Contreras v Wiesmeth
2023 NY Slip Op 35155(U)
May 25, 2023
Supreme Court, Queens County
Docket Number: Index No. 703169/2019
Judge: Ulysses B. Leverett
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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OSCAR CONTRERAS,

Plaintiff,

-against-

JONATHAN D. WIESMETH,

Defendant.

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Index No.: 703169/2019
Motion Seq. No.: 2

Decision and Order

Present: **HONORABLE ULYSSES B. LEVERETT**

	Papers Numbered
Notice of Motion-Affirmation- Exhibits	EF 28-36
Affirmation in Opposition-Affidavit-Exhibits	EF 106-117
Affirmation in Reply	EF 118

Upon the foregoing papers, it is ordered that defendant Jonathan D. Wiesmeth's motion for an order pursuant to CPLR §3212 granting defendant summary judgment and dismissing plaintiff's complaint pursuant to Insurance Law §5104(a) in that plaintiff did not sustain a serious injury as defined under Insurance Law §5102(d) is denied.

This action was brought to recover damages for serious personal injuries allegedly sustained by plaintiff as a result of a motor vehicle accident on November 15, 2017 on W 125th Street intersecting Old Broadway, County of New York, State of New York.

Plaintiff alleges that a vehicle owned and operated by defendant came into contact with a vehicle owned and operated by plaintiff. Plaintiff states that as a result of the accident, he sustained injuries including but not limited to his left knee, thoracic spine, lumbar spine and cervical spine.

Insurance Law §5102(d) defines a "serious injury" as " a personal injury which results in death; dismemberment; significant disfigurement; a fracture, loss of a fetus, 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; or 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 90 days during the 180 days immediately following the occurrence of the injury or impairment."

"[T]o prove the extent or degree of physical limitation, 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... An expert's qualitative assessment of a plaintiff's condition may also suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system" See *Toure v Avis Rent A Car Systems, Inc.*, 98 N.Y.2d 345, 350 (2002).

In support of the motion, defendant Jonathan D. Wiesmeth asserts that plaintiff did not sustain a serious injury as defined in Insurance Law §5102(d). Defendant submitted an IME Report dated July 21, 2020 from Jeffret Passick, M.D., F.A.A.O.S. In preparation of the examination, Dr. Passick reviewed the Bill of Particulars in addition to a multitude of the plaintiff's medical records. Dr. Passick states that following the accident, the plaintiff missed seven months of work but had since returned to work at the same job performing the same duties.

Dr. Passick stated that plaintiff's cervical spine range of motion examination using goniometer revealed range of motion of the cervical spine flexion to 50 degrees (50 normal), extension to 60 degrees (60 normal), plaintiff was able to rotate bilaterally 80 degrees (80 degrees normal) and bend both left and right to 45 degrees (45 degrees normal). Examination revealed no spasms or paraspinal nor trapezii tenderness upon palpation. Neurological examination of the upper extremities demonstrated muscle testing to be 5+/5 throughout. Sensory responses were intact throughout the upper extremities and deep tendon reflexes were +2 and equal bilaterally.

Examination of the thoracic spine revealed no paraspinal spasms or tenderness. Range of motion revealed flexion to 45 degrees (45 normal), extension to 0 degrees (0 normal), plaintiff was able to rotate bilaterally 30 degrees (30 degrees normal) and bend both left and right to 45 degrees (45 degrees normal).

Examination of the lumbar spine revealed paraspinal spasms to palpation, though there was minimal paraspinal tenderness upon light touch to the left. Neurological examination of the lower extremities demonstrated muscle testing to be +5/5 throughout. Sensory responses were intact throughout the lower extremities. Atrophy of the intrinsic muscles was absent. Dr. Passick noted that through the examination of the plaintiff, no motion was allowed for the lumbar spine.

As to the left knee, there was portal scarring noted, examination revealed no tenderness on palpation and effusion was negative. Atrophy of the quadriceps measured 46 cm and no patello-femoral crepitus was noted. The McMurray's, Lachman's, Anterior Drawer, Pivot Shift and Posterior Drawer tests were all negative. Range of motion revealed flexion to 150 degrees (150 normal) and extension to 0 degrees (0 normal).

Dr. Passick concluded his report by stating the cervical thoracic and lumbar spine strains were resolved and the left knee contusion post arthroscopic surgery was recovered. He opined that after a review of the file, taking a history and performing a physical examination the injuries were causally related to the accident on November15, 2017, however the injuries to the left hand and wrist were not. It was further noted that he had a subsequent motor vehicle accident in 2019 with neck, back and shoulder injuries.

