

Garcia v Harry

2023 NY Slip Op 30266(U)

January 13, 2023

Supreme Court, New York County

Docket Number: Index No. 156598/2018

Judge: James G. Clynnes

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JAMES G. CLYNES PART 22M

Justice

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GREGORY GARCIA,
Plaintiff,

- v -

GENDALALL HARRY, JOHN DOE
Defendant.

INDEX NO. 156598/2018
MOTION DATE 03/22/2022
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 20, 21, 24, 26, 27, 28, 29, 31, 32, 33, 34, 35, 36, 37
were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, Defendant Gendalall Harry's motion for summary judgment and to dismiss the Complaint as Plaintiff fails to meet the serious injury threshold under Insurance Law 5102 (d) is denied.

Plaintiff seeks recovery for injuries allegedly sustained as a result of an October 19, 2017 accident between Plaintiff bicyclist and a motor vehicle owned by Defendant Harry and operated by John Doe. Plaintiff's Bill of Particulars alleges injuries to his cervical, thoracic and lumbar spine, right knee, and emotional upset and shock that meet the serious injury threshold under Insurance Law 5102 (d).

In support of his motion, Defendant relies on the certified report of Dr. Louis F. McIntyre, orthopedic surgeon, and Dr. Jessica F. Berkowitz, radiologist.

Dr. McIntyre examined Plaintiff on November 16, 2021 and reported that the alleged injuries to the cervical spine, thoracic spine, lumbar spine, and right knee were all resolved. Dr. McIntyre measured Plaintiff's range of motion using a goniometer pursuant to AMA Guidelines and reported the following: As to Plaintiff's cervical spine, flexion to 50 degrees (50 degrees normal), extension to 60 degrees (60 degrees normal), right and left rotation to 80 degrees (80

degrees normal), and right and left lateral flexion to 45 degrees (45 degrees normal), without pain; as to Plaintiff's thoracic spine, flexion to 45 degrees (45 degrees normal), extension to 0 degrees (0 degrees normal), right and left rotation to 30 degrees (30 degrees normal), and right and left lateral flexion to 45 degrees (45 degrees normal), without pain; as to lumbar spine, flexion to 60 degrees (60 degrees normal), extension to 25 degrees (25 degrees normal), and right and left rotation to 25 degrees (25 degrees normal), without pain; and as to right knee, flexion to 150 degrees (150 degrees normal) and extension to 0 degrees (0 degrees normal). Dr. McIntyre outlined the objective tests taken for each injury and found them all negative. Dr. McIntyre found no evidence of disability or permanent injury and concluded that Plaintiff can perform activities of daily living and work duties without restriction.

Dr. Berkowitz undertook an independent review of the MRIs of Plaintiff's cervical spine and lumbar spine, both taken on December 8, 2017. As to the cervical spine, Dr. Berkowitz reported straightening of the normal cervical lordosis, but concluded that the straightening is a nonspecific finding, but may be related to her chronic and degenerative findings. Dr. Berkowitz noted disc bulging and spondylosis extending into the bilateral neural foramina at C4-5 narrowing them, as well as a tiny central disc herniation and disc bulging at C5-6, and disc bulging at C6-7. Dr. Berkowitz reported that the disc bulges and spondylosis are chronic and degenerative in origin, similar tiny disc herniations to the one at C5-6 are common findings in the general population and are unlikely to be related to an acute traumatic injury, and found no evidence of acute traumatic injury to the cervical spine such as vertebral fracture, asymmetry of the disc spaces, spinal cord contusion or epidural hematoma. Dr. Berkowitz concluded that there is no causal relationship between the subject accident and her findings.

As to the lumbar spine, Dr. Berkowitz reported a minimal disc bulging at L4-5 and disc bulging, a broad-based right central disc herniation, and associated spondylosis at L5-S1, with no discogenic endplate change at L5-S1. Dr. Berkowitz noted that presence of spondylosis confirms the chronic nature of the disc herniation and therefore the disc bulges and spondylosis are chronic

and degenerative. Dr. Berkowitz found no evidence of acute traumatic injury to the lumbar spine such as vertebral fracture, asymmetry of the disc spaces, ligamentous rupture or epidural hematoma. Dr. Berkowitz concluded that the evaluation of Plaintiff's lumbar spine MRI revealed no causal relationship between the subject accident and her findings.

In his examination before trial (EBT) testimony, Plaintiff testified that at the time of the accident, he was working as a mechanic apprentice, shadowing the mechanic and doing work around the "shop" in order to gain experience, which included lifting heavy items with other people, such as a transmission engine weighing approximately 200 pounds. Plaintiff testified that after the subject accident, he was no longer able to lift heavy items, and tried to go back to work but found that he was not "as useful", so he graduated from his apprenticeship and stopped going (NYSCEF DOC NO. 21). Plaintiff testified that he was confined to his bed for two days after the accident and confined to his home for about eight days after the accident. Plaintiff also testified that he is no longer able to engage in daily activities, such as playing catch with his son, and playing sports, and that he has to spend at least two to three hours in the shower before he is able to move to do "normal stuff." Plaintiff also testified that he stopped going to therapy because he received a letter in the mail that the costs were no longer going to be covered.

Defendant's submission establishes that Plaintiff has not sustained a serious injury and thus the burden shifts to Plaintiff to raise an issue of fact as to whether he sustained a serious injury as a result of the accident and whether he was prevented from performing substantially all of his daily activities for 90 out of the first 180 days after the accident (*Licari v Elliott*, 57 NY2d 230 [1982]).

