

Love v Thompson

2019 NY Slip Op 35134(U)

October 23, 2019

Supreme Court, Bronx County

Docket Number: Index No.: 23498/2017E

Judge: ShawnDya L. Simpson

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART: 17

C

LOVE, TIMOTHY

Index No. 0023498/2017

-against-

Hon. Shawndya L. Simpson

THOMPSON, AKEEM OMAR

Justice Supreme Court

The following papers numbered 1 to _____ Read on this motion, (Seq. No. 3) for
SUMMARY JUDGEMENT DEFENDANT, noticed on **May 28 2019**.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s).
Answering Affidavit and Exhibits	No(s).
Replying Affidavit and Exhibits	No(s).

Upon the foregoing papers, it is ordered that this motion is *granted and denied in part*
pursuant to the attached decision.

the clerk is directed to enter judgment accordingly.

Motion is Respectfully Referred to Justice:

Dated:

Dated: 10/24/19

Hon. Shawndya L. Simpson, J.S.C.

- 1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
- 2. MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER SCHEDULE APPEARANCE
- FIDUCIARY APPOINTMENT REFEREE APPOINTMENT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 17

-----X
TIMOTHY LOVE.

Plaintiff, DECISION AND ORDER

- against -

Index No. 23498/2017E

AKEEM OMAR THOMPSON & MARCIA I. TURNER,
Defendants.
-----X

Shawndya L. Simpson, J.:

INTRODUCTION

On October 30, 2016, plaintiff is alleged to have been in a motor vehicle accidents with defendants' vehicle resulting in injury to his neck, back, and chest. Plaintiff claims that these injuries constitute serious physical injury as required by Section 5102(d) of the Insurance Law categories of permanent loss of use, permanent consequential limitation, significant limitation and 90/180-day injury. Defendants counters that plaintiff did not sustain a serious injury and that his injuries do not meet the threshold provided by law.

By notice of motion dated March 13, 2019, and the affirmation and exhibits submitted in support thereof, defendants seek leave to make the instant motion, for summary judgment and dismissal of the complaint asserting that there are no triable issues of fact on whether plaintiff sustained "serious injuries" in the subject motor vehicle accident. Plaintiff filed an affirmation in opposition dated August 13, 2019, with supporting exhibits. A reply affirmation dated August 15, 2019, was also filed. The summons, complaint, answer with demands, note of issue, a notice of motion, stipulation, bill of particulars, deposition transcript of defendant Love, and a medical report are attached in support. In opposition, a police report, medical records, certified medical report, affirmed medical reports are attached. For the foregoing reasons, after review and consideration, the defendants' motion for summary judgment is granted and denied in part.

DISCUSSION

In their arguments, the defense asserts that their expert's report demonstrate that plaintiff's injuries do not meet the threshold requirement. The defense points that test revealed that plaintiff's range of motion was normal, he could perform normal daily activities, and has no permanency. The defense also states that plaintiff's strains and sprain in the affected areas were all resolved. The defense also states in its affirmation that plaintiff has not submitted admissible evidentiary proof to over the motion. The defense further asserts that plaintiff's 90/180-day injury claim should be denied because he was not out of work for at least ninety days immediately after the accident. Additionally, the defendants argue that there was a lapse in plaintiff's medical treatment that undermines his claim of serious injury and that plaintiff has not established causality between the accident and his injuries because of a claimed prior accident.

The defense asserts that the plaintiff's injuries were resolved, but fails to address the positive findings of disc bulges and herniated disc. The defense does not claim that the bulges or herniated disc were preexisting or caused by degeneration. The defense fails also to address the findings presented in EMG and consequently, fails to make a *prima facie* showing that the threshold has not been met. The report fails to provide evidence to counter the claim of disc bulges and herniated disc in the spine. As to the issue of the conditions claimed in the plaintiff's cervical and lumbar spine the defense has failed to provide a *prima facie* showing that requires dismissal. Consequently, the burden did not shift to the plaintiff as the defense did not meet its burden concerning injury alleged to lumbar and cervical spine (*see Cassagnol v. Williamsburg Plaza Taxi Inc.*, 234 A.D.2d 208, 209 [App. Div., 1st Dept. 1996], *citing Rodriguez v. Goldstein*, 182 A.D.2d 396 [App. Div., 1st Dept. 1996], *see also, Sayers v. Hot*, 23 A.D.3d 453

[App. Div., 2nd Dept. 2005], *Jones v. Jacob*, 1 A.D.3d 485 [App. Div., 2nd Dept. 2003]).

Additionally, plaintiff asserts there is contrary expert evidence that demonstrates plaintiff suffered a serious injury as required under the statute. Plaintiff argues that any of the several injuries said to have been sustained by him meet the criteria of serious injury, including herniated and bulging discs. The plaintiff asserts that these conditions are confirmed in MIR films, medical reports and expert opinion. It is alleged that plaintiff had no prior injury to the subject body parts. It is argued that the evidence at the very least demonstrates that there are issues of fact as to whether plaintiff sustained serious injuries. Plaintiff also argues that the defense has not met its burden and establish that they are entitled to summary judgment.

