

Fasano v Mallen

2023 NY Slip Op 34012(U)

November 13, 2023

Supreme Court, New York County

Docket Number: Index No. 152124/2021

Judge: James G. Clynes

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This opinion is uncorrected and not selected for official publication.

The burden rests upon the movant to establish that the plaintiff has not sustained a serious injury (*Perez v Rodriguez*, 25 AD3d 506 [1st Dept 2006]; *Lowe v Bennett*, 122 AD2d 728 [1st Dept 1986]). When the movant has made such a showing, the burden shifts to the plaintiff to produce prima facie evidence to support the claim of serious injury (*see Lopez v Senatore*, 65 NY2d 1017 [1985]; *Abate v Wolf*, 219 AD3d 1118 [4th Dept 2023]).

In support of their motion, Defendants rely on the affirmed independent reports of an orthopedic surgeon, Dr. Roy G. Kulick, a psychologist, Dr. Joel Redfield, and a radiologist, Dr. Sheldon P. Feit.

Dr. Kulick concluded, after an examination of Plaintiff, that Plaintiff suffered no disability as a result of the motor vehicle accident. Dr. Kulick found that Plaintiff suffered a contusion and swelling of the left hand in the wake of the accident, but that those issues resolved soon afterwards. (*Maenza v Letkajornsook*, 172 AD2d 500 [2d Dept 1991] [“allegations of sprains and contusions are insufficient to establish that the plaintiff sustained a ‘serious injury’ as defined in the statute”]). Dr. Kulick also assessed that Plaintiff continues to suffer from “classic osteoarthritis,” but opined that as it is symmetrical on both hands, it is not attributable to the accident.

Dr. Redfield, in turn, examined Plaintiff’s complaints of neurological disabilities stemming from the alleged injuries to his head and neck. After examining Plaintiff, administering tests, and reviewing prior records, Dr. Redfield found no evidence of a post-concussion syndrome or neurocognitive disorder due to traumatic brain injury. Based on his objective evaluation, he did not find evidence of legitimate cognitive deficits or any form of psychopathology, or any neuropsychological disability, either related to the subject accident or to any other cause.

Dr. Feit performed an independent radiology review, consisting of an examination of Plaintiff’s post-accident MRI of the cervical spine. The radiologist concurred that Plaintiff suffers from disc bulges (at the C3-C4, C4-C5, C5-C6, C6-C7 and C7-T1 levels), degenerative spondylosis and associated herniations at the C4-C5, C5-C6, C6-C7 levels. According to Dr. Feit, however, these issues are degenerative and “there are no abnormalities causally related to the accident . . .”

With respect to the claim of deprivation of Plaintiff's usual activities of work and living for 90 of 180 days, Defendants, citing Plaintiff's deposition testimony, point to his admission that he returned to work a week after the accident and was able to perform his usual duties. His Bill of Particulars avers that he was confined to his house and his bed for two weeks after the accident. Although Plaintiff described some limitations, he offered no proof to overcome the evidence, largely in the form of his own testimony, that he remained able to engage in substantially all his usual activities for most of the 180-day period (*Manrique v Warshaw Woolen Assoc.*, 297 AD2d 519 [1st Dept 2002]). The record similarly contains no medical evidence of a 90/180 days limitation (*see Zambrana v Timothy*, 95 AD3d 422 [1st Dept 2012]; *Balshan v Bouck*, 206 AD2d 747, 748 [3d Dept 1994]).

Defendants have met their initial burden of establishing that Plaintiff did not sustain serious injuries as a result of the accident under Insurance Law 5102 (d) (*Perez v Rodriguez*, 25 AD3d 506 [1st Dept 2006]). The burden therefore shifts to Plaintiff to raise an issue of fact.