On August 19, 2020, Dr. Passick submitted an addendum to his IME report following his review of the plaintiff's deposition transcript and intraoperative photos of the left knee scope dated April 27, 2018. His review of the records led him to opine that there was no physical therapy to the knee prior to the surgery. The operative photos as well as the MRI showed no evidence of traumatic injury. There was minimal degenerative fraying of both menisci which he believed to be a normal finding.

Where a defendant has made a showing sufficient for entitlement to summary judgment, the burden shifts to the plaintiff to raise an issue of material fact as to whether plaintiff has sustained a serious injury. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986).

Plaintiff in opposition to the motion, states that defendant has not demonstrated that plaintiff did not sustain a serious injury as defined by Insurance Law §5102 (d) and that plaintiff has raised triable issues that he did indeed sustain a serious injury. Plaintiff alleges that he has sustained serious injuries under the "permanent loss of use", "significant limitation of use" and/or a "permanent consequential 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 customary activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment."

Plaintiff argues that although Dr. Passick had all of plaintiff's medical records available, including MRI reports, he diagnosed plaintiff as having resolved lumbar and cervical spine strains when the reports indicate disc bulges and herniations which Dr. Passick failed to address.

Plaintiff submitted an affirmation from Anthony S. DeSano, D.C., a chiropractor licensed in New York. DeSano affirms that the plaintiff treated with him approximately 27 times. Dr. DeSano opined that with a reasonable degree of medical certainty that the treatment rendered to Mr. Contreras was a medical necessity and causally related to the serious injuries he sustained in the motor vehicle accident of November 15, 2017 and are significant and permanent. He further stated that the findings in the MRI's are causally related to the motor vehicle accident and were not degenerative.

Plaintiff submitted an affirmation from Sean Thompson, M.D., a physician licensed to practice medicine in New York. Plaintiff initially presented to Dr. Thompson with complaints of left knee pain with right knee developing shortly thereafter. His physical examination revealed positive McMurray's test at the medial joint line and positive patellofemoral grind test. The doctor ordered MRIs of the bilateral knees, prescribed physical therapy and advised on a follow up. The plaintiff then followed up on April 10, 2018 where the physical examination revealed the same thing which led Dr. Thompson to recommend left knee surgery. On April 27, 2018, Dr. Thompson performed surgery on the plaintiff's left knee which included arthroscopic left knee medical meniscectomy and debridement. His post-operative diagnosis included left knee medial meniscal tear posterior horn, left knee plicae, left knee synovitis three compartments medial lateral and patellofemoral and left knee lateral meniscus tear. The plaintiff attended post-operative visits but on September 22, 2020 plaintiff presented for the last reported visit with 3/10 pain complaints and was not in physical therapy. Believes he has reached maximum medical improvement through surgery and plastic surgery. He noted there was no calf tenderness bilaterally and range of motion was 0-130 with no pain.

Plaintiff also submitted MRI reports of the lumbar and cervical spine ordered by Dr. DeSano from January of 2018. The impression of the lumbar spine reviewed by Jeffrey Kaufman, M.D. revealed straightening and minimal posterolisthesis of L5 on S1 with a small disc bulge. The impression of the cervical spine reviewed by Elizabeth Maltin, M.D.was there was straightening of the cervical lordosis and small central disc herniation at C3-C4.

It is well established that the proponent of summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact. See *Zuckerman v City of New York*, 49 NY 2d 557 (1980). Here, the medical reports of the parties' doctors directly contradict each other. Where parties offer conflicting medical evidence on the existence of a serious injury, the existence of such injury is a matter for a jury's determination. See *Cracchiolo v Omerza*, 87 AD 3d 674 (2011).

The Court finds triable issues of fact as to the existence of serious injury. Consequently, defendant Jonathan D. Wiesmeth's motion for an order pursuant to CPLR § 3212 granting defendant summary judgment and dismissing the complaint of plaintiff Oscar Contrearas on the grounds that there are no triable issues of fact, in that plaintiff cannot meet the serious threshold requirement mandated by Insurance Law §5102 (d) is denied.

This is the decision and order of this Court.

Dated: 5/25/2023

Hon. Ulysses B. Leverett, JSC

Hon. Ulysses B. Leverett

FILED
5/26/2023
COUNTY CLERK
QUEENS COUNTY