Soleymanzadeh v Khan
2011 NY Slip Op 31053(U)
April 7, 2011
Supreme Court, Nassau County
Docket Number: 15408/09
Judge: Karen V. Murphy
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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 15 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

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RICHARD J. SOLEYMANZADEH,

Plaintiff(s),

-against-

BIBI F. KHAN and PRANAY PARMAR,

Defendant(s).

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Index No. 15408/09

Motion Submitted: 2/10/11
Motion Sequence: 001

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....X
Answering Papers.....X
Reply.....X
Briefs: Plaintiff's/Petitioner's.....
Defendant's/Respondent's.....

Defendants move this Court for an Order granting summary judgment in their favor, and dismissing plaintiff's complaint. Plaintiff opposes the requested relief.

This action arises from a motor vehicle accident that occurred on November 12, 2008. As a result of the accident, plaintiff claims to have suffered a fracture in his right shoulder, with resulting limitation of motion and pain. Defendant asserts that plaintiff has not sustained a serious injury within the meaning of Insurance Law § 5102(d).

It is well recognized that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact. (***Andre***

v. Pomeroy, 35 N.Y.2d 361, 320 N.E.2d 853, 362 N.Y.S.2d 131 [1974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact. (***Cauthers v. Brite Ideas, LLC,*** 41 A.D.3d 755, 837 N.Y.S.2d 594 [2d Dept., 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the plaintiff. (***Makaj v. Metropolitan Transportation Authority***, 18 A.D.3d 625, 796 N.Y.S.2d 621 [2d Dept., 2005]).

A party moving for summary judgment must make a *prima facie* showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (***Winegrad v. New York Univ. Med. Center,*** 64 N.Y.2d 851, 476 N.E.2d 642, 487 N.Y.S.2d 316 (1985); ***Zuckerman v. City of New York,*** 49 N.Y.2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]). Here, the defendants must demonstrate that the plaintiff did not sustain a serious injury within the meaning of Insurance Law Section 5102(d) as a result of this accident ***(Felix v. New York City Transit Auth.,*** 32 A.D.3d 527, 819 N.Y.S.2d 835 [2d Dept., 2006]). Defendants have failed to meet their burden with respect to the categories of injury specified in Insurance Law § 5102(d) pertaining to fracture; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member, and significant limitation of use of a body function or system. Defendants have met their burden with respect to plaintiff's "90/180" claim.[1]

In support of their motion, defendants have submitted, *inter alia*, the affirmed medical reports of Lee M. Kupersmith, M.D., the examining orthopedic surgeon, and Scott S. Coyne, M.D., the examining radiologist. Both of defendants' examining physicians rely on the MRI of plaintiff's right shoulder performed on December 9, 2008, approximately one month after the accident, in addition to other medical records from plaintiff's health care providers.

Dr. Kupersmith conducted his examination of plaintiff on August 10, 2010, approximately one year and eight months after the accident. Dr. Kupersmith measured plaintiff's range of motion using a handheld goniometer, revealing a ten-degree restriction in plaintiff's abduction, forward flexion and posterior extension of his right shoulder. Dr. Kupersmith also acknowledged that plaintiff had suffered a "microtubecular fracture per MRI report," which, in the doctor's opinion, had healed.

Despite the fact that Dr. Kupersmith found some restriction in plaintiff's range of motion, and acknowledged that plaintiff had suffered a fracture in his right shoulder, Dr. Kupersmith concluded that there were "no objective findings to substantiate [plaintiff's] subjective complaints." In a seemingly contradictory sentence, Dr. Kupersmith

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[1]Plaintiff's Bill of Particulars, paragraph 8, lists the categories of injury claimed in this action.

continues, stating that "[t]he claimant does have slight restriction in range of motion of his right shoulder, which is subjective." In view of the fact that Dr. Kupersmith measured plaintiff's range of motion and determined that it is restricted, it appears to the Court that the restricted range of motion is objective, not subjective.

