

Oliver v Larouque
2022 NY Slip Op 34092(U)
November 30, 2022
Supreme Court, Kings County
Docket Number: Index No. 520042/2018
Judge: Bernard J. Graham
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At an IAS Part 36 of the Supreme Court of The State of New York, held in and for the County of Kings, at the Courthouse located at 360 Adams Street, Borough of Brooklyn, City and State of New York, on the 30th day of November, 2022.

P R E S E N T :

Hon. Bernard J. Graham, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

VANDER O. OLIVER and TANYETTA L. WALTHRUST,

Index No.: 520042/2018

Plaintiffs,

DECISION / ORDER

-against-

RAYMOND A. LAROUQUE and HAMSU SAADU,

Defendants.

Recitation, as required by CPLR §2219(a), of the papers considered on the review of this motion to: dismiss plaintiff's complaint pursuant to CPLR §3212.

Papers	NYSCEF Doc. #
Notice of Motion and Affidavits Annexed.....	30-38
Order to Show Cause and Affidavits Annexed.....	
Answering Affidavits.....	39-45
Replying Affidavits.....	46-48
Exhibits.....	
Other.....	

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

Defendants, Raymond A. Larouque ("Mr. Larouque") and Hamisu Saadu ("Mr. Saadu") have moved (seq. 2) for an Order, pursuant to CPLR §3212, to dismiss the complaint of plaintiff Vander O. Oliver ("Mr. Oliver")¹ upon the grounds that the injuries alleged by Mr. Oliver do not satisfy the "serious injury" threshold requirement of CPLR

¹ Defendants have not moved for summary judgment against plaintiff Tanyetta L. Walthrust.

§5102(d) of the New York Insurance Law and, as a result, the claim for non-economic loss is barred by §5104(1) of the statute.

Counsel for the plaintiff, Mr. Oliver, opposes the relief sought in this motion upon the grounds that Mr. Oliver sustained a serious injury, as defined by §5102(d) of the Insurance Law, and that there are issues of fact that must be resolved at trial.

Background:

The plaintiffs commenced the within action by the filing of a Summons and Complaint on or about October 5, 2018. Issue was joined by the service of an answer on behalf of the defendants Mr. Larouque and Mr. Saadu on or about November 7, 2018. Plaintiff Mr. Oliver was deposed on November 25, 2020.

A Note of Issue and Certificate of Readiness was filed on behalf of the plaintiffs on or about June 5, 2022.

Facts:

On November 25, 2017, the plaintiff Mr. Oliver was driving his vehicle on the Grand Concourse, Bronx, NY. Mr. Oliver, his infant daughter, along with her mother, were seated in the rear passenger seats of said vehicle. Mr. Oliver was allegedly stopped at a red traffic light when said vehicle was rear-ended by the defendants' vehicle. Thereafter, EMS appeared at the scene of the incident and transported Mr. Oliver, his daughter, as well as her mother to Lincoln Medical Center. At Lincoln Medical Center Mr. Oliver underwent x-rays and received pain medication and a neck brace. As a result of the incident, Mr. Oliver allegedly suffered several injuries that required medical treatment, physical therapy, and epidural steroid injections.

Defendant's contention:

In support of defendants' motion to dismiss, reports were submitted based upon the evaluations of Hugh Selznick, M.D., F.A.C.S. ("Dr. Selznick"), an orthopedist, and

Eric L. Cantos, M.D. ("Dr. Cantos"), a radiologist. Dr. Selznick performed an orthopedic examination of Mr. Oliver on September 17, 2020. The exam of Mr. Oliver's cervical spine revealed that range of motion was within normal limits. Dr. Selznick performed the following testing of the cervical spine: foraminal compression, shoulder depression, Soto Hall, Cervical Distraction and Spurling. The results of these tests were all negative. The examination of Mr. Oliver's lumbar spine also revealed normal range of motion. Dr. Selznick performed the following testing of the lumbosacral spine: Lasegue's, Straight Leg Raising, Kernig and Waddell's. The results of these tests were all negative. Dr. Selznick's impression was that the alleged injury to the cervical and lumbar spine had resolved and there was no objective evidence of permanency or of a disability. Dr. Selznick determined that Mr. Oliver was able to perform daily living activities without restrictions.

Dr. Cantos performed a radiological evaluation of the MRI imaging of Mr. Oliver's cervical spine. Dr. Cantos found Mr. Oliver's vertebral bodies to be normal in height. In addition, Dr. Cantos found no disc herniations or protrusions, but did find minimal disc bulges and mild degenerative changes in C3-4 and C4-5.

The defendant maintains that based upon the medical evidence as well as plaintiffs' testimony that was adduced during their depositions, that the allegations of injuries were not caused in this accident as no trauma was sustained and the alleged injuries do not rise to the level of impairment sufficient to qualify under any category of the no-fault statute.

Plaintiffs' contention:

In support of the opposition to the relief sought by defendants in their motion for summary judgment are the affirmations submitted by counsel for plaintiff Mr. Oliver as well as the medical report issued by physicians who treated and/or evaluated him.

