Johnson v Tavarez
2022 NY Slip Op 35054(U)
December 19, 2022
Supreme Court, Bronx County
Docket Number: Index No. 23708/2017e
Judge: Veronica G. Hummel
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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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DEREK JOHNSON and CRAIG YOUNG,

Plaintiffs

-against -

REINALDO TAVAREZ and NEBRASKALAND,INC.,

Defendants.

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Index No. 23708/2017e
DECISION/ORDER
Motion Seq. 4

HON. 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 relevant to the motion of defendants REINALDO TAVAREZ and NEBRASKALAND,INC. (defendants) [Mot. Seq. 4], made pursuant to CPLR 3212, seeking an order dismissing the complaint on the ground that plaintiff DEREK JOHNSON (plaintiff) has not sustained a “serious injury” as defined by Insurance Law 5102(d); and the cross-motion by plaintiff, made pursuant to CPLR 3212, seeking for an order granting summary judgment finding that plaintiff suffered a “serious injury” under the 90/180 day category.

A stipulation of discontinuance of the claims of plaintiff Young was signed on April 14, 2020. Summary judgment on liability was granted in favor of the plaintiffs on September 19, 2017.

Plaintiff commenced this 2017 action to recover damages for personal injuries that plaintiff allegedly sustained as a result of a January 12, 2017, motor vehicle accident (the Accident). Plaintiff’s treatment consisted of physical therapy treatments from January 2017 to September 2017.

Ten months after the treatment stopped (and seventeen months post-Accident), plaintiff was involved in a second, work related accident, on July 25, 2018 (the Subsequent Accident). The Subsequent Accident resulted in litigation (Index No. 152030/2019e) (the Subsequent Action).

In the bill of particulars, plaintiff claims to have suffered injuries to the lumbar spine, and the cervical spine, and alleges that those injuries satisfy one or more of the following Insurance Law § 5102(d) threshold categories: permanent consequential limitation, significant limitation, and 90/180 days. As to any other alleged injuries, defendants are not required to address said injuries as they are not set forth in the complaint or bill of particulars . *Cano v U-Haul Company of Arizona*, 178 A.D.3d 409 [1st Dep't 2019]; *Kavrazonis v Villano*, 2020 WL 1049232 [Sup. Ct. Bronx County 2020]; *Chisholm v Samuels*, 2020 WL 5874808 [Sup. Ct. New York 2020]; *see also Clark v MGM Textiles Industries, Inc.,* 18 A.D.3d 1006 [3d Dep't 2005].

Defendants seek 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. Defendants argue 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 an attorney affirmation, a statement of material facts, the pleadings, the bill of particulars from this action and the Subsequent Action, the expert reports/affirmations and records of Dr. Nason (Orthopedist), Dr. Haig (Orthopedist) and Dr. Feit (Radiologist), Dr. Lee (Lower Hudson Medical), and University Orthopedists of New York.

Defendants also oppose the cross-motion with an attorney affirmation and submit an attorney affirmation in reply.

Dr. Nason examined plaintiff on August 14, 2017, seven months after the Accident, and before the Subsequent Accident. The expert reviewed the plaintiff's medical records (no fault, MRIs, Lower Hudson Medical Associates records, X-ray reports), and the police report. In relevant part, Dr. Nason conducted tests on the cervical spine, and lumbar spine, finding normal

results and negative test. The expert does find a decrease in extension and rotation in the cervical spine and a decrease in the range of flexion on the lumber spine. As a diagnoses, the expert finds the cervical spine and lumbar spine are “sprain/strain, resolved”. The expert opines that the decrease in range of motion in the cervical spine is due to underlying spondylosis and degenerative disc disease. Lumbar spine had mild extension deficit from AMA guidelines with underlying spondylosis and degenerative disc disease. No pain was reported during the examination (subjective pain was reported prior to the exam). Therefore, the injuries have resolved.

The expert finds that plaintiff’s condition was caused by the Accident. Plaintiff can return to pre-loss activities including occupational duties without restrictions. Plaintiff has returned to pre-injury status. No further treatment is reasonable or necessary for the Accident. Hence, seven months post-Accident, defendant’s expert found the cervical and lumbar spine injuries were caused by the Accident.

Dr. Haig examined plaintiff on August 30, 2018, nineteen months post-Accident and one month after the Subsequent Accident. The expert reviewed plaintiff’s 2017 medical records, photographs, and the bill of particulars. The expert finds plaintiff has causally related low back pain and referred plaintiff to physical therapy.

Dr. Feit issued a report dated February 6, 2021. As to the 2017 MRI of the cervical spine, he found bulges but no herniations. The craniocervical junction is intact and there is no evidence of spondylolisthesis. No paraspinal soft tissue mass lesions are identified. Anterior and posterior osteophyte formation, disc bulges, degenerative spondylosis exist and there is no evidence of focal herniation. The review of the cervical spine MRI obtained just over two months and three weeks following the date of Accident reveals pre-existing degenerative changes and disc bulges that are not posttraumatic but are degenerative. No posttraumatic changes are identified and there are no abnormalities causally related to the Accident.

