Padippurakkal v Pennatto
2021 NY Slip Op 34009(U)
April 19, 2021
Supreme Court, Bronx County
Docket Number: Index No. 21208/2019E
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

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SUDESH PADIPPURAKKAL,

Plaintiff,

-against -

ANTHONY L. PENNATTO,

Defendant.

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Index No. 21208/2019E
DECISION/ORDER

Motion Seq. 2

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 by defendant ANTHONY L. PENNATTO [Mot. Seq. 2] ("defendant"), made pursuant to CPLR 3212, seeking an order dismissing the complaint on the ground that plaintiff SUDESH PADIPPURAKKAL ("plaintiff") has not sustained a "serious injury" as defined by Insurance Law 5102(d).

This action is for alleged serious personal injuries arising from a pedestrian knock-down accident that occurred on November 7, 2018, at about 5:53 p.m. at the intersection of Maple and Mamaroneck Avenue, White Plains, NY. ("the Accident"). Plaintiff was a crossing the street when defendant, who was making a right turn, stuck plaintiff's left side, knocking plaintiff to the ground.

Plaintiff testified that he was involved in a prior accident in 2010 that resulted in injuries to his pelvis, neck and back. He also testified that on the date of the Accident, he was on route to the chiropractor to receive neck and back treatments for injuries that he incurred as the result of a third, August 2018, accident.

In the bills of particulars, in relevant part, plaintiff alleges that as the result of the Accident he suffered injuries to the neck, back, shoulders, and left elbow. 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]).

While plaintiff has the burden of establishing a *prima facie* case of "serious injury" at trial (*Licari v. Elliott*, 57 NY2d 230 [1982]), defendant on a summary judgment motion must first present evidence establishing that plaintiff has not sustained a "serious injury" as a matter of law, and only after that burden has been met must plaintiff go forward and submit evidence to raise a question of fact (*Franchini v Palmieri*, 1 NY3d 536 [2003]; *Brown v Mat Enterprises of N.Y. Inc.,* 97 AD3d 401 [1st Dept 2012]). Defendant bears the initial burden of establishing the absence of a "serious injury" as a matter of law by tendering sufficient evidence to eliminate any material issues of fact from the case (*McElroy v Sivasubramaniam*, 305 AD2d 944 [3d Dept 2003]). If defendant meets this burden, defendant has established *prima facie* entitlement to summary judgment.

It then becomes incumbent on the plaintiff to submit proof, in admissible form, of the existence of triable issues of fact with regard to the existence of a "serious injury" (*Franchini v Palmieri*, *supra*; *Shinn v Catanzaro,* 1 AD3d 195 [1st Dept. 2003]; *see Cabrera v Ahmed*, 2020 N.Y. Slip Op. 07129 [1st Dept 2020]). Specifically, plaintiff must demonstrate that there is a "serious injury" under the Insurance Law, that summary judgment is not warranted and that the action mandates resolution by trial. Additionally, and equally important, plaintiff must establish, through admissible medical evidence, that

the injuries sustained are causally related to the accident claimed (*see Pommells v Perez*,4 NY3d 566 (2005); *Tusu v Leone*, 187 AD3d 655 [1st Dept 2020]).

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 bill of particulars, deposition transcripts, and the medical reports of Dr. Jonathan D. Glassman (orthopedic surgeon), dated December 6, 2019, and Dr. Adam Mednick, dated December 9, 2019 (neurologist).

Dr. Glassman bases his opinion on the details of a physical examination conducted on December 9, 2019 (approximately one-year post-Accident). In the report, the doctor states that he reviewed, among other things, the plaintiff's medical records, including reports of MRIs taken of plaintiff's lumbar spine, left shoulder, cervical spine (taken 1/21/2019), and left elbow and pelvis (taken 2/2/2019). In terms of the range of motion testing, the doctor finds normal range of motion and negative objective tests results on the cervical spine, thoracic spine, and lumbar spine. The doctor finds an unremarkable neurologic examination and resolved cervical and lumbar sprains/strains. He finds no evidence of an orthopedic disability or permanency connected to the Accident. The doctor opines that plaintiff could perform his daily activities without limitations as it related to the Accident and can continue to work.

