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motion

FILED

JUL 11 2014

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WELSON C. JOHNSON, J.S.C.

Attorneys for Defendant
File No. N29604-PS

RODNEY BROOKS,

Plaintiff(s)

v.

CITY OF PLEASANTVILLE,

Defendant(s)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
ATLANTIC COUNTY

Docket No. ATL-L-494-13

CIVIL ACTION

ORDER GRANTING SUMMARY
JUDGMENT AS TO PLAINTIFF'S
PAIN AND SUFFERING CLAIMS

This matter having come before the court upon Notice of Motion of L. Patricia Sampoli, Esquire, of the firm Youngblood, Franklin, Sampoli & Coombs, P.A., attorneys for the defendant, and the court having considered the papers, as well as any opposition, and for good cause having been shown;

IT IS on this 11th day of July, 2014 ORDERED AND ADJUDGED that defendant's motion is granted and plaintiff's claims for pain and suffering shall be and are hereby dismissed.

IT IS FURTHER ORDERED AND ADJUDGED that a copy of this Order shall be served upon all counsel of record within 7 days of the date of its entry.



J.S.C.

PAPERS CONSIDERED:

- ☒ Notice of Motion
- ☒ Movant's Affidavits
- ☒ Movant's Brief
- ☐ Answering Affidavit
- ☐ Answering Brief
- ☐ Cross-Motion
- ☐ Movant's Reply
- ☐ Other



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SUPERIOR COURT OF NEW JERSEY

NELSON C. JOHNSON, J.S.C.

NELSON C. JOHNSON, J.S.C.

1201 Bacharach Boulevard
Atlantic City, NJ 08401-4527
(609) 594-3384

MEMORANDUM OF DECISION ON MOTION
Pursuant to Rule 1:6-2(f)

TO: L. Patricia Sampoli, Esq.
Youngblood, Franklin, Sampoli & Coombs
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Attorney for Defendant, City of
Pleasantville

Albert Brooks, Esq.
Fodera & Long
1500 Walnut St., Suite 300
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Attorney for Plaintiff, Rodney Brooks

RE: Brooks v. City of Pleasantville

DOCKET NO. ATL-L-494-13

NATURE OF MOTION(S): Summary Judgment

HAVING CAREFULLY REVIEWED THE MOVING PAPERS AND ANY RESPONSE FILED, I HAVE RULED ON THE ABOVE CAPTIONED MOTION(S) AS FOLLOWS:

Nature of Motion and Procedural History

This matter arises from a slip and fall accident that occurred on January 21, 2012. Defendant, the City of Pleasantville ("the City"), brings this motion for summary judgment as to Plaintiff's claims for pain and suffering. Plaintiff, Rodney Brooks, does not oppose this motion.

Plaintiff filed his Complaint on January 28, 2013. Defendant filed its answer on May 2, 2013. The discovery period ended on April 27, 2014. Arbitration is currently scheduled for June 17, 2014.

Findings of Fact

Based upon the Court's review of the parties' submissions, the Court makes the following findings of fact:

1. Plaintiff, a New Jersey Transit bus operator, alleges that he slipped and fell on black ice while returning to his bus at the Pleasantville Bus Terminal.
2. Shortly after falling, Plaintiff sought treatment for pain in his left leg at Atlanticare Regional Medical Center, Mainland Campus ("Atlanticare").
3. Atlanticare took an x-ray of Plaintiff's leg and diagnosed him with a sprained ankle.
4. Atlanticare prescribed Plaintiff Motrin and Vicodin and released him.
5. On January 26, 2012, Plaintiff began follow up treatment with Dr. Richard Islinger, who recommended physical therapy and ordered an MRI of Plaintiff's left ankle.
6. The MRI of Plaintiff's left ankle revealed a sprain of the anterior talofibular ligament, joint fluid effusion, bone contusion, reactive edema of the medial malleolus and lateral malleolus, a small tear of the peroneal brevis, and a sprain of the tibial spring ligament.
7. On April 17, 2012, Plaintiff consulted with Dr. Joseph Daniel at the Rothman Institute.
8. Dr. Daniel diagnosed Plaintiff with an intrasubstance tear of the left peroneus brevis tendon and an asymptomatic syndesmotic widening of the left ankle.
9. Dr. Daniel recommended continued immobilization of Plaintiff's left ankle and physical therapy at the Rothman Institute through June 2012.
10. When Plaintiff returned to work in June 2012, he resumed his usual work duties and hours.
11. On February 12, 2014, Dr. Daniel authored a narrative report detailing Plaintiff's injuries.
12. In his report, Dr. Daniel states that Plaintiff showed no permanency in his injury whatsoever and that Plaintiff's injuries went on to completely heal.

