

Cohn v Vogel

2024 NY Slip Op 32595(U)

July 25, 2024

Supreme Court, New York County

Docket Number: Index No. 151506/2023

Judge: James G. Clynes

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This opinion is uncorrected and not selected for official publication.

Plaintiff's Bill of Particulars alleges injury to his left knee, right knee and left hip. However, his motion for partial summary judgment, his opposition to defendant's motion and the affirmed submission of his expert focus only on serious injuries to the left knee. In this respect, Plaintiff alleges complex and displaced tear of the medial meniscus, joint effusion and small amount of intra-articular debris, partially ruptured Baker's Cyst, nonspecific edema deep to the iliotibial band, requiring a left knee partial medial meniscectomy, partial synovectomy, patellofemoral, medial and lateral compartments and chondroplasty medial femoral condyle on January 3, 2023.

Plaintiff's Bill of Particulars contends that these injuries fall within all of the categories set forth under Insurance Law §5102[d] except death, thus including dismemberment; significant disfigurement; a fracture; 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; a medically determined injury or impairment of a nonpermanent nature which prevents the injured person from performing substantially all of the material acts which constitutes such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

Plaintiff was a lawyer and partner in his law firm at the time of the accident. While he testified at his deposition that he made some scheduling adjustments and that he was sidelined briefly after the accident and his surgery, his Bill of Particulars does not allege damages arising from lost earnings.

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], *ced* 69 NY2d 701 [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 her motion, defendant relies on an affirmed report of a board-certified orthopedic surgeon, William Schell, M.D., following an examination on November 14, 2023.

Dr. Schell performed a series of tests and processes designed to measure plaintiff's range of motion, including use of a goniometer, and compared his measurements to normal values. He reported normal range of motion. Dr. Schell concluded in an affirmed report that "there is no current objective limitation to the claimant with daily activities and resuming pre-injury level of activity in regard to the incident" and "no objective evidence of a disability or permanency as it relates to the alleged incident" preventing resumption of his pre-injury normal activities of daily living and gainful employment.

Defendant also proffered the transcript of Plaintiff's deposition. She urges that various statements at the deposition concede a lack of serious injury.

Defendant has met her 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). The burden therefore shifts to Plaintiff to raise an issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). In doing so, plaintiff must come forward with evidence which, if not overcome, would sustain a jury verdict in his favor (*id.*).

In opposition, Plaintiff submits both his own and Defendant's deposition transcripts, as well as an affirmed report of his treating orthopedist, and a series of medical records. He contends that he still suffers discomfort in his left knee. He has proffered substantiation of his claims of permanent consequential limitation of use of a body organ or member and significant limitation of use of a body function or system, but not of any of the other serious injury branches of Section 5102.

Though acknowledging that he suffered prior knee problems, he asserts that his previous issues were lateral as opposed to the present medial difficulties. He further asserts that he no

longer engages in periodic two to three mile runs or in certain athletic activities with his grandchildren as a result of his injury. His work and earnings as a lawyer have not been affected.

Plaintiff's treating physician was Guillem Gonzalez-Lomas, M.D., a physician and assistant professor at the Center for Musculoskeletal Care at the Department of Orthopaedic Surgery, Division of Sports Medicine at NYU Langone Health System. According to Dr. Gonzalez-Lomas's narrative, Plaintiff had a pre-existing painful knee condition for which he had been receiving treatment before the accident. Plaintiff complained of "occasional pain starting in 2022 that was worse with kneeling and standing from a sitting position." Plaintiff reported having approximately two months prior to the accident "a searing pain on the lateral knee while jogging." In the notes of Plaintiff's examination the day after the accident, the orthopedist reported that Plaintiff's "[p]ain was improving until December 3rd 2022," eight days before the accident, in which he "[t]wisted the knee" and had "pain laterally . . . [a]ggravated with stairs."¹ The examination that Plaintiff underwent the day after the vehicular accident was actually scheduled for the pre-existing problem, not as a result of the prior evening's episode.

