

Jennings v Sheridan

2023 NY Slip Op 34618(U)

December 7, 2023

Supreme Court, New York County

Docket Number: Index No. 155430/2021

Judge: James G. Clynes

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

extensive synovectomy, and lysis of the CA ligament. He further alleges that the injuries fall under the serious injury categories of Insurance Law 5102 (d), specifically a fracture; permanent consequential limitation of use of a body organ or member; significant limitation of use of body function or systems of the injured parts with permanent pain, limitation and impairment; and a medically determined injury or impairment preventing him from performing substantially all of the material acts constituting his usual and customary daily activities for not less than ninety days during the one-hundred-eighty days immediately following the occurrence of the injury.

In support of their motion, Defendants rely on the affirmed reports of Dr. Robert S. April, a board-certified neurologist, who performed an independent medical examination (IME) of Plaintiff on May 25, 2022, and Dr. Eial Faierman, a board-certified orthopedic surgeon, who performed an IME of Plaintiff on June 27, 2022.

Dr. April observed that Plaintiff had equal motion of the shoulders, elbows, and joints when he undressed and was able to get on and off the examination table without limitation of movement or complaints of pain. Dr. April further observed that Plaintiff had no swelling of joints or soft tissue and appeared neurologically intact. Assessing Plaintiff's cranial nerves, Dr. April found no abnormalities in Plaintiff's ocular movements, facial sensation, facial movements, eye blink/closure rate and symmetry, palatal movements, swallowing, voice production, respiratory dynamics, and tongue. Upon motor examination, Dr. April found motor power was 5/5 in the muscles of Plaintiff's upper and lower limbs and observed no tremor or rigidity or problems with Plaintiff's gait or stance; Plaintiff's reflexes were normal, and Babinski sign and Romberg sign were both absent. Perception of touch, pin, and vibration was normal and symmetrical in Plaintiff's hands and feet. Using a goniometer, Dr. April measured and recorded full range of motion as to Plaintiff's lumbar spine, cervical spine, and shoulders with the following exceptions: flexion of the lumbar spine was 50 degrees (60 degrees normal), flexion of the shoulders was 150 degrees bilaterally (180 degrees normal), and abduction of the shoulders was 150 degrees bilaterally (180 degrees normal). Dr. April concluded that Plaintiff was not suffering from a neurological diagnosis, disability, limitation, or impairment related to the May 9, 2019, accident,

but deferred further evaluation, particularly regarding Plaintiff's right shoulder, to an orthopedic expert, i.e., Dr. Faierman.

Dr. Faierman measured Plaintiff's range of motion with a goniometer pursuant to AMA Guidelines and recorded full range of motion and negative objective tests as to Plaintiff's wrists, hands, and the finger joints on both hands, as well as to both knees. With respect to Plaintiff's cervical spine, Dr. Faierman measured right and left lateral rotation at 60 degrees (80 degrees normal). Dr. Faierman further noted limited active range of motion of the lumbar spine at 40 degrees flexion (60 degrees normal) and 10 degrees extension (25 degrees normal) and recorded a positive right supine straight leg raise. With respect to Plaintiff's shoulders, Dr. Faierman recorded a limited range of motion bilaterally—80 degrees flexion (180 degrees normal), 70 degrees abduction (180 degrees normal), internal rotation to S1 (80 degrees normal), and external rotation to 50 degrees (90 degrees normal)—and observed “nonanatomic tenderness to light touch in all bony surfaces, tendinous surfaces, joint surfaces, and ligamentous surfaces of the entire right upper extremity throughout the shoulder, brachium, elbow, forearm, wrist, and right hand.” Dr. Faierman stated that he “did not examine stability [of the shoulders] due to obvious symptom magnification and exaggerated complaints.”

