

Kreizman v Glantz

2022 NY Slip Op 34525(U)

November 7, 2022

Supreme Court, Kings County

Docket Number: Index No. 523455/2017

Judge: Carl J. Landicino

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KINGS COUNTY CLERK
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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 7th day of November 2022.

PRESENT:

CARL J. LANDICINO, J.S.C.

-----X
FRED KREIZMAN and STEPHANIE KREIZMAN,

Index No.: 523455/2017

Plaintiffs,

- against -

DECISION AND ORDER

Yael GLANTZ,

Motion Sequence #3

Defendant.

-----X
Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers Numbered (NYSCEF)

Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed.....	48-57,
Opposing Affidavits (Affirmations).....	61-64,
Reply Affidavits (Affirmations).....	65

After a review of the papers and oral argument the Court finds as follows:

The Defendant Yael Glantz (the “Defendant”) now moves (motion sequence #3) to dismiss the remaining Plaintiff, Fred Kreizman’s (the “Plaintiff”), action on the grounds that the Plaintiff fails to meet the serious injury threshold as provided in New York State Insurance Law § 5102(d).¹ The purported injuries were allegedly a consequence of a motor vehicle accident on July 7, 2017 at Avenue U, between East 57th Street and Pierson Avenue in Brooklyn, N.Y. Pursuant to the Plaintiff’s Bill of Particulars, the Plaintiff sustained injuries to, *inter alia*, his cervical and lumbar

¹ By Decision and Order dated March 30, 2020, this Court dismissed Plaintiff, Stephanie Kreizman’s, action on the basis of her failure to meet serious injury requirements (Insurance Law §5102(d)).

spine and right shoulder. As part of his Amended Bill of Particulars the Plaintiff alleges that he suffered a traumatic brain injury.²

It has long been established that “[s]ummary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it ‘should only be employed when there is no doubt as to the absence of triable issues of material fact.’” *Kolivas v. Kirchoff*, 14 AD3d 493 [2d Dept 2005], citing *Andre v. Pomeroy*, 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The party seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. See *Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2d Dept 2004], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2d Dept 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. See *Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; see *Menzel v. Plotnick*, 202 AD2d 558, 558–559, 610 N.Y.S.2d 50 [2d Dept 1994].

In support of Defendant’s motion the Defendant proffers affirmed medical reports from Dana A. Mannor, M.D. (Orthopedist). Dr. Mannor purportedly examined the Plaintiff on May 30, 2019, nearly two years after the accident. Dr. Mannor conducted range of motion testing, with the

² Although Defendant’s physicians do not directly address this purported injury, the Plaintiff fails to raise the issue in opposition and the Plaintiff’s physicians make no reference to it. Additionally, the Plaintiff’s amended bill is dated after the I.M.E.

use of a goniometer, in relation to the Plaintiff's cervical spine, Dr. Mannor found "flexion to 50 degrees (50 degrees normal), extension to 60 degrees (60 degrees normal), right lateral flexion to 45 degrees (45 degrees normal) and right rotation to 80 degrees (80 degrees normal) and left rotation to 80 degrees (80 degrees normal)". In relation to the lumbar spine "flexion to 60 degrees (60 degrees normal), extension 25 degrees (25 degrees normal), and right lateral bending to 25 degrees (25 degrees normal) and left lateral bending to 25 degrees (25 degrees normal)." As to the right and left shoulder Dr. Mannor found no limitation in range of motion. Dr. Mannor stated that the claimant is not disabled, is able to work and not restricted in relation to daily activities. (Defendant's Motion, Exhibit G, Report of Dr. Mannor).

Dr. Peter A. Ross did not examine the Plaintiff but reviewed the MRIs of the Plaintiff's cervical spine, lumbar spine thoracic spine. The cervical spine MRIs examined by Dr. Ross were performed on two dates, October 8, 2013 and July 19, 2017, several years prior to and approximately one month after the Plaintiff's accident, respectively. As to the first cervical spine MRI, Dr. Ross states that "there is a mild congenital central canal stenosis present extending from the C2-3 through the C6-7 levels." Dr. Ross also states that "[i]n addition, there is mild central canal stenosis present, and bilateral foraminal stenoses, the left side greater than the right." As to the July 19, 2017 MRI of the cervical spine, Dr. Ross states that "[r]eview of the MRI examination of the Cervical Spine performed on July 19, 2017 following an accident on July 17, 2017 as compared with a previous study which was performed on October 8, 2013 shows no progressive interval changes, nor recent focal disc herniations present."