After reviewing Dr. Coyne's report concerning the MRI, which called into question whether plaintiff had suffered a fracture at all, Dr. Kupersmith produced an "addendum" to his original report. In the addendum, which is dated November 3, 2010, Dr. Kupersmith essentially adopts Dr. Coyne's conclusion that plaintiff suffered a "bone bruise" to his right shoulder, not a fracture.[2] Other than his original report and Dr. Coyne's report, Dr. Kupersmith did not rely on any other medical records supporting his change of opinion, and Dr. Kupersmith did not re-examine plaintiff.

The fact that Dr. Kupersmith changed his opinion, apparently based solely on whose report he last reviewed, does not constitute a sufficiently sound basis upon which to grant defendant's summary judgment motion with respect to the categories of injury pertaining to fracture; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member, and significant limitation of use of a body function or system.

In addition, Dr. Coyne's conclusion that plaintiff did not suffer a fracture serves to underscore the material issues of fact that exist regarding the aforementioned categories of injury in this case.

Thus, defendants have failed to meet their burden in establishing that plaintiff did not suffer a "serious injury" within the meaning of Insurance Law § 5102(d), with respect to those categories of injuries pertaining to fracture; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member, and significant limitation of use of a body function or system. (*See* ***Smith v. Hartman***, 73 A.D.3d 736, 899 N.Y.S.2d 648 (2d Dept., 2010); ***Quiceno v. Mendoza***, 72 A.D.3d 669, 897 N.Y.S.2d 643 [2d Dept., 2010]).

Since the defendants failed to meet their *prima facie* burden with respect to these categories of injury, it is unnecessary to determine whether the plaintiff's papers submitted in opposition were sufficient to raise a triable issue of fact (*See* ***Levin v. Khan***, 73 A.D.3d 991, 904 N.Y.S.2d 73 (2d Dept., 2010); ***Kjono v. Fenning***, 69 A.D.3d 581, 893 N.Y.S.2d 157 [2d Dept., 2010]).

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[2]Insurance Law § 5102(d) includes "a fracture" in its definition of "serious injury."

Defendants have sustained their burden with respect to plaintiff's claim that he suffered an injury that prevented him from performing 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 or impairment ("90/180 claim").

In support of their motion, defendants have submitted plaintiff's Bill of Particulars and his deposition testimony. Plaintiff does not claim a loss of earnings. Furthermore, plaintiff testified that he was treated in the emergency room and released on the date of the accident. Plaintiff has also gone on vacation with his family since the occurrence of the accident, and he admits that he was able to carry a duffel bag during that trip. Plaintiff does not assert that he was unable to work, or dress himself, or drive a car.

Plaintiff must set forth competent medical evidence to establish that he sustained a medically determined injury or impairment of a nonpermanent nature, which prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for 90 of the 180 days following the subject collision (***Ly v. Holloway***, 60 A.D.3d 1006, 876 N.Y.S.2d 482 [2d Dept., 2009]; ***Rabolt v. Park, supra***). In providing only his self-serving testimony that he was prevented from picking up his three-month-old daughter, and cannot use his driver when playing golf, which he has played on several occasions since the accident, plaintiff has failed to provide competent medical evidence of the same. Thus, plaintiff has failed to raise triable issues of fact as to whether he sustained a serious injury within the context of his 90/180 claim (see ***Niles v. Lam Pakie Ho***, 61 A.D.3d 657, 877 N.Y.S.2d 139 (2d Dept., 2009); ***Cantave v. Gelle***, 60 A.D.3d 988, 877 N.Y.S.2d 129 [2d Dept., 2009]). In addition, the Court notes that, in his papers opposing the instant motion, plaintiff did not controvert, or even address defendants' contention that plaintiff failed to establish a claim for a serious injury under this particular category (Defendant's Affirmation in Support, paragraph 20).

Based on the foregoing, the defendants' motion for summary judgment is granted as to plaintiff's 90/180 claim, and denied with respect to the other categories of injury alleged by plaintiff.

The foregoing constitutes the Order of this Court.

Dated: April 7, 2011
Mineola, N.Y.

Karen V. Murphy
J.S.C.

ENTERED
APR 13 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE