

Rodriguez v MTA Bus Co.

2022 NY Slip Op 32877(U)

March 31, 2022

Supreme Court, Westchester County

Docket Number: Index No. 53081/2019

Judge: Sam D. Walker

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This opinion is uncorrected and not selected for official publication.

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
WESTCHESTER COUNTY

PRESENT: HON. SAM D. WALKER, J.S.C.

-----X
JOSE RODRIGUEZ, JR.,

Plaintiff,

DECISION & ORDER
Index No. 53081/2019
Seq. # 2

-against-

MTA BUS COMPANY and DARRAYLE WILLIAMS,

Defendants.
-----X

The following papers were read and considered in deciding the present motion:

- Notice of Motion/Statement of Material Facts/Affirmation/Exhibits A-G
- Affirmations in Opposition/Exhibits A-G
- Reply Affirmation

Upon the foregoing papers it is ordered that the motion is decided as follows:

FACTUAL AND PROCEDURAL BACKGROUND

The plaintiff, Jose Rodriguez, Jr., commenced this action on February 25, 2019, to recover damages for alleged serious injuries sustained in a motor vehicle accident that occurred on February 9, 2018, at or near the intersection of Yonkers Avenue and Seminary Avenue in Westchester County, New York.

The defendants, MTA Bus Company and Darrayle Williams, now file the instant motion for summary judgment pursuant to CPLR 3212, seeking dismissal of the complaint on the basis that the plaintiff did not sustain a serious injury as defined under New York Insurance Law §§ 5102(d). In support of the motion, the defendants rely upon, *inter alia*, the plaintiff's deposition testimony, an independent medical

examination ("IME") reports from Howard Katz, M.D. and Michael J. Carciente, M.D., medical records, an attorney's affirmation, statement of material facts, copies of the pleadings and other court documents. The defendants, by their attorney, argue that the plaintiff's alleged injuries are comprised of right shoulder tears and spinal disc bulges, which do not qualify as serious injuries under the statute.

The defendants' attorney argues that the affirmed reports based on the plaintiff's orthopedic IME and neurological IME, both establish by objective medical proof, that the plaintiff has not sustained a serious injury within the of the statute.

The plaintiff, by his attorney, opposes the motion arguing that the moving papers fail to sufficiently demonstrate the defendants' entitlement to summary judgment as a matter of law. The defendant argues that the plaintiff's papers fail to sufficiently demonstrate the defendants' entitlement to summary judgment as a matter of law.

The plaintiff's attorney asserts that the orthopedic's report is not dispositive because it is based upon one orthopedic examination of the plaintiff, which was over three years after the date of loss and Dr. Katz never reviewed the MRI films, but only the MRI reports. The attorney further asserts that Dr. Katz found limitations in range of motion in the lumbar spine and right shoulder, two of the areas affected by the accident.

The attorney also argues that the neurologist, Dr. Carciente, elicited differences in measurement of the plaintiff's forearms, with no explanation given for the difference and its relation to the subject accident. The attorney also asserts that Dr. Carciente contradicts Dr. Katz by stating that the plaintiff's lumbar injuries are chronic and pre-existing, without any basis for that assessment.

The plaintiff's attorney also argues that the opposition papers raise triable

questions of fact, which preclude summary judgment on the issue of damages. The attorney asserts that the medical records, MRI reports, narrative report and other documents demonstrate the existence of triable issues of material fact as to whether the plaintiff sustained a serious injury. The attorney asserts that the range of motion tests performed by the plaintiff's physician, A. Shusterman, D.O., quantify the plaintiff's range of motion deficits and provide empirical data that can be independently evaluated by the Court. He further asserts that the MRI findings clearly demonstrate that there are triable issues of fact as to whether the plaintiff's injuries meet the statutory requirement. The physician determined that the plaintiff has a permanent disability that is causally related to the subject accident.

In reply, the defendants' attorney argues that the plaintiff is deemed to have admitted that all objective testing performed during the plaintiff's IME with Dr. Katz revealed negative results, as stated in the defendants' statement of material facts, pursuant to NY CLS Unif Rules Civil Cts § 202.8-g (c). The attorney further argues that the affirmed orthopedic IME report, the affirmed neurological IME report and the plaintiff's sworn testimony all establish that none of the plaintiff's alleged injuries constitute serious injuries within any of the categories of serious injury alleged by the plaintiff.

The defendants' attorney also asserts that the plaintiff has failed to rebut the defendants' prima facie showing with objective medical proof, since the plaintiff has failed to show any proof that he suffered a fracture or an injury in the permanent loss or use category and the plaintiff's treating physician's affirmation is vague, conclusory, speculative, self-contradictory and not entitled to any probative value. The attorney

states asserts that there is no support in the record for Dr. Shusterman finding that the plaintiff has a permanent disability and such is a misstatement of Dr. Shusterman's affirmation.

