

Dolce v Valenza
2022 NY Slip Op 31896(U)
June 13, 2022
Supreme Court, Kings County
Docket Number: Index No. 521598/2019
Judge: Debra Silber
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9

X

ISRAEL DOLCE,

Plaintiff,

DECISION/ORDER

-against-

Index No. 521598/2019

MARCO VALENZA and STEFANIE CANGIANO,

Motion Seq. No. 2

Defendants.

X

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendants' motion for summary judgment.

Papers	NYSCEF Doc.
Notice of Motion, Affirmations, Affidavits, and Exhibits Annexed...	<u>29-37</u>
Affirmations in Opposition and Exhibits Annexed.....	<u>40-41</u>
Reply Affirmation.....	<u>42</u>

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

In this personal injury action arising from an automobile accident that occurred on January 25, 2018 at the intersection of Schenectady Avenue and Dean Street in Brooklyn, New York, the defendants move this court for an order granting them summary judgment, based upon their contention that the plaintiff has not sustained a "serious injury" as defined in §5102(d) of the Insurance Law.

In his bill of particulars, the plaintiff claims that he sustained numerous injuries in the subject accident, including a left shoulder tear, disc herniations, and disc bulges in his cervical and lumbar spine. The plaintiff's bill of particulars claims that he sustained a serious injury as defined in the Insurance Law in these categories: a consequential limitation of use of a body organ or member; a significant limitation of use of a body function or system; 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 accident; a fracture; and a significant disfigurement.

In support of the motion, the defendants submit an attorney's affirmation, copies of the pleadings, the plaintiff's bill of particulars, the plaintiff's deposition transcript and the affirmed report of Dr. John Xethalis, an orthopedic surgeon who examined the plaintiff on behalf of the defendants.

In his exam of the plaintiff, Dr. Xethalis found that the plaintiff had full range of motion in his cervical spine, with no muscle spasm or tenderness upon palpation. He found that the Distraction, Compression, Spurling and Soto Hall tests were all negative, and that his neurological exam of the plaintiff's upper extremities was normal, bilaterally. His exam of the plaintiff's thoracic spine found no spasm or complaints of tenderness upon palpation. In his exam of the plaintiff's lumbar spine, Dr. Xethalis found that the plaintiff had full range of motion in his lumbar spine, with no muscle spasm or complaints of tenderness upon palpation. The doctor also noted that the Straight Leg Raise Test was negative, and that the Fabere, Kemp's and Lasegue's tests were all negative, with no complaints of pain by plaintiff during the tests. The neurological exam of the plaintiff's lower extremities was also normal. In his exam of the plaintiff's left shoulder, Dr. Xethalis found that the plaintiff had a full range of motion in his left shoulder. The doctor found no heat, swelling, effusion, erythema, or crepitus in the plaintiff's left shoulder, and noted that all of the tests he performed were negative.

Dr. Xethalis diagnoses plaintiff with sprains/strains to his cervical spine, thoracic spine, lumbar spine, and left shoulder, all of which have resolved. He opines that there

is a causal relationship between the subject accident and the injuries that the plaintiff sustained. Finally, Dr. Xethalis opines that “there is no objective evidence of an orthopedic disability.”

The court notes that, although the plaintiff’s bill of particulars states that he was “incapacitated from work for approximately three months,” his deposition testimony is clear that he missed “a month or less” from his job as a New York City police officer, and that he worked full-time light-duty for “two weeks or less” when he returned to work. The plaintiff also testified that he was neither confined to bed nor home after the subject accident. The court notes that the plaintiff testified that he did not break or fracture any bones, that he does not have any scars as a result of this accident, and the plaintiff’s medical records make no mention of any fractures or any disfigurement.

The court finds that the plaintiff’s testimony that he missed a month or less of work after the accident, and that he did not break any bones and is neither scarred nor disfigured, demonstrates a prima facie showing on the 90/180-day, fracture and disfigurement categories of injury, and that the defendants have made a prima facie showing that the plaintiff has not sustained a serious injury with regard to the categories of “permanent consequential limitation of use of a body organ or member” and “significant limitation of use of a body function or system,” and thus they have established that they are entitled to summary judgment. The burden of proof then shifts to the plaintiff to raise a triable question of fact such that summary judgment should be denied.