Similarly, the lumbar spine MRIs were performed on two dates, October 8, 2013 and July 19, 2017, several years prior to and approximately one month after the Plaintiff's accident, respectively. As to the lumbar spine, Dr. Ross found "mild spondylosis changes involving the L3

through the L5 vertebrae, with mild desiccation of the L3-4 disc.” Dr. Ross also found that “[t]he L3-4 level shows a small smooth diffuse broad based annular bulge minimally deforming the ventral thecal sac.” Dr. Ross concluded that a “[r]eview of the MRI examination of the LumboSacral Spine performed on July 24, 2017 following an accident on July 17, 2017 as compared with a previous study which was performed on October 8, 2013 shows no progressive interval changes, nor recent focal disc herniations present.”

The thoracic spine MRIs were also performed on two dates, October 9, 2013 and July 19, 2017, several years prior to and about one month after the Plaintiff’s accident, respectively. As to the initial MRI, Dr. Ross concludes that it “shows mild Schmorls node changes involving the superior endplate of the T11 vertebra. No abnormal focal marrow edematous changes are present along the vertebral superior endplate.” He also concludes that a “[t]here is no evidence of focal thoracic disc herniations or diffuse annular bulges present.” Dr. Ross also concludes that a “[r]eview of the MRI examination of the Thoracic Spine performed on July 26, 2017 following an accident on July 17, 2017 as compared with a previous study which was performed on October 9, 2013 shows no progressive interval changes, nor recent focal disc herniations present.” (Defendant’s Motion, ExhibitF, Report of Dr. Ross).

Assuming, based upon the foregoing submissions, including expert medical testimony, the Defendant has met his initial burden of proof as to this Plaintiff, it becomes incumbent upon the Plaintiff to establish that there are triable issues of fact as to whether the Plaintiff suffered serious injuries in order to avoid the dismissal of their actions. *See Jackson v United Parcel Serv.*, 204 A.D.2d 605 [2nd Dept, 1994]; *Bryan v Brancato*, 213 AD2d 577 [2nd Dept, 1995]. There is no particular claim set forth in the subject Complaint, or verified Bill of Particulars, that the Plaintiff sustained a medically determined injury or impairment of a nonpermanent nature which prevented

her from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident. Plaintiff's counsel argues that Plaintiff may maintain a 90/180 claim. Where the Bill of Particulars contains conclusory allegations of a 90/180 claim and the Deposition and/or affidavit of Plaintiff does not support, or reflects that there is no, such claim, Defendant movant may utilize those factors in support of its motion. As stated, the Plaintiff's Bill of Particulars reflects that he missed four days of work. Moreover, his deposition reflects that although he returned to work with limited duties, this occurred during a four month period. (See Defendant's Motion, Plaintiff's Deposition, Pages 16-17). See *Master v. Boiakhtchion*, 122 A.D.3d 589, 590, 996 N.Y.S.2d 116, 117 [2nd Dept, 2014]; *Kuperberg v. Montalbano*, 72 A.D.3d 903, 904, 899 N.Y.S.2d 344, 345 [2nd Dept, 2010]; *Camacho v. Dwelle*, 54 A.D.3d 706, 863 N.Y.S.2d 754 [2nd Dept, 2008].

In opposition to the Defendant's motion, the Plaintiff presents the affirmed report of Matthew Alan Wert, M.D. and Howard Baum, M.D. Dr. Wert conducted an examination of the Plaintiff on November 22, 2021, more than four years after the accident. As part of that examination, Dr. Wert conducted range of motion testing of the Plaintiff's right shoulder and found "flexion - 165 (normal -180); extension -50 (normal 60); adduction - 25 (normal 30); abduction 165 (normal - 180); internal rotation - 60 (normal - 70); external rotation 75 (normal - 90)." Dr. Wert also reviewed the MRI of the right shoulder and found "glenohumeral effusion with subarachnoid bursitis and rotator cuff tendinopathy of the right shoulder." Dr. Wert also conducted range of motion testing for the cervical spine and found "flexion - 45 (normal 50); extension - 45 (normal 60); rt. rotation - 60 (normal 80); lt. rotation - 60 (normal 80)." For the lumbar spine, Dr. Wert found "flexion - 40 (normal 70); extension - 25 (normal 35); r. rotation - 30 (normal 35); l. rotation - 25 (normal 35); r. bending - 20 (normal 30); l. bending - 25 (normal 30)." After this