The plaintiff's bill of particulars alleges the following injuries:

Right Shoulder: Contusion; tendinosis of the supraspinatus and infraspinatus tendons with fraying of the bursal surface fibers (as per MRI); tear of the superior labrum from the 11:00 to 1:00 position (as per MRI); biceps tenosynovitis (as per MRI); recommendation for arthroscopic surgery.

Lumar Spine: lumbar sprain/strain; disc bulges at L3-L4 and L4-L5 (as per MRI); disc bulges at L3-L4 and L4-L5 (as per MRI); disc-osteophyte complex/spur at L5-S1 (as per MRI); disc narrowing at L5-S1 with anterior osteophyte formation (as per X-Ray); evidence of sub-acute left L5 and bilateral S1 radiculopathy (as per EMG/NCV).

Discussion

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers, (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

"Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (see *Alvarez v Prospect Hosp.*, 68 NY2d at 324, citing to *Zuckerman v City of New York*, 49 NY2d at 562). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion (see *Mgrditchian v Donato* , 141 AD2d

513 [2d Dept 1988]).

Insurance Law §5104(a) provides in pertinent part that:

Notwithstanding any other law, in any action by or on behalf of a covered person against another covered person for personal injuries arising out of negligence in the use of operation of a motor vehicle in this state, there shall be no right to recovery for non-economic loss, except in the case of a serious injury, or for basic economic loss....(McKinney's Insurance Law §5104[a])

Insurance Law §5102(d) defines "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. (McKinney's Insurance Law §5102[d]).

"The determination of whether [a] plaintiff sustained a serious injury within the meaning of the statute is, as a rule, a question for the jury." (31 N.Y.Prac., New York Insurance Law § 32:32 [2015-2016 ed.]; see also, *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345 [2002]). "[O]n a motion for summary judgment the defendant has the burden to show that the plaintiff has not sustained a serious injury as a matter of law" (*Id.*).

The degree or seriousness of an injury may be shown in one of two ways: either

by an expert's designation of a numeric percentage of a plaintiff's loss of range of motion or by an expert's qualitative assessment of a plaintiff's condition...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 *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 357 [2002]). A defendant can establish that a plaintiff's injuries are not serious within the meaning of New York State Insurance Law § 5102(d), by the submission of an affirmed medical report from a medical expert who has examined the plaintiff and has determined that there are no objective medical findings to support the plaintiff's alleged claim (see *Rodriguez v Huerfano*, 46 AD3d 794 [2d Dept 2007]).

In this case, the plaintiff did not suffer death, dismemberment, significant disfigurement, a fracture, or loss of a fetus. Therefore, those categories of the Insurance Law § 5102(d) can be eliminated. The plaintiff alleges that he sustained a permanent loss of use of a body organ, member, function or system; a permanent consequential limitation of use of a body organ or member; and significant limitation of use of a body function or system or a medically determined injury or impairment of a non-permanent nature which prevented him from performing substantially all of the material acts which constitute her 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.

The defendants argue that the plaintiff did not sustain any injuries corresponding to those categories and submitted the affirmed report of Dr. Katz, a Board Certified Orthopedic Surgeon, who performed an IME of the plaintiff on May 28, 2021, and Dr.

Carciente, a Board Certified Neurologist, who performed an IME on the plaintiff on June 18, 2021.

Dr. Katz states that he performed range of motion measurements reported represent reflect active or active-assist motion performed by the plaintiff and measured by the examiner, using a hand-held goniometer, where applicable, and states that, as much as possible, the measurement is an objective measurement of the plaintiff's subjective efforts. Dr. Katz's examination of the Lumbar Spine noted no muscle spasm upon palpation of the paralumbar muscles and no complaint of tenderness upon palpation bilaterally. Dr. Katz noted range of motion of flexion at 50 degrees (normal 60 degrees), extension at 15 degrees (25 degrees normal), right lateral bending at 15 degrees (25 degrees normal) and left lateral bending at 20 degrees (25 degrees normal). Dr. Katz notes that the plaintiff has complaints of pain with flexion.

For the right shoulder, Dr. Katz reported no swelling, effusion erythema, or crepitus present. There was no complaint of tenderness upon palpation. Range of motion is forward flexion at 165 degrees (180 degrees normal, extension at 30 degrees (40 degrees normal), abduction at 160 degrees (180 degrees normal), adduction at 30 degrees (30 degrees normal), internal rotation at 50 degrees (80 degrees normal), and external rotation at 80 degrees (90 degrees normal). There was no complaint of pain with motions and the rotator cuff strength was 5/5.