While Dr. Nason reports reviewing a MRI of the lumbar spine taken on February 28, 2017, Dr. Feit did not review that MRI.

Based on the submissions, defendants set forth a *prima facie* showing that plaintiff did not suffer a serious injury under the permanent consequential limitation, and significant limitation categories as to the spine.

In opposition to the motion and in support of the cross-motion, plaintiff submits an attorney affirmation, a statement of material facts, plaintiff's medical records of St. John's Riverside Hospital (dated July 25, 2018- after the Subsequent Accident), Dr. Geraci (orthopedist- dated May 2019), Dr. Touliopoulos (regards to shoulder operation- dated September 2020), Dr. Lattuga (radiologist- dated September 19, 2019-spine), and Dr. Geraci (spine specialist-dated September 2018-April 14, 2020).

In total, plaintiff's evidence raises triable issues of fact as to plaintiff's claims of "serious injury" to the cervical and lumbar spines under the threshold category of significant limitation . *Morales v Cabral,* 177 A.D.3d 556 [1st Dep't 2019]. The records submitted concerning course of initial treatment shows persistent significant limitations in the lumber spine and cervical spine which defendants' expert casually related to the Accident. The 2017 MRI reports make findings of disc bulges and herniations, thus raising an issue of fact as to whether plaintiff sustained a significant limitation of the use of the cervical and lumbar spines. *Licari v Elliott*, 57 N.Y.2d 230 [1982]. The other records submitted by plaintiff, issued after the Subsequent Accident, however, do not causally relate the injuries to the Accident, and fail to explain the gap in treatment and therefore fail to generate an issue of fact as to permanent consequential. *Acevedo v Grayline N.Y. Tours, Inc.*, 2022 N.Y. Slip Op 02860 [1st Dep't 2022]. In addition, the expert reports and other evidence, dated after the Subsequent Accident, fail to mention or address plaintiff's injuries from the Accident and fail to distinguish the injuries caused by each accident, and therefore do not establish permanency. *Antepara v Garcia,* 194 A.D.3d 514 [1st Dep't 2021]; *see Bogle v Paredes*, 170 A.D.3d 455 [1st Dep't 2019]. As such, without a more medical proof, plaintiff fails to raise an issue as to a permanent consequential limitation of spine arising from

the Accident. *see Lee v Lippman*, 136 A.D.3d 411 [1st Dep't 2016]. Nevertheless, if it is found by the trier of fact that plaintiff sustained any injury that constitutes a "serious injury", plaintiff is entitled to recover damages for any other injury causally related to the Accident .s*ee Gordon v Hernandez*, 181 A.D.3d 424 [1st Dep't 2022].

In addition, defendants establish *prima facie* that there was no 90/180 day injury, and plaintiff generates an issue of fact. *Morales v Cabral,*177 A.D.3d 556 [1st Dep't 2019]. Accordingly, the motion and cross-motion are denied as applicable to the 90/180 day category.

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 of defendants REINALDO TAVAREZ and NEBRASKALAND,INC. (defendants) [Mot. Seq. 4], made pursuant to CPLR 3212, seeking an order dismissing the complaint on the ground that plaintiff DEREK JOHNSON (plaintiff) has not sustained a "serious injury" as defined by Insurance Law 5102(d); and the cross-motion by plaintiff, made pursuant to CPLR 3212, seeking for an order granting summary judgment finding that plaintiff suffered a "serious injury" under the 90/180 day category are denied; and it is further

ORDERED that, in light of the partial discontinuance, the caption in this action shall be amended to read as:

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DEREK JOHNSON,

Index No. 23708/2017e

Plaintiff

-against -

REINALDO TAVAREZ and NEBRASKALAND,INC.,

Defendants.

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And it is further

ORDERED that plaintiff Johnson shall file in NYSCEF a form EF22[1] by January 15, 2023; and it is further

ORDERED that, in light of the age of the Note of Issue (filed August 17, 2021) and the fact that the court held a Pre-trial/Settlement conference[2] in the action, the action is now referred to the STP part for the scheduling of a trial; and it is further

ORDERED that the Clerk shall immediately transfer the action to the STP part and mark motion sequence 4 decided in all court records; and it is further

ORDERED that the Clerk shall remove this case from the inventory of Part 31.

The foregoing constitutes the decision and order of the court.

Dated: December 19, 2022

E N T E R,

Hon. s/Hon. Veronica G. Hummel/signed 12/19/2022
Hon. Veronica G. Hummel

1. CHECK ONE.....
2. MOTION IS.....
3. CHECK IF APPROPRIATE.....

CASE DISPOSED IN ITS ENTIRETY x CASE STILL ACTIVE

☐ GRANTED X DENIED ☐ GRANTED IN PART ☐ OTHER

☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE

☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT

X TRANSFER TO STP PART FOR TRIAL

[1] NYSCEF Form EF22 can be found at:
https://iappscontent.courts.state.ny.us/NYSCEF/live/forms/notice.to.county.clerk.pdf

[2] The next virtual settlement conference scheduled for Part 31 is now cancelled. The parties are to contact the STP Part for a trial date.