Reviewing the operative photographs from the surgery performed on Plaintiff's left shoulder, Dr. Faierman observed minimal fraying of the anterior and superior labrum, which he described as a “normal degenerative finding.” Further, Dr. Faierman acknowledged that the MRI report of Plaintiff's right shoulder documented an anterior labral tear with a partial rotator cuff tear of the anterior supraspinatus tendon but noted that “[t]hese findings are ubiquitous in the asymptomatic population” of Plaintiff's age. Similarly, Dr. Faierman attributed MRI findings of partial tears of the anterior cruciate ligaments (ACL) in both of Plaintiff's knees to “minimal degenerative fraying.” Although the MRI report of Plaintiff's wrist documented a tear of the radial collateral ligament and partial tears of multiple tendons, Dr. Faierman concluded “there [were] no objective findings of any traumatic pathology on examination of the bilateral hands or wrists” at the time of his examination of Plaintiff. With respect to Plaintiff's cervical spine, Dr. Faierman

noted that the pertinent MRI report documented a right-sided paracentral disc herniation at C5/6 but stated that he could not ascertain “[w]hether there is a traumatic or degenerative disc....without review of the MRI films,” which had not been provided to him. With respect to Plaintiff’s lumbar spine, Dr. Faierman noted that the associated MRI report documented bulging discs from L4 through S1 but observed that bulging discs are “ubiquitous in the asymptomatic population of this age.”

In summary, Dr. Faierman stated that there were no objective findings of any traumatic pathology in examination of Plaintiff’s shoulders, knees, wrists and hands, cervical spine, lumbar spine, or right hip. He further opined that Plaintiff demonstrated “obfuscation,” and “symptom magnification,” making his examinations “of limited value,” and that Plaintiff’s “exaggerated symptoms” on clinical examination were inconsistent with the available MRI reports and operative photographs. Dr. Faierman concluded that none of Plaintiff’s physical complaints were causally related to the May 9, 2019 accident.

Although Dr. Faierman reviewed Plaintiff’s MRI reports in conjunction with his IME of Plaintiff, the actual MRI films had not been made available to him at that time. However, Defendants submitted with their reply papers a supplemental report dated April 25, 2023, in which Dr. Faierman attests that he has had the opportunity to review the MRI films, that the MRI films reveal no traumatic pathology, and that the conclusions he drew from his June 27, 2022 IME of Plaintiff remain unchanged. Of note, Dr. Faierman opines that “[t]he findings on the MRI report [of Plaintiff’s right wrist] are minimal, subjective, and unrelated to the accident of 5/9/19,” and that the previously noted disc herniation at C 5/6 is due to a degenerative, rather than traumatic, pathology.

In opposition, Plaintiff submits certified medical records from All Boro Medical Rehabilitation PLLC and Maximum Orthopedics that establish that he sought treatment for his pain and other symptoms on June 3, 2019 and, over the course of the following three years, pursued a course of treatment that included physical therapy sessions, chiropractic treatment, and massage therapy. Plaintiff also submits reports of several MRIs performed by Kolb Radiology, each

accompanied by an affirmation from Dr. Thomas M. Kolb: 1) an MRI of Plaintiff's right knee, performed July 1, 2019, showing a partial tear of the tibial insertion of the ACL with associated joint effusion; 2) MRIs of Plaintiff's right and left shoulders, performed February 10, 2020, showing a tear of the anterior labrum of the right shoulder with associated joint effusion and a SLAP tear of the left shoulder with associated joint effusion, as well as a low-grade partial rotator cuff tear at the articular aspect of the infraspinatus tendon of the left shoulder; 3) MRIs of Plaintiff's cervical and lumbar spine, performed February 18, 2020, showing a cervical disc herniation at C 5/6 and disc bulges at L 4/5 and L5/S1; and 4) an MRI of Plaintiff's right wrist, showing a tear of the radial collateral ligament, tears of the extensor pollicis longus and extensor carpi radialis longus tendons, extensive soft tissue edema and joint effusion, and a partial tear of the scaphoid lunate ligament with subluxation, his right and left shoulders (performed February 10, 2020), his cervical and lumbar spine (performed February 18, 2020), and his right wrist (performed March 5, 2020). Per Dr. Kolb's affirmations, the MRI of Plaintiff's knee showed a partial tear of the tibial insertion of the ACL with associated joint effusion. In addition, Plaintiff submits certified records of treatment he received from Dr. Kenneth McCulloch, an orthopedic surgeon between June 3, 2020 and July 1, 2022. These records reveal that Dr. McCulloch performed surgery on Plaintiff's left shoulder on April 27, 2021.

Finally, Plaintiff submits the report of Dr. Jerry A. Lubliner, a board-certified orthopedic surgeon, who examined Plaintiff on January 25, 2023. Dr. Lubliner measured Plaintiff's range of motion with a goniometer and a tape measure. With respect to Plaintiff's cervical spine, Dr. Lubliner recorded flexion to 30 degrees (40 degrees normal), extension to 30 degrees (40 degrees normal), lateral flexion to 40 degrees (60 degrees normal), and lateral rotation to 40 degrees (80 degrees normal). Dr. Lubliner also noted a positive Spurling test on the right.

With respect to Plaintiff's shoulders, Dr. Lubliner recorded forward flexion of 160 degrees on the right and 150 degrees on the left (180 degrees normal), abduction of 140 degrees on the right and 130 degrees on the left (180 degrees normal), and internal rotation bilaterally to L3 (internal rotation to T10 normal). Dr. Lubliner also noted a positive Speed's test, a positive

apprehension test, and a positive O'Brien's test on the right, and positive Neer and Hawkins' test on both the right and the left.

Dr. Lubliner recorded normal range of motion for Plaintiff's left wrist. With respect to Plaintiff's right wrist, Dr. Lubliner recorded dorsiflexion of 30 degrees (60 degrees normal), palmar flexion of 30 degrees (60 degrees normal), and ulnar deviation of 20 degrees (30 degrees normal).

With respect to Plaintiff's lumbar spine, Dr. Lubliner recorded flexion of 60 degrees (90 degrees normal), extension to 30 degrees (40 degrees normal), and lateral flexion of 30 degrees (60 degrees normal). Dr. Lubliner recorded normal range of motion and negative objective tests for Plaintiff's knees and hips and observed that Plaintiff's gait was normal.

After reviewing Plaintiff's medical records, including the records of Plaintiff's treatment at New York Presbyterian Hospital immediately after the May 9, 2019 accident; the records of Plaintiff's treatment at All Boro Medical Rehabilitation and McCulloch Orthopedics, including the post-operative report of Plaintiff's left shoulder surgery; and the MRI reports from Kolb Radiology, Dr. Lubliner concluded that Plaintiff has and will continue to have permanent impairments. Specifically, Dr. Lubliner stated that Plaintiff suffers from permanent recurrent radiculopathy down his right upper extremity, permanent recurrent pain in both shoulders, permanent scarring of the left shoulder, permanent weakness, and permanent loss of range of motion, resulting in a permanent limitation of his activities of daily living and permanent limitation of his ability to work. Dr. Lubliner opined that the May 9, 2019 accident was the "competent cause" of the injuries to Plaintiff's shoulders, neck, back, wrist, and knees. He further recommended that Plaintiff undergo surgery on his right shoulder and stated that the need for such surgery was causally related to the May 9, 2019 accident.

At summary judgment, the burden rests upon the movant to establish that the plaintiff has not sustained a serious injury (*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]).

Defendants correctly point out that Plaintiff has produced no evidence at all in this case that he sustained or was treated for a fracture as a result of the May 9, 2019 accident. Accordingly, Defendants have met their burden of establishing that Plaintiff did not sustain a serious injury under the “fracture” category of Section 5102(d).

However, Defendants have failed to meet their burden with respect to the remaining categories of serious injury alleged by Plaintiff. A defendant may meet this initial burden by submitting admissible evidence that the plaintiff has a full range of motion and suffers no disabilities causally related to the accident at issue (*see Kearse v. New York City Transit Auth.*, 16 AD3d 45, 49-50 [2d Dept 2005]). Here, however, both Dr. April and Dr. Faierman recorded a significantly decreased range of motion in Plaintiff’s right and left shoulders and lumbar spine. Most notably, Dr. Faierman recorded a 100-degree limitation bilaterally in shoulder flexion, a 110-degree limitation bilaterally in shoulder abduction, and a 40-degree limitation bilaterally in external rotation of the shoulder. Dr. Faierman additionally recorded a decreased range of motion in Plaintiff’s cervical spine. Neither expert provided an adequate explanation for these findings or what caused them. In *Toure v. Avis Rent a Car Sys.*, the Court of Appeals held that “an expert’s designation of a numeric percentage of a plaintiff’s loss of range of motion can be used to substantiate a claim of serious injury” (*Toure v. Avis Rent a Car Sys.*, 98 NY2d 345, 350 [2002]). This is no less the case when such evidence is proffered by the defendant (*see, e.g., Crane v. Glover*, 151 AD3d 1841 [4th Dept 2017] [“Defendants’ own submissions in support of their motion raise[d] triable issues of fact” as to whether the plaintiff suffered a serious injury]).