In opposition to the motion, the plaintiff provides an attorney’s affirmation and an affirmation from plaintiff’s treating orthopedist, Dr. Matthew Wert. In his affirmation, Dr. Wert states that he started treating the plaintiff four days after the subject accident. He

diagnosed plaintiff with injuries to his left shoulder, cervical spine, and lumbar spine. At his deposition, the plaintiff testified that, in addition to seeing Dr. Wert, he had MRIs and was given a referral for physical therapy, which he testified he went to two times per week for approximately one month. He testified that he stopped receiving physical therapy because he was not given another doctor's referral.

Dr. Wert states that he personally reviewed all of the MRI films and that, when he last saw the plaintiff in October of 2021, he found that the plaintiff still had a limited range of motion in his left shoulder. Specifically, he found that the plaintiff had deficits in flexion, extension, adduction, abduction, internal rotation, and external rotation. He notes that the Hawkins and Neer Impingement tests were positive. In his review of the MRI films of the plaintiff's left shoulder, he confirms the radiologist's finding of an intrasubstance tear of the anterior glenoid labrum, and opines that "[t]hese MRI results are fully consistent with the clinical limitations I observed during my clinical examinations of Mr. Dolce."

In his exam of the plaintiff's cervical spine, Dr. Wert found that the plaintiff had a reduced range of motion, noting deficits upon flexion, extension, right rotation, left rotation, right lateral flexion and left lateral flexion. He notes that "[t]here was a positive Spurling Test bilaterally and positive Lhermitte's Sign, both of which are clinical indications of radiculopathy and nerve damage." In his review of the plaintiff's cervical MRI, Dr. Wert states [¶10] that the MRI reveals a bulge at the C4-5 level, and "C3-4 and C5-6 herniations deforming the thecal sac with C3-4 bilateral neural foraminal narrowing." He opines that "[b]y reviewing these diagnostic findings, I am able to confirm the source of Mr. Dolce's neck pain facilitating constant radiating pain to the

upper extremities, numbness and restrictions in the range of motion I observed clinically.”

In his exam of the plaintiff’s lumbar spine, Dr. Wert found reduced ranges of motion upon flexion, extension, right rotation, left rotation, right bending and left bending. He noted that the plaintiff had a positive Straight Leg Raise Test. In his review of the plaintiff’s lumbar MRI films, Dr. Wert states [¶12] that the MRI revealed a “right proximal L1-2 neural foraminal disc herniation and opines that “[b]y reviewing these diagnostic findings, I am able to confirm the source the Mr. Dolce lower back pain facilitating constant radiating pain to the lower extremities, numbness and restrictions in the range of motion I observed clinically.”

Dr. Wert opines that [¶13] the plaintiff’s “injuries ensued immediately after the accident and are continual in nature persisting through the present time based on my examination of October 5, 2021.” He further opines [¶18] that “the left shoulder injury suffered by Israel Dolce is permanent in nature (as confirmed by my recent examination of October 5, 2021) and is causally related to the accident of January 25, 2018.”

In their reply affirmation, the defendants’ attorney repeats the arguments made in the motion papers. The movants also argue that the plaintiff had an unexplained gap in treatment, and that, as such, his case should be dismissed, citing *Pommells v Perez*, 4 NY3d 566 (2005). However, as this argument is made for the first time in the defendants’ reply papers, depriving the plaintiff of the ability to address the argument, it was not considered by the court. “The function of reply papers is to address arguments made in opposition to the position taken by the movant, not to permit the movant to introduce new arguments or new grounds for the requested relief” *Allstate Ins. Co. v Dawkins*, 52 AD3d 826 (2d Dept 2008).

The court finds that the plaintiff has raised a triable issue of fact as to whether he sustained “a permanent consequential limitation of use of a body organ or member,” and/or “a significant limitation of use of a body function or system.”

Accordingly, it is **ORDERED** that the defendants’ motion for summary judgment is denied.

This constitutes the decision and order of the court.

Dated: June 13, 2022

ENTER:



Hon. Debra Silber, J.S.C.