An MRI taken on December 14, 2022 revealed a complex and displaced tear of the medial meniscus. The orthopedist recommended a left knee arthroscopy, which was performed on January 3, 2023. He also underwent a partial medial meniscectomy, chondroplasty, and partial synovectomy.

Dr. Gonzalez-Lomas concluded that the subject accident aggravated Plaintiff's left knee symptoms. Although Plaintiff had been treating with Dr. Gonzalez-Lomas, Plaintiff's original presentation was for lateral knee pain, whereas after the accident, Dr. Gonzalez-Lomas noted that the imaging and arthroscopy showed damage to the medial meniscus. Furthermore, Dr. Gonzalez-Lomas noted that Plaintiff seemed to have been improving with a home exercise program until the

¹ The Court may consider unsworn medical reports and records of an injured plaintiff's physicians in connection with a defendant's motion for summary judgment (*see Meely v 4 G's Truck Renting Co.*, 16 AD3d 26, 29 [2d Dept 2005]).

time of the accident, but following that accident, he developed worsening pain in both knees that ultimately necessitated a left knee arthroscopy and a partial medial meniscectomy. Dr. Gonzalez-Lomas found that the significantly worsening symptoms to the left knee post-accident, the subsequent post-accident MRI, and the intraoperative findings demonstrate, to a reasonable degree of medical certainty, new traumatic damage to the medial meniscus and an exacerbated injury to the left knee that was directly caused by the subject accident.

The affirmation of Plaintiff's treating doctor, attributing the injury to the accident as opposed to any other cause, is sufficient to raise a triable issue of fact (*see Lee Yuen v Arka Memory Cab Corp.*, 80 AD3d 481 [1st Dept 2011]).

Finally, partial summary judgment is granted on Plaintiff's claim of a nonpermanent injury which prevented him from performing substantially all of the material acts constituting his usual and customary daily activities for not less than 90 days during the 180 days immediately following the injury. Although this limitation is pleaded in Plaintiff's Complaint and Bill of Particulars, it has no evidentiary support in the record. Plaintiff testified at his deposition that he was not confined to his bed or his home following the accident. Plaintiff also pointed to discomfort on stairs and his inability to run twice a week, toss a football or engage in horseplay with his grandsons as the limitations caused by his injury. Those, however, do not rise to the level required by the statute (*see Caiazzo v Crespi*, 124 AD2d 623, 624 [2d Dept 1986] [inability to play "pick-up" games of lacrosse and pain while swimming and lifting heavy boxes does not satisfy the statute]; *see also Satterfield v Maldonado*, 127 F Supp 3d 177, 195 [SDNY 2015] [holding that plaintiff's inability to "run, play basketball, enjoy dancing, or walk too long" did not satisfy Section 5102]). Plaintiff also testified that he and his wife continued with their planned evening out immediately following the accident and his schedule returned to normal within two weeks (*see Deneen v Bucknor*, 178 AD3d 461, 462 [1st Dept 2019] [plaintiff did not sustain a serious injury under the 90/180-day category when he returned to work two weeks after the motor vehicle accident]; *see*

also *Hernandez v Rodriguez*, 63 AD3d 520, 521 [1st Dept 2009]). Thus, that branch of Defendant's motion is granted. Accordingly, it is

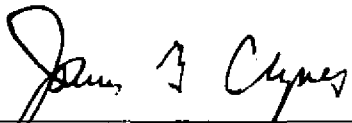
ORDERED that Defendant's motion for summary judgment and dismissal of Plaintiff's Complaint on the grounds that Plaintiff's claimed injuries do not satisfy the serious injury threshold under Insurance Law Section 5102 (d) is denied except as to the 90/180 days category of Insurance Law 5102 (d); and 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 with Notice of Entry upon Defendant.

This constitutes the Decision and Order of the Court.

7/25/2024
DATE



JAMES G. CLYNES, J.S.C.

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