examination Dr. Wert concluded that “it is my opinion with the reasonable degree of medical certainty that the absence of pre-existing conditions and the above objective clinical findings and diagnostic studies, demonstrates that the accident of July 17, 2017 was the direct producing cause of the above noted injuries suffered by Fred Kreizman.” Dr. Wert also concluded that “Mr. Kreizman will continue to experience pain and limitation of his daily activities. At this time, it has become abundantly clear that Fred has reached maximum benefit from his treatment.” Dr. Wert does not state how or whether the motion ranges were objectively measured. (See Affirmation in Opposition of the Plaintiff, Report of Dr. Wert).

Dr. Baum conducted an examination of the Plaintiff on July 19, 2017, twelve days after the accident. Dr. Baum conducted range of motion testing of the Plaintiff’s right shoulder and found “158 on flexion (normal 180); 33 on extension (normal 60); 7 on adduction (normal 25) and 78 on abduction (normal 180).” As to the Plaintiff’s cervical spine, Dr. Baum found “20 on flexion (normal 60); 34 on extension (normal 75); 31 on left rotation (normal 80) and 30 on left rotation (normal 80).” As to the Plaintiff’s lumbar spine, Dr. Baum found “13 on left lateral (normal 25); 7 on right lateral (normal 25); 12 on min. lordosis (normal 15); 17 on flexion (normal 60), 6 on extension (normal 25); 0 on sacral hip flexion (normal 45) and 0 on sacral hip extension (normal 5).” Dr. Baum also reviewed the Plaintiff’s MRIs for the right shoulder, cervical and lumbar spine and found various disc bulges and herniations. Dr. Baum opined that “Mr. Kreizman’s injuries are causally related to the motor vehicle accident taking place on July 17, 2017 and are permanent in nature.” Dr. Baum also does not state how or whether the motion ranges were objectively measured. (See Affirmation in Opposition of the Plaintiff, Report of Dr. Baum).

“The mere existence of a bulging or herniated disc is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the

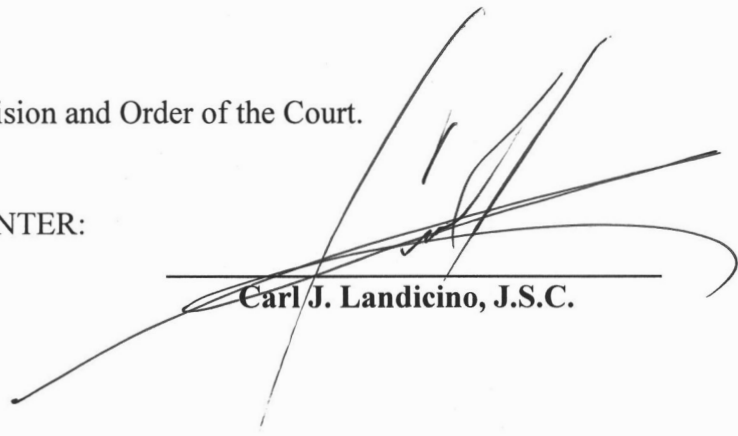
disc injury and its duration". *Siegel v. Sumaliyev*, 46 A.D.3d 666, 846 N.Y.S.2d 583 [2nd Dept, 2007]. See also, *Gastaldi v. Chen*, 56 A.D.3d 420, 866 N.Y.S.2d 750 [2nd Dept, 2008] Moreover, neither Dr. Baum nor Dr. Wert indicated that the limitations of range of motion they found were objectively obtained or that an objective test instrument, such as a goniometer, was used. See *Gersbeck v. Cheema*, 176 AD3d 684, 686, 107 N.Y.S.3d 705 [2d Dept 2019]; *Durand v. Urick*, 131 AD3d 920, 15 N.Y.S.3d 475 [2d Dept 2015]. Accordingly, the Plaintiff has failed to raise a material issue of fact in relation to Defendant having initially established that the Plaintiff did not suffer a serious injury, as such term is defined by Insurance Law 5102(d), as a result of the accident.

Based on the foregoing, it is hereby ORDERED as follows:

The motion by the Defendant (motion sequence #3) is granted and Plaintiff Fred Kreizman's action is accordingly dismissed.

This constitutes the Decision and Order of the Court.

ENTER:



Carl J. Landicino, J.S.C.

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