

Hardeen v Plymouth Rock Assur.
2024 NY Slip Op 35710(U)
March 18, 2024
Supreme Court, Nassau County
Docket Number: Index No. 614221/2021
Judge: Conrad D. Singer
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. CONRAD D. SINGER,
Justice

TRIAL PART: 20

-----X
COLIN HARDEEN,

Plaintiffs,

Index No.: 614221/2021
Motion Seq. No.: 001
Motion Submitted: 12/21/2023

-against-

DECISION AND ORDER ON
MOTION

PLYMOUTH ROCK ASSURANCE AND 21st CENTURY
NORTH AMERICA INSURANCE COMPANY,

Defendants.

-----X

The following papers were read on this motion:

Defendant's Notice of Motion for Summary Judgement and Supporting papers [Seq. 001].....X
Plaintiff's Affirmation in Opposition and Supporting Papers [Seq. 001].....X
Defendant's Reply Affirmation [Seq. 001].....X

Upon the foregoing e-filed papers, the motion filed by the Defendant, 21st CENTURY NORTH AMERICA INSURANCE COMPANY ["21st Century"], for an order pursuant to CPLR § 3212 granting summary judgment in its favor and dismissing the Plaintiff's Complaint on the ground that the Plaintiff, Colin Hardeen ["Plaintiff"], did not suffer a "serious injury" as defined by Insurance Law § 5101(d) [Seq. No. 001], and for an Order pursuant to CPLR 3211[a][7] dismissing the Complaint for the failure to state a cause of action, is determined as hereinafter follows:

The Plaintiff commenced the instant personal injury action on November 10, 2021, by filing a Summons and Verified Complaint. The Plaintiff thereafter served a Supplemental Amended Summons and Amended Complaint dated December 28, 2021, and then served another Supplemental Summons and Amended Complaint dated January 14, 2022. Accordingly 21st Century, defense counsel's office never received the January 14, 2022 Supplemental Summons

and Amended Verified Complaint, which named both Plymouth Rock Assurance and 21st Century as Defendants. According to defense counsel, that is why an Answer has only been interposed in this matter on behalf of Defendant 21st Century; the Verified Answer was served on or about January 19, 2022.

Plaintiff commenced this action seeking Supplemental Underinsured Motorist Benefits to recover for personal injuries he allegedly sustained as a result of a motor vehicle accident that occurred on April 27, 2019, at approximately 10:15 AM, on Rte. 107, in Hicksville, New York.

The Plaintiff served a Verified Bill of Particulars in which he alleged injuries to, *inter alia*, his neck, thoracic spine, lumbar spine, and shoulders. The Plaintiff further avers that on July 21, 2021, he underwent a surgical procedure consisting of C5-6 anterior cervical discectomy with osteophytectomy and interbody arthrodesis, and that he also received multiple injections and nerve ablations to the cervical and lumbar spine.

The parties agree that no ambulance came to the scene of the accident and Plaintiff drove his vehicle home from the accident. Plaintiff testified that he went home after the accident, took some Tylenol, and put ice packs on his neck and lower back. The Plaintiff first sought medical treatment the Monday following the accident, with Dr. Richard Grosso. Plaintiff previously treated with Dr. Grosso for his lower back and neck following a motor vehicle accident in 2017. Plaintiff had received “Manipulation Under Anesthesia” and Physical Therapy to mostly his neck and the rest of his body due to injuries from the prior car accident. Plaintiff made complaints to Dr. Grosso of pain in his neck and entire back following the accident that is the subject of this suit. He received physical therapy and chiropractic treatments. He treated at Innovative Physical Treatment of Long Island approximately 12 (twelve) or less times, receiving heating pads and electrical stimulation to his neck and lower back.

Plaintiff also treated with Dr. Iqbal and received injections to his lumbar and cervical spine. Dr. Iqbal recommended the Plaintiff have surgery based on the Plaintiff's Complaints. The Plaintiff underwent a cervical discectomy fusion by Dr. Gaudin on July 21, 2021. Plaintiff was confined to his home for one day and night following the accident. He testified that he was confined to his bed for one month and to his home for 8 (eight) weeks following the discectomy surgery.

The Defendant contends that the Plaintiff's personal injury action does not meet the statutory threshold requirement of "serious injury" as required by Insurance Law §5102(d), such that the Plaintiff's Summons and Complaint should be dismissed in its entirety. In opposition, the Plaintiff contends that his injuries constitute a "serious injury" as defined by Insurance Law §5102(d) under the "significant limitation of use of a body function or system" and "permanent consequential limitation of use of a body, organ, or member" categories.

