

Gonzalez v MTA Metro-N. R.R.

2024 NY Slip Op 32692(U)

July 24, 2024

Supreme Court, New York County

Docket Number: Index No. 157290/2020

Judge: James G. Clynes

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JAMES G. CLYNES PART 22M

Justice

-----X
MANUEL GONZALEZ,

Plaintiff,

- v -

MTA METRO-NORTH RAILROAD, ANDREW ZAGAJESKI

Defendants.

-----X

INDEX NO. 157290/2020
MOTION DATE N/A
MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60 were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, the motion by Defendants pursuant to CPLR 3212 for summary judgment and to dismiss Plaintiff’s complaint on the grounds that there are no triable issues of fact, in that Plaintiff cannot meet the serious injury threshold requirements as mandated by Insurance Law Section 5102 (d) is decided as follows:

Plaintiff seeks to recover for injuries allegedly sustained as a result of an August 27, 2019 motor vehicle accident between a vehicle operated by Plaintiff and a vehicle owned by Defendant MTA Metro-North Railroad (“MTA Metro-North Railroad”) and operated by Defendant Andrew Zagajeski (“Defendant Driver”) on the FDR Drive just south of the 59th Street Bridge. Plaintiff’s Bill of Particulars alleges that Plaintiff was confined to his bed and home for about three months due to injuries to his right knee, for which he underwent surgery on December 6, 2019, left knee, right shoulder, lumbar spine, and cervical spine that fall under the categories of Insurance Law 5102 (d).

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]).

In support of their motion, Defendants rely on the affirmed independent orthopedic examination report of Dr. Andrew Bazos, the affirmed radiological review of Dr. Scott Berger, Plaintiff's Examination Before Trial ("EBT"), Plaintiff's Examination Under Oath ("EUO"), and Defendant Driver's EBT.

In Plaintiff's EUO, he testified that he underwent surgery on his right knee and was provided a cane which he continues to use. Plaintiff testified that he is a caretaker of his brother who has cerebral palsy. Plaintiff further testified that as a result of his injuries, he has difficulty providing evening care for his disabled brother. Plaintiff's brother has home health aides for ten hours during the day, but not overnight. Before the subject accident, Plaintiff testified that he could shower and bathe his brother if he defecates in his bed in the middle of the night, but Plaintiff is no longer able to do so. Plaintiff further testified he also has difficulty playing with his son. In Plaintiff's EBT, he testified that he was not confined to his bed or home after the accident but stayed home for a week after surgery on his right knee. Plaintiff further testified that before surgery on his right knee, he was given a neck brace and knee brace which he used for a couple of months and a back brace which he used for five months.

In Defendant Driver's EBT, he testified that he was working for MTA Metro-North Railroad when he was driving on the FDR Drive. Defendant Driver testified that Plaintiff's vehicle "jumped out" in front of him and his vehicle made contact with the back quarter panel behind Plaintiff's vehicle passenger door. Defendant Driver further testified that when he viewed Plaintiff's vehicle coming into the lane that Defendant Driver was in, he put his foot on the brakes and swerved right, striking the retaining wall to the right and then came to a stop.

Dr. Berger undertook an independent radiological review of the MRIs taken of Plaintiff's cervical spine, thoracic spine, lumbar spine, and right knee taken on October 25, 2019, and Plaintiff's left shoulder taken on December 23, 2019. As to Plaintiff's cervical spine, Dr. Berger found the exam to be unremarkable other than mild/moderate chronic spondylosis at C3-4. As to Plaintiff's thoracic spine, Dr. Berger found no evidence of any recent injury and had findings considered "strongly suggestive" of chronic Scheuermann's Kyphosis. As to Plaintiff's lumbar spine, Dr. Berger found no evidence of any recent injury and found his spine demonstrated the typical appearance of congenital spinal stenosis with severe superimposed chronic spondylosis and facet arthropathy. As to Plaintiff's right knee and left shoulder, Dr. Berger found no evidence of any recent traumatic injury and that the images demonstrate chronic degenerative conditions. Dr. Berger concluded that there is no evidence that the subject accident caused or exacerbated Plaintiff's claimed conditions.

Dr. Bazos examined Plaintiff on November 18, 2021 and concluded that he has made a complete recovery from minor soft tissue injuries to his cervical spine, lumbar spine, and right knee. Dr. Bazos measured Plaintiff's range of motion with a goniometer and visual landmarks and compared the measurements with normal values based on AMA guidelines. Dr. Bazos reported normal range of motion and negative objective tests as to Plaintiff's cervical spine, thoracolumbar spine, wrists, knees, and ankles.

Dr. Bazos found that Plaintiff had a normal bilateral shoulder internal rotation of 50 degrees (normal 55 degrees) and a normal bilateral elbow extension of 5 degrees (normal 0 degrees). Dr. Bazos further found that Plaintiff had a normal bilateral hip flexion of 120 degrees (normal 90 degrees) and a normal bilateral extension of 30 degrees (normal 20 degrees). "[A]n expert's designation of 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]).

Here, Dr. Bazos demonstrates that the Plaintiff has multiple limitations in range of motion, most notably, a 30-degree range of motion decrease in the flexion of his hip bilaterally. This restriction satisfies the standard enunciated by the Court of Appeals in *Toure*.

Dr. Bazos reported that Plaintiff is capable of performing work-related activities or normal daily activities of living without limitations. Dr. Bazos concluded that Plaintiff's right knee surgery and lumbar intervention pain management procedures were not medically necessary as a result of the subject accident. Dr. Bazos further concluded that there is no permanency or disability from the subject accident.

As the medical report submitted by Defendants indicated that Plaintiff has a limited range of motion bilaterally in his shoulder, elbow, and hip, the report is insufficient to eliminate all triable issues of fact. Therefore, Defendants have failed to make a prima facie showing that Plaintiff does not have a serious physical injury as defined in Insurance Law 5102 (d).

Even if the Court found that Defendants met their burden, and the burden shifted to Plaintiff, Plaintiff raised an issue of fact to preclude summary judgment in Defendants' favor (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]).

In opposition, Plaintiff relies, in pertinent part, on a medical narrative report by Dr. Louis Rose, an MRI report by Dr. Mark Decker, an examination and record of operation by Dr. Solomon Halioua, records from Dr. Joseph Gorum with an operative report, and Plaintiff's affidavit. Plaintiff also submits certified records from Urgent Physical Therapy P.C. and uncertified records from Montefiore Hospital, Chiropractic Health One P.C., and Dr. Bhupinder Sawhney.

As an initial matter, Defendants contend Dr. Rose's medical narrative report of Plaintiff fails to state methods used to measure ranges of motion and provide an objective basis for the measurements. Besides setting forth a range of motion, a physician must identify the objective tests performed in ascertaining those measurements (*Taylor v Terrigno*, 27 AD3d 316 [1st Dept

2006)). The Court finds that Dr. Rose's measurements of Plaintiff's range of motion cannot be properly assessed to see whether any limitations are significant due to a lack of comparison to normal values (*see Campbell v Wendt*, 152 AD3d 413 [1st Dept 2017]). While an expert's designation of a numeric percentage of a 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 can also suffice when supported by objective evidence (*see Toure*, 98 NY2d at 350-351). Though the Court does not find probative value in Dr. Rose's measurements of Plaintiff's range of motion, other findings within his narrative report are sufficient qualitative assessments of Plaintiff's condition.

Dr. Rose reviewed October 25, 2019 MRI images of Plaintiff's right knee, lumbar spine, and cervical spine. As to Plaintiff's right knee, Dr. Rose found a medial meniscus tear, insertional tendinopathy of the quadriceps with partial tear, and joint effusion lateral subluxation of the patella with thickened medial plica. As to Plaintiff's lumbar spine, Dr. Rose found developmental narrowing of the mid and lower lumbar spine which is contributing to central canal stenosis at the L4-L5 and L3-L4, disc herniations at L3-L4 and L5-S1, disc bulging at L4-L5, straightening of the lumbar spine, and mild levoscoliosis in the lower lumbar spine. As to Plaintiff's cervical spine, Dr. Rose found disc herniation at C3-C4, disc bulging at C5-C6, and foraminal narrowing at multiple cervical levels.

Dr. Rose concluded that Plaintiff will continue to be symptomatic on a permanent basis and require continued treatment with pain management for the neck and lumbar spine and that Plaintiff will have difficulty with any type of physical activity as well as sedentary activities. Dr. Rose further concluded that Plaintiff's injuries are a direct result of the subject motor vehicle accident.

Dr. Decker performed an MRI of Plaintiff's right knee, lumbar spine, and cervical spine on October 25, 2019. As to Plaintiff's right knee, Dr. Decker found a medial meniscal tear,

insertional tendinopathy of the quadriceps with partial tear, joint effusion, and lateral subluxation of the patella with thickened medial plica. As to Plaintiff's lumbar spine, Dr. Decker found developmental narrowing of the mild and lower lumbar spine, disc herniations at L3-L4 and L5-S1, disc bulging at L4-L5, straightening, and mild levoscoliosis in the lower lumbar spine. As to Plaintiff's cervical spine, Dr. Decker found disc herniation at C3-C4, disc bulging at C5-C6, and foraminal narrowing. While unaffirmed, the Court will consider the MRI report in its determination because of the findings in Dr. Rose, Dr. Halioua, and Dr. Gorum's reports (*see Pietropinto v Benjamin*, 104 AD3d 617 [1st Dept 2013] [finding an unaffirmed MRI report accompanied by other evidence such as a physician's affirmation showing limitations can provide requisite proof of limitations]).

Dr. Halioua examined Plaintiff's cervical spine, thoracic spine, and lumbar spine. Dr. Halioua performed orthopedic tests during examination and had positive findings for orthopedic tests in Plaintiff's cervical and lumbar spine including bilateral Spurling Sign, bilateral Straight Leg Raising, and bilateral Lasègue Sign. Dr. Halioua concluded that Plaintiff's injuries are a result of the subject accident.

Plaintiff included a record of operation by Dr. Halioua of a lumbar epidurogram performed on Plaintiff on March 7, 2020. Dr. Halioua stated that Plaintiff continues to suffer his usual lumbosacral pain and lower extremity radiative symptoms. Following the procedure, Dr. Halioua concluded that the diagnosis of lumbar radiculopathy was correct because upon examination, Plaintiff's VAS score was 0/10 with SLR being negative.

Dr. Gorum submitted an affirmed report containing an operative note of a December 6, 2019 surgery on Plaintiff's right knee. Dr. Gorum performed a comprehensive arthroscopic examination of Plaintiff's knee. During the procedure, Dr. Gorum found an acute lateral meniscus tear of Plaintiff's right knee and an acute medial meniscus tear of Plaintiff's right knee. Based on

his evaluation of Plaintiff, Dr. Gorum concluded that the accident was the cause of Plaintiff's injuries for which Plaintiff underwent surgery. Dr. Gorum noted that Plaintiff had been treated with physical therapy, a home exercise program, and medications but that treatment failed to restore the patient to the pre-accident level of normal function. Dr. Gorum concluded that it was against medical standards not to further treat Plaintiff, who continued to experience significant pain, disability, and loss of quality of life, with surgery.

In Plaintiff's affidavit, he avers that the impact from the accident on August 27, 2019, caused his neck to snap back and his knee to hit the console. Plaintiff avers that he went to the hospital and then started physical therapy which he went to on a regular basis except when recovering from surgery to his right knee. Plaintiff avers that he was recovering from the surgery to his right knee until March 2020 and had to stop going to physical therapy because of the COVID-19 pandemic. When the clinic reopened, Plaintiff avers that he wanted to continue physical therapy but could not because insurance would no longer pay for the treatment, and he could not afford to pay. Plaintiff further avers that he still feels pain in his knee, neck, and back, that he cannot lift things like he could previously, and cannot go running or play with his son like he did before the subject accident.

In reply, Defendants contend that Plaintiff's medical records do not address degenerative conditions so as to rebut Defendants' showing. Defendants contend that Dr. Decker's MRI reports do not indicate Plaintiff suffered from a traumatic injury. Defendants further contend that Plaintiff was not confined to a hospital, his bed or home during the 180 days following the subject accident.

Regardless of Defendants' failure to make a showing that Plaintiff has not sustained a serious injury, Plaintiff raises an issue of fact as to whether he suffered a permanent injury or "significant limitation" of use of his right knee, lumbar spine, and cervical spine (see *Arias v Martinez*, 176 AD3d 548 [1st Dept 2019]; *Salman v Rosario*, 87 AD3d 482, 484 [1st Dept 2011]).

To the extent that there may have been a gap in Plaintiff’s treatment, that purported gap is not fatal to Plaintiff’s claim where, as here, Plaintiff explained that his insurance would not cover his treatment anymore (*Ramkumar v Grand Style Transp. Enters. Inc.*, 22 NY3d 905 [2013]; (*Nwanji v City of NY*, 190 AD3d 650 [1st Dept 2021]). As such, Plaintiff has raised a sufficient issue of fact to preclude summary judgement in favor of Defendants (*see generally Toure*, 98 NY2d 345). The motion is denied. Accordingly, it is

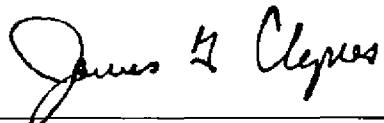
ORDERED that the motion by Defendants for summary judgment and dismissal of Plaintiff’s complaint on the grounds that Plaintiff cannot meet the serious injury threshold requirements under Insurance Law Section 5102 (d) is DENIED; and it is further

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

ORDERED that within 30 days after 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.

7/24/2024
DATE



JAMES G. CLYNES, J.S.C.

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