Dr. April, a neurologist, deferred further investigation of the shoulder limitations to Dr. Faierman, an orthopedic surgeon. Dr. Faierman attributed all objective indicia of injury observed during the IME to Plaintiff’s “obvious symptom magnification.” Essentially, Dr. Faierman is accusing Plaintiff of malingering, but he offers little besides his own subjective impressions to support that claim (*see Roc v. Domond*, 88 AD3d 862, 862 [2d Dept 2011] [defendant failed to meet initial burden on summary judgment where expert indicated that plaintiff’s diminished range of motion was “subjective” but failed to explain or substantiate with any objective medical

evidence the basis for that conclusion]; *Granovskiy v. Zarbaliyev*, 78 AD3d 656, 657 [2d Dep't 2010]). Without some objective medical evidence as to why Dr. Faierman concluded that Plaintiff was exaggerating his symptoms, his report merely raises issues as to Plaintiff's credibility, which are matters to be determined at trial (*see Perl v. Meher*, 18 NY3d 208, 219 [2011]).

In addition, Dr. Faierman attributed the labral tears in Plaintiff's shoulders and the bulging discs in Plaintiff's lumbar spine to normal degenerative processes. However, he fails to explain the basis for this conclusion. (*See Bengaly v. Singh*, 68 AD3d 1030 [2d Dept 2009]). He opines that labral tears and bulging discs are "ubiquitous in the asymptomatic population of this age." By using the word "ubiquitous," Dr. Faierman is stating that all or nearly all individuals who are Plaintiff's age suffer from labral tears and bulging discs (Plaintiff was 29 at the time Dr. Faierman performed the IME). Such a statement is conclusory and of little help in explaining the cause or severity of the abnormalities observed in the MRIs of Plaintiff's shoulders and spine (*see Buono v. Sarnes*, 66 AD3d 809 [2d Dep't 2009]).

Even if Defendants did meet their initial burden, Plaintiff has raised an issue of fact through the affirmed report of Dr. Lubliner, who measured limitations in range of motion of Plaintiff's shoulder, right wrist, and cervical and lumbar spine. Dr. Lubliner opined that Plaintiff's injuries were causally related to the May 9, 2019 accident and that Plaintiff was currently impaired and would continue to be impaired to a degree that would limit Plaintiff's daily activities and his ability to work. At his deposition, Plaintiff testified that he still feels pain in his shoulders; that he has been unable to work since the May 9, 2019 accident; and that he cannot engage in activities that require lifting, such as grocery shopping, cleaning, and picking up his son, who was born a few days after the accident. Dr. Lubliner's report, combined with Plaintiff's medical records and his deposition testimony is sufficient to defeat summary judgment as to whether Plaintiff has suffered a permanent consequential limitation of use of a body organ or member or a significant limitation of use of body function or systems of the injured parts with permanent pain, limitation and impairment. Plaintiff alleged in his bill of particulars that he was confined to home for over three months after the accident and testified that he has not been able to return to work since May 9,

2019. These allegations and the certified medical records of Plaintiff's treatment at All Boro Medical Rehabilitation, starting in June of 2019 are sufficient to raise an issue of material fact with respect to the 90/180 category as well.

Accordingly, it is

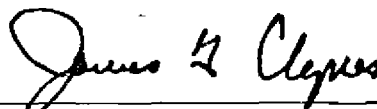
ORDERED that the motion by Defendants Kevin Sheridan, TBBK Direct Leasing LLC, and Electronic Drive & Controls, Inc. for summary judgment on the grounds that Plaintiff's alleged injuries fail to satisfy the serious injury threshold under Insurance Law 5102 (d) is denied; and it is further

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 with Notice of Entry upon all Defendants.

This constitutes the Decision and Order of the Court.

12/7/2023
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 checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>
					<input type="checkbox"/>
					OTHER
					REFERENCE