Plaintiff submits records that are not all in admissible form. However, the affirmed report from Dr. Aric Hausknecht, and accompanying electrodiagnostic results, both dated December 21, 2016, is provided in admissible form and documents plaintiff's limited range of motion with the use of an arthordial protractor and goniometer. The doctor affirms that his report is based on his personal review of the comprehensive history and examination of the plaintiff. The December 21, report is also detailed and specific. Dr. Hausknecht also provides an affirmation dated May 15, 2019, reaffirming the findings in his prior reports dated December 21, 2016, wherein he identifies herniated and bulging disc in the spine with limited range of motion. Aggravation of prior injuries is noted in the report and the doctor states that the subject accident was the cause for the condition and that plaintiff was partially disable.

The affirmed report of Dr. Gabriel Dassa, an orthopedic surgeon, dated December 5, 2016, documents plaintiff's regimen of physical therapy and limited range of motion for the affected body parts and use of goniometer. The December 5, 2016, report also provides the

doctors diagnosis, findings and conclusions which include, multiligamentous injury to the cervical and lumbar spine, which is also provided in certified records in the subsequent exhibit. The certified medical records from Dr. Dassa, each dated November 16, 2016, and December 5, 2016, are also affirmed and document plaintiff's reduced range in motion and multiligamentous injury to the cervical and lumbar spine. The affirmed report of Dr. Narayan Paruchudi, documents the results of the radiological exams that were performed on November 29, 2016 and December 13, 2016. Dr. Paruchudi's report provides that the MRI reveals bulges in the lumbar spine and herniated and bulging disc in the cervical spine. The affirmed report of Dr. Dassa, dated June 28, 2019, provides the current reduced range of motion the affected body parts and the findings of herniated and bulging disc in plaintiff's spine. It also provides that the disability is permanent and the recommended course of treatment. Plaintiff has provided admissible evidence to establish a *prima facie* showing of serious injury. Plaintiff provides detailed evidence to counter defendant's claim that plaintiff's injuries were resolved and provides specific proof to demonstrate that traumatic injury resulted from the subject accident. Plaintiff counters defendants' claim and provides evidence of serious injury.

There are triable issues of fact as to whether plaintiff sustained serious injury as required by law in the various categories. The dispute in this instance between the defendants' experts and plaintiff's physicians creates questions of facts appropriate for trial. Claim of a disc herniation or bulging disc and limited range of motion has been found to constitute objective evidence of serious injury (*see Janskowsky v. Smith*, 294 A.D.2d 540 [App. Div., 2nd Dept. 2002]). The plaintiff has provided evidence that the injuries, some identified in the MRI films of disc herniation and bulging, have not been resolved. Evidence of an abnormality in the

plaintiff's ranges of motion consistent after the accident is also provided (*see Munoz v. Robinson*, 2019 NY Slip Op 01520 [1st Dept. 2019]; *Ortiz v. Boamah*, 169 A.D.3d 486 [App. Div., 1st Dept. 2019]; *Hayes v. Gaceur*, 162 A.D.3d 437 [App. Div., 1st Dept. 2018]). The types of test performed on the plaintiff are identified and explained in the medical reports. "The significance of the findings and a description of the nature of the limitations based on the normal function and use of the" affected body parts is provided (*Colon v. Vincent Plumbing & Mech. Co.*, 85 A.D.3d 541 [App. Div., 1st Dept. 2011]).

There is a dispute between the findings of each party's expert. There is a factual dispute between the findings of the party's experts. There is competing evidence on the question of serious injury. Further, plaintiff's experts assertion that the disability is permanent demonstrates that the maximum point of medical improvement with respect to plaintiff's injuries was reached. The evidence demonstrates that the treatment would be palliative. The evidence also addresses the claim of a possible prior injury in that plaintiff's experts assert that the subject accident aggravated any prior injuries and caused the subject accident was the cause of the condition and plaintiff's disability.

The plaintiff provides a sufficient showing to dispute the claim that the threshold has not been met. Plaintiff's entitlement to any relief is a question for trial. The defendant has however, disproved the issue of the plaintiff's lack of curtailment of activities proceeding the accident for the 90/180 day period as it is provided that plaintiff returned to work within a month of the accident and did not miss time from work for the proscribed period (*Williams v. Baldor Specialty Foods, Inc.*, 70 A.D.3d 522 [App. Div., 1st Dept. 2010]). Consequently, plaintiff's 90/180-day injury claim is dismissed.

CONCLUSION

Accordingly, it is:

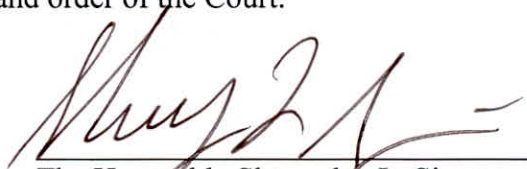
ORDERED, that the defendants' motion for summary judgment dismissing plaintiff's claims of "serious injury" with respect to injuries claimed to his neck, back, arms, hip, and right wrist with respect to the Insurance Law § 5102(d) categories of permanent loss of use is denied, it is further

ORDERED, that defendant's motion to dismiss plaintiff's 90/180 day-injury claim is granted and that claim is hereby dismissed, it is further ordered

ORDERED, that defendant's motion for leave to make the instant motion is deemed moot for the reasons stated above.

This constitutes the decision, opinion and order of the Court.

Dated: Bronx, New York
October 23, 2019



The Honorable Shawndya L. Simpson
Justice of the Supreme Court