Defendant also submits the IME report of Dr. Adam Mednick (neurologist) based on an examination conducted on December 9, 2019 (one year post-Accident). Dr. Mednick reviewed plaintiff's medical records, including the MRI reports as well as other items. He notes that plaintiff was working, missed 3 days of work post-Accident, and was in a prior motor vehicle accident in which he sustained a pelvis fracture and injury to his back. The doctor finds no higher cortical function, cranial nerve, cerebellar, motor examination or reflex deficits. The range of motion results for the cervical, thoracic, and

lumbar spine are all normal. The doctor concludes that plaintiff has no neurologic deficits and neurologically intact in the cervical and lumbar spine. There is no objective signs of cervical or lumbar radiculopathy, spasm or any positive orthopedic testing to substantiate the plaintiff's subjective complaints. There is no tenderness and the neurological examination is normal. Based on his findings, the expert opines that, from a neurotologic perspective, there is no disability or permanency with regards to the Accident. Plaintiff can perform all regular activities without restriction. The doctor finds that the plaintiff has unrelated neurological issues and opines that a permanent neurological injury was not sustained due to the Accident.

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]).

In opposition, plaintiff submits a personal affidavit, various medical records and the expert reports of Dr. Gabriel L. Dass (orthopedic surgeon) (dated February 28, 2019 and January 10, 2019), Dr. Siddharth Prakash (radiologist), and Dr. Allan Wettenmaker (chiropractor). Initially, pursuant to CPLR 2106, the medical reports and affirmation of the chiropractor expert, Dr. Wettenmaker, may not be considered by the court as they are not in admissible form. Specially, the "affirmation" of the chiropractor is not competent evidence as it is not properly sworn to before a notary or the authorized official (*see Walker v Village of Ossining,* 18 AD3d 867 [2d Dept 2005]; *Shinn v Catanzaro*, 1 AD3d 195 [1st Dept 2003]; *Pugsley Chiropractic PLLC v Merchants Preferred Insurance Co*., 50 Misc. 3d 139(A) [1st Dept 2016]).

Based on the remaining medical evidence, plaintiff's evidence raises triable issues of fact as to his claims of "serious injury" as to the left shoulder, right shoulder, left elbow, cervical spine, and lumbar spine (*Morales v Cabral*, 177 AD3d 556 [1st Dept 2019]). Plaintiff's submissions demonstrate that he received medical treatment for the claimed injuries after the Accident, and that he had substantial limitations in motion according to

plaintiff's experts in the relevant body parts after the Accident and at the recent examination by plaintiff's expert in February 2019 (*see Perl v Meher*, 18 NY3d 208 [2011]). Plaintiff's experts find that, as a result of the Accident, plaintiff suffered disc bulges and a new herniated disc in the cervical and lumber spine, resulting in a decreased range of motion. Dr. Dass opines that the injuries to the neck, spine, and shoulders are not due to the previous accident and finds them 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]). He also finds that the Accident is the cause of significant exacerbation of pre-existing conditions of the cervical and lumbar spine. 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 listed body parts. 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 establishes *prima facie* that there was no 90/180 day injury by submitting plaintiff's own testimony that he returned to work within three days of the Accident and travelled immediately after the Accident without any medical proof indicating that he had to be confined to home during the requisite time period. 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 by defendant ANTHONY L. PENNATTO [Mot. Seq. 2], made pursuant to CPLR 3212, seeking an order dismissing the complaint on the ground that plaintiff SUDESH PADIPPURAKKAL has not sustained a “serious injury” as defined by Insurance Law 5102(d) is denied with respect to the claimed injuries to the left shoulder, right shoulder, left elbow, cervical spine, and lumbar spine and granted in part with respect to the claim of 90/180.

Dated: April 19, 2021

E N T E R,

s/Hon. Veronica G. Hummel/signed 04/19/2021

Hon. Veronica Hummel. A.J.S.C.