

Baez v Nunez

2013 NY Slip Op 30476(U)

February 6, 2013

Supreme Court, Queens County

Docket Number: 28684/2011

Judge: Robert J. McDonald

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Law. In support of the motion, the defendants submit an affirmation from counsel, Adam Warner, Esq; a copy of the pleadings; plaintiff's verified bill of particulars; a copy of the transcript of plaintiff's examination before trial; the affirmed medical report of radiologist, Dr. Audrey Eisenstadt and board certified orthopedic surgeon, Dr. Christopher J. Cassels.

In his verified bill of particulars, the plaintiff, age 22, states that as a result of the accident he sustained, inter alia, a tear of the anterior glenoid labrum of the right shoulder, herniated disc at C6-7, and cervical radiculopathy. The plaintiff contends that he sustained a serious injury as defined in Insurance law §5102(d).

Dr. Audrey Eisenstadt, a radiologist retained by the defendants, reviewed the MRI of the plaintiff's cervical spine which was taken eight days following the accident of June 16, 2010. She states that upon her review she observed a small central C6-C7 disc herniation. She states that the MRI also revealed degenerative disc disease in the lower cervical and upper thoracic spine. She states that the C5-6 and C6-7 intervertebral disc levels are the two most common levels in the cervical spine for degenerative disc disease to occur. She states that the disc dessication is greater than three months in development and could not be causally related to the incident. With respect to the MRI of the right shoulder she states that the MRI is normal and that she did not observe and post-traumatic abnormalities. She states that the rotator cuff musculature is intact, no rotator cuff or tendinopathy is seen and the labrum appears normal.

The plaintiff was examined on July 25, 2012 by orthopedist, Dr. Christopher J. Cassels, a physician retained by the defendants. Plaintiff presented with pain to his neck and shoulder. Dr. Cassels' objective range of motion testing showed no limitations of range of motion of the cervical spine, lumbar spine and right shoulder. He states that his examination was normal and there was no objective evidence to substantiate that the alleged injury is related to acute trauma attributable to the subject accident. He states that in his opinion the plaintiff did not sustain any significant or permanent injury to the cervical spine, lumbar spine or right shoulder as a result of the subject accident.

In his examination before trial, taken on May 31, 2012, the plaintiff testified that after the impact he felt pain to his right knee, lower back and right shoulder. The following day he sought treatment with his internist Dr. Jawaid. Plaintiff

testified that he felt at that time that he broke his shoulder and his neck was in a lot of pain. He followed-up with an orthopedist, Dr. Berkowitz where he complained of pain to his right shoulder, neck, and lower back. After reviewing the plaintiff's MRI, Dr. Berkowitz told him he tore his rotator cuff and recommended surgery. Plaintiff chose not to have surgery but went for physical therapy with Dr. Theodore two or three times a week until November. He continued until his no fault was cut-off. He also saw a neurologist for pain to his right shoulder and neck. He stated that after the accident he was confined to his home until September when school started.

Defendants' counsel contends that the affirmed medical reports of Drs. Eisenstadt and Cassels are sufficient to establish, prima facie, that the plaintiff has not sustained a permanent loss of a body organ, member, function or system; that he has not sustained a permanent consequential limitation of a body organ or member or a significant limitation of use of a body function or system. Counsel also contends that the plaintiff did not sustain a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff, for not less than 90 days during the immediate one hundred days following the occurrence, from performing substantially all of his usual daily activities.

In opposition, plaintiff's attorney, Francisco D. Savinon, Jr., Esq., submits the affidavit of plaintiff Ronald Baez, the physician's affirmation of Dr. Leslie Theodore, the affirmed report of Dr. Dov. Berkowitz and the physician's affirmation of radiologist, Dr. Steven Ham.

Dr. Berkowitz first examined the plaintiff on June 28, 2010 and found that he had pain in the right shoulder and cervical spine due to injuries sustained in the accident of June 16, 2010.

Dr. Hamm, a radiologist, reviewed the plaintiff's MRI reports and observed a tear of the anterior glenoid labrum of the right shoulder and a disc herniation at C6-C7.

Dr. Theodore states that he initially examined the plaintiff on July 7, 2010 at which time the plaintiff had pain to his neck, back and right shoulder. Objective testing indicated significant loss of range of motion of the cervical spine and right shoulder. Plaintiff had a course of physical therapy from June 29, 2010 through mid November 2010. Dr. Theodore states that he determined that the plaintiff reached medical maximum improvement as of October 7, 2010 and that any additional treatment thereafter would have been palliative in nature. Dr. Theodore reexamined the plaintiff on November 13, 2012 and conducted objective range of

motion testing which revealed that the plaintiff still had significant limitations of range of motion of the cervical spine and right shoulder. Dr. Theodore states that in his opinion, as a direct and proximate result of the motor vehicle collision of June 16, 2010, Ronald Baez sustained permanent injuries to his neck, cervical spine and right shoulder and that his past medical history is non-contributory. He states that the plaintiff sustained significant restrictions and limitations of use of his cervical spine and right shoulder causally related to the subject accident.

On a motion for summary judgment, where the issue is whether the plaintiff has sustained a serious injury under the no-fault law, the defendant bears the initial burden of presenting competent evidence that there is no cause of action (Wadford v. Gruz, 35 AD3d 258 [1st Dept. 2006]). "[A] defendant can establish that [a] plaintiff's injuries are not serious within the meaning of 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 [1st Dept. 2000]). Whether a plaintiff has sustained a serious injury is initially a question of law for the Court (Licari v Elliott, 57 NY2d 230 [1982]).

Where defendants' motion for summary judgment properly raises an issue as to whether a serious injury has been sustained, it is incumbent upon the plaintiff to produce evidentiary proof in admissible form in support of his or her allegations. The burden, in other words, shifts to the plaintiff to come forward with sufficient evidence to demonstrate the existence of an issue of fact as to whether he or she suffered a serious injury (see Gaddy v. Eyler, 79 NY2d 955 [1992]; Zuckerman v. City of New York, 49 NY2d 557[1980]; Grossman v Wright, 268 AD2d 79 [2d Dept 2000]).

Here, the proof submitted by the defendants, including the affirmed medical reports of Drs. Eisenstadt and Cassels were sufficient to meet its prima facie burden by demonstrating that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]).

However, this Court finds that the plaintiff raised triable issues of fact by submitting the affirmed medical reports of Dr. Theodore, Berkowitz and Hamm, attesting to the fact that the plaintiff sustained injuries to his cervical spine and right shoulder as a result of the accident and finding that the

plaintiff had significant limitations in range of motion of his cervical spine and right shoulder, both contemporaneous to the accident and in a recent examination, and concluding that the plaintiff's limitations were significant and permanent and resulted from trauma causally related to the accident (see Perl v. Meher, 18 NY3d 208 [2011]; David v Caceres, 2012 NY Slip Op 5132 [2d Dept. 2012]; Martin v Portexit Corp., 2012 NY Slip Op 5088 [1st Dept. 2012]; Ortiz v Zorbas, 62 AD3d 770 [2d Dept. 2009]; Azor v Torado, 59 ADd 367 [2d Dept. 2009]). As such, the plaintiff raised a triable issue of fact as to whether he sustained a serious injury under the permanent consequential and/or the significant limitation of use categories of Insurance Law § 5102(d) as a result of the subject accident (see Khavosov v Castillo, 81 AD3d 903 [2d Dept. 2011]; Mahmood v Vicks, 81 AD3d 606 [2d Dept. 2011]; Compass v GAE Transp., Inc., 79 AD3d 1091 [2d Dept. 2010]; Evans v Pitt, 77 AD3d 611 [2d Dept. 2010]; Tai Ho Kang v Young Sun Cho, 74 AD3d 1328 743 [2d Dept. 2010]).

In addition, Dr. Theodore adequately explained the gap in plaintiff's treatment stating that the plaintiff had reached the point of maximum medical improvement. In addition the plaintiff testified that his no fault benefits had been terminated (see Abdelaziz v Fazel, 78 AD3d 1086 [2d Dept. 2010]; Tai Ho Kang v Young Sun Cho, 74 AD3d 1328 [2d Dept. 2010]; Domanas v Delgado Travel Agency, Inc., 56 AD3d 717 [2d Dept. 2008]; Black v Robinson, 305 AD2d 438 [2d Dept. 2003]).

Accordingly, for the reasons set forth above, it is hereby,

ORDERED, that the defendants' motion for an order granting summary judgment dismissing the complaint of plaintiff RONALD BAEZ is denied.

Dated: February 6, 2013
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.