Counsel for Mr. Oliver offers the report of Metropolitan Interventional Medical Services, dated December 8, 2017. On that date, Mr. Oliver was evaluated for complaints

of pain in his neck and lower back following the motor vehicle accident on November 25, 2017. The report notes that Mr. Oliver had tenderness of the lumbar and cervical spine, muscle spasms of the left and right cervical paraspinals as well as the left and right lumbar paraspinals. The cervical compression test was positive. The right straight leg raise and left straight leg raise tests were negative. Range of motion testing for the cervical spine revealed reduction in flexion, extension, left and right rotation, as well as left and right tilt. As to the lumbar spine, reduced range of motion was noted in flexion, extension, and left and right lateral. Mr. Oliver allegedly underwent physical therapy three times per week, which primarily consisted of acupuncture and chiropractic treatment. Mr. Oliver underwent MRIs of the cervical and lumbar spine on December 19, 2017. It is alleged that the MRI of the cervical spine revealed central disc herniations at C4-5 and C5-6, accompanied by compression of the ventral aspect of the thecal sac. It is also alleged that the MRI of the lumbar spine showed diffuse disc bulges at L4-5 and L5-S1. Following the evaluation, Mr. Oliver received six epidural steroid injections² and completed several months of physical therapy.

As a result of the injuries, Mr. Oliver claims that he is unable to hold his daughter for extended periods, perform basic household activities, or work out in the gym.

With respect to the report by Dr. Selznick, plaintiff's counsel argues that the physical examination upon which the report is based was conducted nearly three years after the subject accident. Plaintiff's counsel asserts that, although Dr. Selznick opines that the injury resolved, he does not opine as to when said injury resolved. As to Dr. Cantos' report, plaintiff's counsel argues that his characterization of the cervical injuries as "degenerative" is conclusory.

Discussion:

Insurance Law §5102(d) defines a serious injury as, including but not limited to, an injury resulting in:

“(vi) permanent and total loss of use of a body organ, member, function

² These injections were administered on May 1, 2018, June 12, 2018, and July 17, 2018.

or system; (vii) permanent consequential limitation of use of a body organ or member; (viii) significant limitation of use of a body function or system; or (ix) 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 90 days during the 180 days immediately following the occurrence of the injury or impairment."

Once the defendant establishes a prima facie case that the plaintiff's injuries are not serious, the burden shifts to the plaintiff to come forward with sufficient evidence to overcome defendant's motion by demonstrating that a serious injury was sustained within the meaning of the insurance law. Gorbas v. Dowgiallo, 287 AD2d 690, 732 NYS2d 80 [2nd Dept. 2001]; Gaddy v. Eyler, 79 NY2d 955, 582 NYS2d 990 [1992].

The Court of Appeals has held that "[w]hether a limitation of use or function is 'significant' or 'consequential' (i.e. important) relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part". Toure v. Avis Rent A Car Systems, Inc., 746 NYS2d 865, 869, 98 NY2d 345 [2002]. It is further required that such an opinion addressing the medical significance of the limitation is supported by objective medical evidence, including tests and reports. Toure v. Avis Rent A Car Systems, Inc., 746 NYS2d at 870.

This Court finds that plaintiff Mr. Oliver has failed to satisfy the criteria as set forth in Toure v. Avis Rent A Car Systems, Inc., 746 NYS2d 865, 98 NY2d 345 for opposing a summary judgment motion. This Court has considered the argument of defendants' counsel in which the defendants presented medical evidence that any injuries resulting from the accident of November 25, 2017, were resolved. Defendants' counsel submitted evidence establishing that the alleged injuries to the cervical and lumbar regions of the spine did not constitute serious injuries under the permanent consequential limitation of use and the significant limitation of use categories of Insurance Law §5102(d).

In opposition, counsel for plaintiff failed to offer any objective medical findings

based on a recent examination of the regions of Mr. Oliver's spine that were allegedly injured. Bacon v Bostany, 104 AD3d 625 [2d Dept 2013]; Griffiths v Munoz, 98 AD3d 997 [2d Dept 2012]; Lively v Fernandez, 85 AD3d 981 [2d Dept 2011]. The only medical report offered on behalf of Mr. Oliver was based on an examination performed on December 8, 2017, which was two weeks following the accident. Said report is insufficient to raise a triable issue of fact as to whether the alleged limitations existed for a sufficient period of time to rise to the level of "significance" and, thus, whether the plaintiff sustained a significant limitation of use of a body function or member. Lively v Fernandez, 85 AD3d at 982. A recent examination is required for the plaintiff to demonstrate "significant" or "permanent consequential" limitations in range of motion. Bacon v Bostany, 104 AD3d 625 [2d Dept 2013]; Griffiths v Munoz, 98 AD3d 997 [2d Dept 2012]; Cabrera v Apple Provisions, Inc., 151 AD3d 594 [1st Dept 2017].

In addition, plaintiff's counsel did not offer a medical opinion that addressed the findings of defendants' radiologist, Dr. Cantos. The Court has held that a medical expert must adequately address the opinions of the defendant's expert that the claimed injury was due to ongoing pathology and degenerative changes, or pre-existing congenital or chronic conditions. Holmes v Parkinson, 186 AD3d 1619 [2nd Dept 2020]; Cavitolo v Broser, 163 AD3d 913 [2d Dept 2018]; John v Linden, 124 AD3d 598 [2d Dept 2015]. Although Dr. Cantos' findings were addressed in the opposition, the analysis was provided by plaintiff's counsel, who is not qualified to opine as an expert in the field of radiology.

As plaintiff has failed to raise a triable issue of fact as to whether Mr. Oliver's injury meets the serious injury threshold requirement as defined by Insurance Law §5102(d), defendants' motion for summary judgment is granted. Plaintiff Mr. Oliver's complaint is dismissed.

In accordance with the above, the caption is amended to read as follows:

TANYETTA L. WALTHRUST,

Index No.: 520042/2018

Plaintiff(s),

-against-

RAYMOND A. LAROUQUE and HAMSU SAADU,

Defendants.

This shall constitute the decision and order of the Court.

Dated: November 30, 2022
Brooklyn, NY

ENTER



Hon. Bernard J. Graham, Justice
Supreme Court, Kings County

HON. BERNARD J. GRAHAM