The Defendant now moves for an Order dismissing the Plaintiff's Complaint on the ground that he failed to satisfy the threshold "serious injury" mandate as defined by New York Insurance Law §5102(d). "[T]he proponent of a 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 issues of fact". (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]; *see also*, *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *see also*, *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). "This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (*Cach, LLC v. Khan*, 188 AD3d 1135, 1136 [2d Dept. 2020]). Additionally, "[i]n determining a motion for summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be resolved in favor of the nonmoving party". (*Santiago v. Joyce*,

127 AD3d 954 [2d Dept 2015]).

However, once the movant has made a *prima facie* showing of entitlement to judgment, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*See, Zuckerman, supra*). Conclusory allegations, bold assertions, or speculation are insufficient to successfully oppose a motion for summary judgment (*Id.*). “A shadowy semblance of an issue is not enough to defeat the motion”. (*S. J. Capelin Assoc., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974] [internal quotation marks omitted; citations omitted]).

“Serious Injury” is defined in Insurance Law § 5102(d) as:

“...[A] personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of 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 constitutes such person’s usual and customary daily activities for not less than ninety day during the one hundred eighty days immediately following the occurrence of the injury or impairment.” (Insurance Law § 5102[d]).

“A defendant can establish that the plaintiff’s injuries are not serious within the meaning of the Insurance Law § 5102(d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff’s claim” (*Grossman v. Wright*, 268 AD2d 79 [2d Dept 1999]). “A plaintiff’s subjective claim of pain and limitation of motion must be supported by verified objective medical findings” (*Grossman*, 268 AD2d at 84; *see also Kauderer v. Penta*, 261 AD2d 365 [2d Dept 1999]). The threshold question in determining a summary judgment motion on the issue of serious injury focuses on the sufficiency of the moving papers. Once a Defendant submits evidence establishing that the Plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102(d),

the burden then shifts to the Plaintiff to produce evidence in admissible form demonstrating the existence of a triable issue of fact. (*See, Gaddy v. Eyler*, 79 NY2d 955, 957 [1992]).

The Defendants' motion includes a sworn report by Dr. Jay Eneman, M.D., Orthopedic Surgeon, following an IME performed on December 22, 2022. According to Dr. Eneman, the Plaintiff did not provide information concerning his past medical history, he reported negative surgical history, and he provided no information regarding his prior motor vehicle or workers' compensation accidents. Dr. Eneman had previously conducted an IME of the Plaintiff in connection with the Plaintiff's previous motor vehicle accident dated March 30, 2017, in which he had injuries to his neck, mid back, and low back. The Plaintiff provided no treatment history other than to report that he underwent an anterior cervical discectomy and fusion on July 21, 2021.

Dr. Eneman reviewed the Plaintiff's Response to Combined Demands, Operative report from Dr. Gaudin regarding the July 21, 2021, discectomy, MRI report of the lumbar spine, dated May 28, 2019, MRI report of the cervical spine, dated May 28, 2019, a procedure report from Dr. Iqbal, dated December 11, 2020, regarding a Translaminar epidural steroid injection, daily physical therapy notes dated May 5, 2019 to July 15, 2019, physical therapy initial examination report from Innovative Physical Therapy of Long Island, PC, May 8, 2019, and physical therapy re-evaluation report dated July 26, 2019, office visit reports from Dr. Richard Grosso, dated April 29, 2019, to May 10, 2019, initial consultation report from Sunil H. Butani Physician, P.C., dated November 23, 2020, initial visit report from Mid Island Medical, PC, dated May 27, 2020, procedure reports from Dr. Iqbal, dated October 30, 2019, March 11, 2020, and June 12, 2020, for lumbar branch blocks and ablations, reports from NSPC Brain and Spine Surgery dated June 1, 2021, and July 2, 2021 to September 9, 2021, and vehicle damage photographs.

The Plaintiff reported to Dr. Eneman that he feels pain in the neck, mid-back, lower back,

and that he experiences headaches. Dr. Eneman found deficits in the Plaintiff's Range of Motion ["ROM"] compared to normal with respect to the Plaintiff's cervical and thoracic spine. He found slight ROM deficits in the Plaintiff's lumbar spine. Dr. Eneman stated that ROM findings are "voluntary, which are fully under the control of the claimant being examined and therefore, are not a truly objective finding".

Dr. Eneman diagnosed the Plaintiff with:

- "1. Cervical spine sprain/strain, status post-surgery, recovered.
2. Thoracic spine sprain/strain, resolved.
3. Lumbar spine sprain/strain, resolved."