In opposition, Plaintiff relies upon the reports and records of his treating physicians. These include Dr. Joyce Goldenberg, board certified in physical medicine and rehabilitation, Dr. Emilio Oribe, whose specialty is not noted, and Dr. Salvatore R. Lenzo, a hand surgeon. His opposition also includes an MRI evaluation from Dr. David Milbauer of Lenox Hill Radiology. The reports and records of Dr. Milbauer, Dr. Oribe, and Dr. Lenzo are unaffirmed and unsworn. While it is true that uncertified medical records and unsworn letters or reports are of no probative value in opposing a summary judgment motion, the New York Court of Appeals ruled that a sworn medical opinion that relies on unsworn MRI reports constitutes competent evidence (*Pommells v Perez*, 4 NY3d 566 [2005]). Accordingly, the Court will not consider the unsworn and unaffirmed treatment records. However, the affirmed reports of Dr. Goldenberg sufficiently raise an issue of fact.

Dr. Goldenberg affirmed her opinion that the injury is permanent, a product of the accident and not caused by degeneration, and backed up her conclusion with range-of-motion testing. Plaintiff first sought treatment with Dr. Goldenberg on December 3, 2019. Dr. Goldenberg

measured Plaintiff's range of motion with an inclinometer or goniometer. Those tests revealed tenderness, as well as loss of range of motion as to Plaintiff's cervical spine and left hand, as well as positive objective tests as to Plaintiff's cervical spine. Dr. Goldenberg also reviewed the MRI of Plaintiff's cervical spine performed on January 9, 2020 and the EMG/NCV of the cervical and lumbar spine performed on February 12, 2020. With regard to the MRI of the cervical spine, Dr. Goldenberg noted a posterior disc bulge at C4-C5, diffuse disc bulge at C5-C6 and C6-C7 associated with mild foraminal narrowing, right more than left at both levels, and midline posterior disc bulge at C7-T1 associated with mild C7-T1 facet arthrosis. With regard to the EMG/NCV of the cervical and lumbar spine, Dr. Goldenberg noted evidence of left C5 cervical radiculopathy and a bilateral carpal tunnel syndrome. Dr. Goldenberg reported limitation in range of motion as to Plaintiff's cervical spine at her most recent examination of Plaintiff on July 5, 2022.

Dr. Goldenberg found a causal relationship between the automobile collision and Plaintiff's injuries. With regard to the degeneration cited by Defendants' Dr. Feit, Dr. Goldenberg opined that degeneration did not play a factor in the causation of Plaintiff's injuries, treatment and ultimate diagnosis of permanency. Dr. Goldenberg explained that Plaintiff had not sought any treatment for his cervical spine for over 16 years, nor had he ever had any reason to seek any treatment for his cervical spine during that time span. Rather, she opined, Plaintiff's condition began following this accident and the subject accident exacerbated and aggravated any underlying asymptomatic conditions in Plaintiff's cervical spine.

Dr. Goldenberg concluded that Plaintiff has a permanent impairment and disability due to the injuries he sustained in the subject accident.

At Plaintiff's examination before trial he testified that he was not confined to his bed or to his home for any amount of time after the accident, he missed one week of work, and that the most affected element of his daily life is his sleep because he can't get comfortable in different positions, he wakes up with headaches, or he has bouts of insomnia. Plaintiff's subjective claims of pain and his unsubstantiated claim that she was unable to perform her customary daily activities during the relevant period following the accident are insufficient to raise a triable issue of fact with respect

to his 90/180 days serious injury claim (*Copeland v Kasalica*, 6 AD3d 253, 254 [1st Dept 2004]). Therefore, Defendants' motion for summary judgment is granted under the 90/180 category only. Accordingly, it is

ORDERED that the motion by Defendants for summary judgment and dismissal of Plaintiff's complaint is DENIED except as to Plaintiff's claim of serious injury under the 90/180-day category of Insurance Law 5102 (d); and it is further

ORDERED that any requested relief not specifically addressed herein has nonetheless been considered; and it is further

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

This constitutes the Decision and Order of the Court.

11/13/2023
DATE



JAMES G. CLYNES, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input checked="" type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE