr. Rosarios cervical and lumbar spines, using a goniometer, and following was present. Regarding the cervical spine, flexion was 35/60, extension was 30/50, left/right lateral 30/50, and left/right rotation 45/80. For the lumbar spine, flexion was 45/90, extension 15/30, left/right rotation 20/45, and left/right lateral flexion 15/30.

Furthermore, plaintiff submits an MRI report from Dr. Steve Losik, MD., a radiologist who examined Mr. Rosario's cervical, lumbar, and thoracic spine. (Exh. B). MRI of the lumbar spine was taken on December 26th, 2017. MRI of the cervical and thoracic spine were taken on December 4th, 2017. For the cervical spine, there is a mild loss of the C3-4 disc space height with a right paracentral/foraminal disc herniation with compression of the anterior thecal sac, partial effacement of right anterior subarachnoid space and encroachment of right neural foramina and right exiting nerve root at this level. C4-5 and C6-7 show a disc bulge with compression of anterior thecal sac and partial effacement of anterior subarachnoid space. Mild loss of C5-6 and C7-T1 disc space height with a diffuse disc herniation with compression of anterior thecal sac, effacement of anterior subarachnoid space, compression of cervical spinal cord and encroachment of neural foramina. For the lumbar spine, L3-4 and L4-5 disc bulge with encroachment on the neural foramina and posterior subcutaneous soft tissue swelling and edema consistent with recent trauma or bursitis; in an appropriate clinical setting. Lastly, for the thoracic spine, T6-7/T7-8/T8-9 show disc bulge with compression of anterior thecal sac and partial effacement of anterior subarachnoid space.

Finally, plaintiff submits affirmed medical records from Neurologist Dr. Nicky Bhatia, MD., who conducted an objective range of motion test using an arthrodiagonal protractor and goniometer. (Exh. C). The cervical spine exhibits flexion 50/50, extension is 45/60, left/right lateral flexion 45/45, and left/right rotation 80/80. For the thoracic and lumbar spine flexion is 90/90, extension is 25/25, and left/right lateral flexion 25/25. Further, Dr. Bhatia states that he disagrees with the findings of Dr. Elkin that the positive findings within Mr. Rosario's thoracic, cervical and lumbar spine are due to degeneration and there is only minimal age-related degeneration. He concludes that the medically findings from Dr. Losik, that are mentioned above, are causally related to the motor vehicle accident in question and are not due to a pre-existing condition or degeneration.

Discussion

As to plaintiff's alleged cervical, lumbar and thoracic spine injuries, the Court finds that defendant met its initial prima facie burden of demonstrating that plaintiff did not sustain a serious injury through the affirmed report of Dr. Elkin which states there is no evidence of

orthopedic disability, no permanency or residuals and that the Plaintiff is able to work. See, Kester v Sendoya, 123 A.D.3d 418 (1st Dept 2014). See also, Rodriguez v Abdallah, 51 A.D.3d 590 (1st Dept 2008).

With the burden shifting onto plaintiff, the Court next finds that plaintiff met its burden of proof and raised a material issue of fact as to the plaintiff sustaining a serious injury. Dr. Paulus, Dr. Losik, and Dr. Bhatia's affirmations state that the injuries are both permanent in nature and are causally related to the accident with sufficient objective findings and qualitative assessment. See, Linton v. Nawaz, 62 A.D.3d 434 at 439 (holding that plaintiff raised an issue of fact regarding causation as the doctor concluded that plaintiff's symptoms were related to the accident based on a full physical examination of plaintiff). See also Ramkumar v. Grand Style Trans. Enter., 22 N.Y.3d 905, 976 N.Y.S.2d 1 (2013). Plaintiff's doctor directly address the issue of degeneration by noting that the plaintiff had a history of prior injuries but has fully recovered from these injuries. These opinions from Dr. Bhatia were sufficient to raise an issue of fact (Moreira v. Mahabir, 158 A.D.3d 518, 519 [1st Dept 2018]). Additionally, plaintiff explained the cessation in treatment was due to his no-fault insurance cut off, (Ramkumar v. Grand Style Trans. Enter., 22 N.Y.3d 905, 978 N.Y.S.2d 36 [2013]).

As to defendants' branch of the motion, which argues that the proof rules out a serious injury based on the 90/180-day claim, the Court finds that defendant established its entitlement to summary judgment as the proof clearly shows plaintiff did not miss work for 90 days out of the first 180 days immediately after the accident or that he was totally confined to bed or home. Defendants established as a matter of law that plaintiff did not have a claim by submitting plaintiff's bill of particulars in which he admitted that he was only confined to home and bed for approximately one month and intermittently thereafter. The effect of the admission in establishing no serious injury under the 90/180-day category renders unnecessary any medical proof, see Sanchez v. Oxcin, 157 A.D.3d 561, 69 N.Y.S.3d 623 (1st Dep't 2018). In addition, plaintiff's proof is insufficient to raise a triable issue of fact as the limitations upon which plaintiff relies, e.g., inability to walk for long periods of time and struggling to hold heavy weight, do not establish that he was limited to "substantially all" of his daily activities, see McIntyre v. Salluzzo, 159 A.D.3d 1547, 72 N.Y.S.3d 718 (4th Dep't 2018).

As to defendants' branch of the motion requesting dismissal of the permanent loss of use claim, the medical proofs plainly establish that plaintiff did not sustain a complete loss of use of a body organ or member. Plaintiff states in his own deposition that he has not been permanently prevented from performing any task he could prior to the accident. Thus, the plaintiff has failed to establish a triable issue of fact as to that category of the statute. See Oberly v. Bangs Ambulance, Inc., 96 NY2d 295 (2001); Vaughn v. Baez, 305 AD2d 101 (2d Dept. 2003).

Conclusion

Accordingly, it is

ORDERED, that defendants' motion for summary judgment is granted only to the extent of dismissing the "90/180 day" claim and the permanent loss of use claim, and it is further

ORDERED, that the remaining branches of Defendants' motion are denied.

This constitutes the decision and order of the Court.

Dated: October 29, 2021

Hon.  _____
BIANKA PEREZ, J.S.C.

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- 1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
 - 2. MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
 - 3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER SCHEDULE APPEARANCE
 - FIDUCIARY APPOINTMENT REFEREE APPOINTMENT