He stated that "if the information provided by the claimant is true and correct and the alleged complaints are a direct result of the accident on April 27, 2019, then the above-diagnosed sprain/strain injuries are causally related to the accident on 4/27/19". Dr. Eneman referenced the Plaintiff's prior accident of March 30, 2017, and noted his resulting injuries to the neck, mid-back, and low back. He then referenced the MRI of cervical spine dated May 30, 2019, over two years post prior MRI of 2017, and found no change in cervical spine status. Dr. Eneman stated that the "only significant area of any change, inconsequential at that, is C6-C7", which is where the Plaintiff's surgery was performed. Dr. Eneman stated that the "surgery...whether needed or not was to an area where there was no change from the MRI of 2017 and therefore not in any way causally related to the accident of 2019". Dr. Eneman found no orthopedic causally related disability based on the IME and reviewed medical records, and found that the Plaintiff is capable of performing all daily living tasks as well as maintaining full employment without any restrictions.

In this case, the Court finds that the Defendant failed to satisfy its *prima facie* entitlement

to summary judgment dismissal of the Plaintiff's Complaint. Dr. Eneman's examination of the Plaintiff revealed decreased ROM of as much as twenty-five [25] degrees in the Plaintiff's cervical spine, decreased ROM of as much as fifteen [15] degrees in the Plaintiff's thoracic spine, and decreased ROM of five [5] degrees in the Plaintiff's lumbar spine. While Dr. Eneman stated that "findings of range of motion are voluntary...and...not a truly objective finding", he failed to substantiate this generalized statement with objective medical evidence. (*Farrah v Pinos*, 103 AD3d 831, 832 [2d Dept 2013]; *Astudillo v MV Transp., Inc.*, 84 AD3d 1289, 1290 [2d Dept 2011]; *Mondert v Iglesia De Dios Pentecostal Cristo Viene, Inc.*, 69 AD3d 590, 590-91 [2d Dept 2010]; *Park-Lee v Voleriaperia*, 67 AD3d 734, 734-35 [2d Dept 2009] [citations omitted]). Construing the evidence in the light most favorable to the non-moving Plaintiff, the Defendant failed to eliminate all triable issues of fact regarding whether the Plaintiff sustained a "significant limitation of use of a body function or system" or "permanent consequential limitation of use of a body organ or member" categories of "serious injury". (See *Rodriguez v Collaguazo*, 217 AD3d 800, 801 [2d Dept 2023]).

Therefore, the portion of the Defendant's motion which seeks an Order pursuant to CPLR 3212 dismissing the Plaintiff's Complaint on the ground that the Plaintiff did not sustain a "serious injury" shall be **DENIED**.

The Defendant also moves for an Order pursuant to CPLR 3211[a][7] and contends that the Plaintiff's Complaint fails to state a claim for Supplementary Underinsured Motorist benefits because the Plaintiff failed to allege that the limit of the tortfeasor's insurance policy had been exhausted by payment. However, the Plaintiff points out in opposition that in his Supplemental Summons and Amended Complaint served on January 14, 2022 and attached as Exhibit B to the Defendant's Amended Motion, the Plaintiff alleged that he complied with all conditions precedent

for bringing a claim under the Supplementary Underinsured Motorist policy. Affording the Amended Complaint with a liberal construction, accepting the facts as alleged therein as true, and construing the evidence in the light most favorable to the Plaintiff, as the Court must do on a motion to dismiss pursuant to CPLR 3211 [*Russo v Crisona*, 219 AD3d 920 (2d Dept Aug. 30, 2023)], the Court finds that the Complaint states a claim to recover Supplementary Underinsured Motorist benefits.

Therefore, the portion of the Defendant's motion which seeks an Order pursuant to CPLR 3211[a][7] dismissing the Complaint shall be **DENIED**.

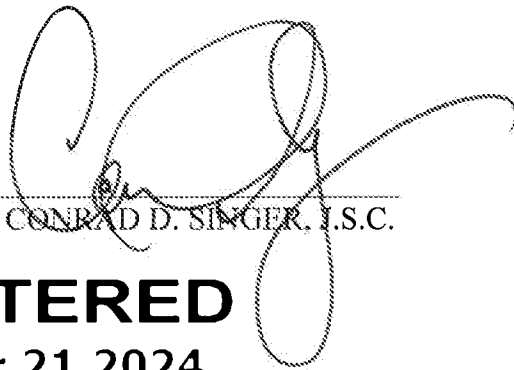
Accordingly, it is hereby,

ORDERED that the Defendant's motion for an Order pursuant to CPLR 3212 and pursuant to CPLR 3211[a][7] dismissing the Plaintiff's Complaint is hereby **DENIED**, in its entirety; and it is further,

ORDERED, that all other requests for relief not specifically addressed herein shall be deemed **DENIED**.

This shall constitute the Decision and Order of the Court.

Dated: March 18, 2024
Mineola, New York


HON. CONRAD D. SINGER, J.S.C.

ENTERED

Mar 21 2024

NASSAU COUNTY
COUNTY CLERK'S OFFICE