In opposition, Plaintiff raises a triable issue of fact that he sustained a serious injury as a result of the subject accident. Plaintiff relies on the affirmed medical records from his treatment with Dr. Rosario A. Bascon, the orthopedic Telemedicine Video Consultation report and addendum report by Dr. Hank Ross, and the review of the MRI of Plaintiff's right knee by Dr. Mark Madhavi Kaza, radiologist and Dr. Hank Ross, orthopedic surgeon, and MRIs of Plaintiff's cervical, lumbar and thoracic spine by Dr. Gary Tubman, diagnostic neuroradiologist.

Dr. Bascon measured Plaintiff's range of motion using a goniometer pursuant to AMA Guidelines. On November 6, 2017, Dr. Bascon reported the following: As to Plaintiff's cervical spine, flexion to 29 degrees (50 degrees normal), extension to 31 degrees (60 degrees normal), right rotation to 51 degrees (80 degrees) and left rotation to 53 degrees (80 degrees normal), and right lateral flexion to 29 degrees (45 degrees normal) and left lateral flexion to 27 degrees (45 degrees normal); as to Plaintiff's thoracic spine, flexion to 32 degrees (50 degrees normal), right rotation to 17 degrees (30 degrees normal), and left rotation to 18 degrees (30 degrees normal); as to lumbar spine, flexion to 34 degrees (60 degrees normal), extension to 13 degrees (25 degrees normal), right lateral flexion to 16 (25 degrees normal), and left lateral flexion to 14 degrees (25 degrees normal); and as to right knee, flexion to 94 degrees (150 degrees normal). On December 20, 2017, Dr. Bascon reported the following: As to Plaintiff's cervical spine, flexion to 38 degrees (50 degrees normal), extension to 42 degrees (60 degrees normal), right rotation to 57 degrees (80 degrees) and left rotation to 58 degrees (80 degrees normal), and right lateral flexion to 31 degrees (45 degrees normal) and left lateral flexion to 33 degrees (45 degrees normal); as to Plaintiff's thoracic spine, flexion to 37 degrees (50 degrees normal), right rotation to 23 degrees (30 degrees normal), and left rotation to 21 degrees (30 degrees normal); as to lumbar spine, flexion to 42 degrees (60 degrees normal), extension to 17 degrees (25 degrees normal), right lateral flexion to 18 (25 degrees normal), and left lateral flexion to 19 degrees (25 degrees normal); and as to right knee, flexion to 104 degrees (150 degrees normal).

In reviewing the MRIs of Plaintiff's cervical spine, Dr. Tubman noted a diffuse disc bulge at C4-C5 and C5-C6, and a small broad-based disc herniation at C6-C7. As to Plaintiff's lumbar spine, Dr. Tubman noted a diffuse disc bulge at L4-L5 and at L5-S1, there is a diffuse disc bulge with a small to moderate-sized broad-based superimposed central disc herniation. As to Plaintiff's thoracic spine, Dr. Tubman noted diffuse disc bulges at T3-T4 and T4-T5, as well as mild to moderate endplate degenerative changes at T7-T8.

Dr. Ross conducted a telemedicine video consultation with Plaintiff on June 28, 2022 and found decreased range of motion to Plaintiff's cervical spine, lumbar spine, and right knee. The Court notes that although a telemedicine examination may not accomplish all the elements of an in-person examination, particularly with regard to range of motion measurements, when taken in conjunction with other medical records, they are not inherently unreliable. Dr. Ross concluded that Plaintiff's injuries are permanent in nature, and he is likely to continue to suffer these symptoms, as well as suffer exacerbations of variable intensity and severity.

In reviewing the MRI of Plaintiff's right knee, Dr. Kaza reported, and Dr. Ross agreed, joint effusion and an irregularity of the inferior articular surface of the posterior horn of the medial meniscus, which is consistent with "fraying versus a tear. Meniscocapsular sprain."

Dr. Ross conducted an independent review of Plaintiff's MRI films and expressly disagreed with the findings of Dr. Berkowitz. Dr. Ross concluded that the films show tears in the right knee, bulges and herniations in the lumbar spine and bulges in the cervical spine that are causally related to the subject motor vehicle accident and not due to degeneration or a preexisting condition.

Plaintiff also submits his affidavit, in which he avers that he stopped going to physical therapy and treatment because his no-fault benefits ran out and he could not afford to pay for further treatment on his own. However, even though he stopped treating with his doctors and therapists, he does treat at home. While an unexplained cessation of medical treatment may be fatal to a plaintiff's claim of a significant or consequential limitation (*Baez v Rahamatali*, 24 AD3d 256 [1st Dept. 2005]), Plaintiff here has provided adequate explanation (*Streeter v Stanley*, 128 AD3d 477 [1st Dept 2015]).

With regard to the final category claimed under Insurance Law 5102 (d), 90/180, a plaintiff must submit objective medical evidence to establish a claim, namely that s/he was prevented from performing substantially all usual and customary daily activities for not less than 90 days during the 180 days immediately following the subject accident (*Elias v Mahlah*, 58 AD3d 434 [1st Dept 2009]). Here, Plaintiff has sufficiently raised an issue of fact by relying on the affirmed report of

Dr. Ross, which outlines the permanency of Plaintiff's injuries as well as Plaintiff's subjective complaints of pain and limitation. Accordingly, it is

ORDERED that Defendant's motion for summary judgment and to dismiss the Complaint as Plaintiff fails to meet the serious injury threshold under Insurance Law 5102 (d) is denied; and it is further

ORDERED that within 30 days of entry, movant shall serve a copy of this Decision and Order upon Plaintiff with notice of entry.

This constitutes the Decision and Order of the Court.

1/13/2023

DATE

James G. Clynes
JAMES G. CLYNES, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: