

Pierre-Francois v Anderson
2022 NY Slip Op 35093(U)
May 5, 2022
Supreme Court, Queens County
Docket Number: Index No. 701027/2018
Judge: Janice A. Taylor
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5/6/2022

COUNTY CLERK
QUEENS COUNTY

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part 15
Justice-----x
SHAWN PIERRE-FRANCOIS,

Plaintiff(s),

- against -

Index No.: 701027/18

Motion Date: 2/1/22

Motion Cal. No.: 26

Motion Seq. No.: 1

JOSEPH ANDERSON,

Defendant(s).

-----x

The following papers numbered 1 - 9 read on this motion by defendant, pursuant to CPLR § 3212, for summary judgment dismissing the complaint.

PAPERS
NUMBERED

Notice of Motion-Affirmation-Exhibits-Service..... 1 - 4
Affirmation in Opposition-Exhibits-Service..... 5 - 7
Reply Affirmation-Service..... 8 - 9

Upon the foregoing papers, it is **ORDERED** that the above-referenced motion is decided as follows:

This personal injury action arises from a December 25, 2016 automobile collision that occurred at or near the intersection of Francis Lewis Boulevard and South Conduit Avenue, County of Queens, City and State of New York. According to the bill of particulars ("BP"), plaintiff sustained injuries to, *inter alia*, his left shoulder, and to the lumbar, cervical, and thoracic regions of the spine, including herniated and bulging discs. Plaintiff claims to have sustained the following "serious injuries," as set forth in the Insurance Law:

"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; [and] 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 happening of this occurrence."

Defendant now moves for summary judgment dismissing the complaint. Summary judgment is a drastic remedy that will be granted only if the movant has demonstrated, through submission of evidence in admissible form, the absence of material issues of fact (see *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]), and has affirmatively established the merit of their cause of action or defense (see *Zuckerman v New York*, 49 NY2d 557, 562 [1980]). Failure to make a *prima facie* showing of entitlement to judgment as a matter of law "requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Upon such a showing, the burden shifts to the non-movant to raise a material issue of fact requiring a trial (see *id.*). Courts must view the evidence in the light most favorable to the non-movant (see *Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]), drawing all reasonable inferences in their favor (see *Haymon v Pettit*, 9 NY3d 324, 327, n* [2007]).

Defendant argues that plaintiff's alleged injuries do not meet the threshold for maintaining a personal injury action under the "No-Fault Law," which "bars recovery in automobile accident cases for 'non-economic loss' (e.g., pain and suffering) unless the plaintiff has a 'serious injury' as defined in the statute" (*Perl v Meher*, 18 NY3d 208, 215 [2011]; see Ins Law § 5104[a]), and the injury is "causally related to the accident" (*Elshaarawy v U-Haul Co. of Mississippi*, 72 AD3d 878, 881 [2d Dept 2010]). This "require[s] objective proof of a plaintiff's injury," as "subjective complaints alone are not sufficient" (*Toure v Avis Rent a Car Sys.*, 98 NY2d 345, 350 [2002]). As the proponents of summary judgment, defendants bear the "prima facie burden of showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the accident" (*Luque v Flovictov Cab Corp.*, 168 AD3d 922, 923 [2d Dept 2019]).

In support of the motion, defendant submits, *inter alia*, the BP, plaintiff's certified deposition transcript, and the report from defendant's orthopaedic expert, Louis C. Romeo, MD, FAAOS, FCS, who performed an independent medical examination ("IME") of plaintiff on August 20, 2020. At the IME, Dr. Romeo recorded normal measurements for the ranges of motion of the lumbar and cervical regions of plaintiff's spine. All of Dr. Romeo's other tests of plaintiff returned normal results. He, thus, pronounced plaintiff's lumbar and cervical strain/sprain as "resolved." He further indicated that his examination did not yield objective findings to support plaintiff's present subjective complaints.