Dr. Katz reported that the lumbar spine sprain/strain was resolved and the right shoulder sprain/strain was resolved. He states that there is no evidence of a causally related disability and no permanency. He further states that the decreased range of motion noted on examination were the ranges allowed by the plaintiff and are subjective

responses that are not substantiated by any objective clinical findings. Therefore, limited ranges of motion are not related to the injuries sustained and are, as a result of the plaintiff's self-restricting and carry no medical significance. Dr. Katz states that the plaintiff is able to work and perform all normal activities of daily living without any restrictions.

Dr. Carciente also examined the plaintiff and reported no atrophy and no fasciculations throughout the upper and lower extremities. He reported circumference of 29.4 cm on the right and 28.7 on the left, the upper arms 31.7 on the right and 31.7 on the left and the calves 38.1 on the right and 38.5 on the left. There was normal sensation to pinprick, cold temperature and vibration in the upper and lower extremities; no finger to nose dysmetria. Dr. Carciente reports that the plaintiff walks normally and without difficulty and was able to stand and walk on heels and toes. There was no tenderness to the cervical spine and no evidence of paraspinal spasm. There was no tenderness of the thoracic/lumbar spine and no evidence of paraspinal spasm and the straight leg maneuver was negative.

Dr. Carciente reported no objective neurological findings, no objective evidence to support the presence of a lumbar radiculopathy and there was no correlation between the findings noted in the spine MRI reports and the exam. Dr. Carciente states that findings such as disc bulges, a disc osteophyte complexes and a spur mentioned in the lumbar spine MRI report dated less than two months after the plaintiff's reported accident, are consistent with a chronic and preexisting condition and the neurological examination does not support the presence of an ongoing neurological injury, disability or permanency.

Upon review and viewing the facts in the light most favorable to the plaintiff, this Court finds that the defendants have failed to make a prima facie showing of entitlement to judgment as a matter of law with respect to the plaintiff suffering a 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.

The plaintiff's IME by Dr. Katz revealed range of motion deficiencies in the plaintiff's lumbar spine and right shoulder and Dr. Carciente did not perform any range of motion testing. Dr. Katz states that the plaintiff's injuries are resolved, but failed to state whether the plaintiff's injuries were causally related to the subject accident. Further, Dr. Carciente states in a conclusory manner that the findings of disc bulges, a disc osteophyte complexes and spur in the lumbar spine MRI report are consistent with a chronic and therefore, preexisting condition. The neurologist fails to specifically state that the plaintiff had a preexisting condition. Dr. Carciente also does not explain the difference in the circumference of the plaintiff's forearm, even to explain that such difference is normal and to be expected.

Dr. Carciente stated that the injuries were resolved, but neither physician stated whether the plaintiff's injuries were causally related to the subject accident. The conclusion of the defendants' examining physicians were belied by the findings of

limitations in range of motion in the plaintiff's lumbar spine and right shoulder, existing more than three years after the subject accident (*Jenkins v Miled Hacking Corp.*, 43 AD3d 393 [2d Dept 2007]). Dr. Katz states that there was decreased range of motion, but then states that such is a subjective response and not substantiated by any objective clinical findings and therefore, not related to the injuries sustained. However, he performed the test using a hand-held goniometer, where applicable and states in his own report that the measurement is an objective measurement of the plaintiff's subjective efforts. Further, since the defendants failed to meet their burden of proof, the burden does not shift to the plaintiff to raise a triable issue of fact regarding causation or to explain any gaps in treatment (*Cortez v Nugent*, 175 AD3d 1383, 1384 [2d Dept 2019]). Since, the defendants did not meet their burden, there is no need to address the sufficiency of the plaintiff's papers in opposition with regard to these categories.

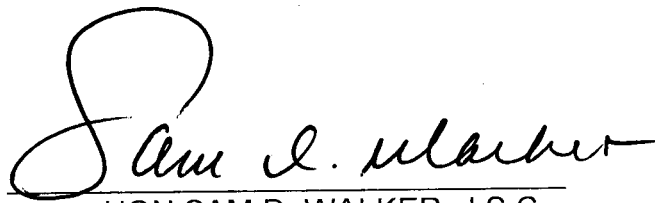
Accordingly, based upon the foregoing, it is

ORDERED that the defendants' motion for summary judgment is DENIED.

The parties are directed to appear before the CPT-ADR Part on a date to be scheduled in the future.

The foregoing shall constitute the Decision and Order of the Court.

Dated: White Plains, New York
March 31, 2022


HON SAM D. WALKER, J.S.C.