The court finds that defendant did not satisfy his *prima facie*

burden to establish that plaintiff's injuries do not qualify as "serious" under the No-Fault Law. It is well-settled that the statutory threshold categories are read in the disjunctive, and so, the failing to qualify under one category "does not necessarily preclude a recovery for the same alleged injuries under another category" (see *Damas v Valdes*, 84 AD3d 87, 92 [2d Dept 2011]). Rather, a plaintiff need only establish one qualifying injury, after which he or she is "entitled to seek recovery for all injuries [] allegedly incurred as a result of the accident" (*Swed v Pena*, 65 AD3d 1033, 1034 [2d Dept 2009]; see also *Linton v Nawaz*, 14 NY3d 821, 822 [2010]). Defendant primary relies on the report of Dr. Romeo. However, Dr. Romeo stated that he did not review any of plaintiff's medical records, and he did not indicate whether he reviewed plaintiff's BP or any other documents setting forth the claimed injuries. Here, the BP alleges specific injuries to plaintiff's left shoulder and to the affected regions of his spine, and expressly cited to the specific MRI films which allegedly depict said injuries. Yet, Dr. Romeo did not review these films, or opine as to their findings, although he did acknowledge that plaintiff's reported injuries were, generally speaking, causally related to the subject accident. More importantly, Dr. Romeo proffered no opinion regarding plaintiff's claimed shoulder injury, as there is no indication in the report that Dr. Romeo examined same, or performed any range of motion tests.

Dr. Romeo's findings that the injuries to plaintiff's lumbar and cervical spine had resolved may, arguably, establish *prima facie* that plaintiff did not sustain a "permanent loss of use of a body organ, member, function or system" or a "permanent consequential limitation of use of a body organ or member." However, these findings are of limited utility with respect to those claimed serious injury categories which do not require a finding of permanency (see *Estrella v GEICO Ins. Co.*, 102 AD3d 730, 731-732 [2d Dept 2013]; *Decker v Rassaert*, 131 AD2d 626, 627 [2d Dept 1987]). To this point, Dr. Romeo examined plaintiff just once, nearly four years after the subject accident, and did not opine as to whether plaintiff had experienced any significant limitation of use of a body function or system during the several years preceding the IME. Nor did Dr. Romeo opine as to whether plaintiff suffered a medically determined injury which prevented him from performing substantially all of the material acts constituting his usual and customary daily activities for 90 out of the first 180 days following the accident ("the 90/180 category").¹ Defendant's failure to affirmatively establish that the claimed injuries do not qualify under the "significant limitation of use" or 90/180 categories, renders his arguments regarding the other categories academic.

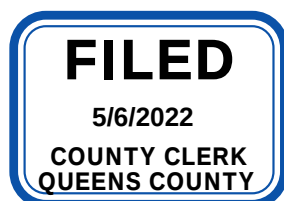
¹Defendant also argues that plaintiff's testimony evinces the inapplicability of the 90/180 category. For the reasons discussed below, the court need not address this question.

Since defendant did not make an adequate *prima facie* showing, his motion for summary judgment must be denied, regardless of the sufficiency of plaintiff's opposition (see *Alvarez*, 68 NY2d at 324; *Penoro v Firshing*, 70 AD3d 659, 660 [2d Dept 2010]; *Powell v Prego*, 59 AD3d 417, 419 [2d Dept 2009]). In any event, even if defendant had made his showing, plaintiff sufficiently raised triable issues of fact. Plaintiff relies on the affirmed report of his orthopaedic expert, Jerry A. Lubliner, MD, FAAOS, regarding his examination of plaintiff on October 5, 2021. According to Dr. Lubliner, he measured deficits in the range of motion in the lumbar and cervical regions of plaintiff's spine, as well as in his shoulders. This is in stark contrast to the presentation by defense expert Dr. Romeo, who reported normal range of motion in those regions of the spine, and failed to conduct any examination of the claimed shoulder injuries.

Accordingly, the above-referenced motion by defendant for summary judgment dismissing the complaint is **DENIED**.

The foregoing shall constitute the decision and order of this court.

Dated: May 5, 2022





JANICE A. TAYLOR, J.S.C.

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