Movant's Contentions

In support of its motion, Defendant argues that Plaintiff has failed to demonstrate that his alleged injuries resulted in any permanent loss of a bodily function. Defendant states that Plaintiff has yet to offer any objective medical evidence of a permanent injury, as defined by the New Jersey Tort Claims Act. Specifically, Defendant states that throughout Plaintiff's course of treatment, no treating physician characterized his injury as permanent or substantial. In addition, Defendant points to Dr. Daniel's narrative report, which states that Plaintiff "shows no permanency in his injury whatsoever." [Defendant's Exhibit F, Dr. Daniel's Report.] Dr. Daniel also stated that Plaintiff's injuries are completely healed and that Plaintiff's prognosis is excellent. Further, Defendant also highlights the fact that Plaintiff has returned to his full work duties and hours. Although Defendants admit that Plaintiff may suffer from continued intermittent pain and loss of a range of motion, Defendant maintains that such claims, alone, are not sufficient to constitute permanent and substantial loss of a bodily function.

Standard

Rule 4:46-2 provides that Summary Judgment is appropriate where "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." All inferences of doubt are drawn against the movant in favor of the non-movant. See Brill vs. Guardian Life Ins. Co., 142 N.J. 520 (1985). "[A] determination whether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Brill, 142 N.J. at 530. Accordingly, "when the evidence is 'so one-sided that one-party must prevail as a matter of law,' the trial court should not hesitate to grant summary judgment." Id. (citation omitted).

Discussion

The New Jersey Tort Claims Act, N.J.S.A. 59:9-2(d), provides,

No damages shall be awarded against a public entity or public employee for pain and suffering resulting from any injury; provided, however, that this limitation on

the recovery of damages for pain and suffering shall not apply in cases of permanent loss of a bodily function, permanent disfigurement or dismemberment where the medical treatment expenses are in excess of \$ 3,600.00.

The current test for recovery of damages under the Tort Claims Act is as follows: "To recover under the Tort Claims Act, a plaintiff must prove '(1) an objective permanent injury, and (2) a permanent loss of a bodily function that is substantial.'" *Id.* (quoting *Gilhooley v. County of Union*, 164 N.J. 533, 541 (2000)). In determining the substantiality of an injury, "the appropriate focus is on the degree of injury and impairment." *Id.* at 15. Temporary injuries, no matter how painful or debilitating, are not compensable under the Tort Claims Act. *Brookes v. Odom*, 150 N.J. 395, 403 (1997). Similarly, a plaintiff may not recover for soft-tissue injuries or for mere subjective feelings of discomfort. *Ibid.* Our Supreme Court has noted, however, that "a plaintiff's eligibility to recover pain and suffering damages will not be defeated merely because she can perform some routine functions almost as well as she could prior to her injury." *Kahrar, supra*, 171 N.J. at 15.

In viewing the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, in a light most favorable to Plaintiff, the Court finds that no genuine dispute exists as to whether Plaintiff suffered permanent loss of a bodily function, or permanent disfigurement or dismemberment. There is nothing in the record to indicate that Plaintiff suffered a permanent loss of any bodily function that is substantial as a result of his slip and fall accident. Rather, the competent evidential materials presented to the Court appear to indicate just the opposite – although Plaintiff suffered an intrasubstance tear of the left peroneus brevis tendon and an asymptomatic syndesmotomic widening of the left ankle, according to the objective medical evidence, Plaintiff does not require any further medical treatment, as his injuries have completely healed, and has no limitations with regard to his level of physical activity. [See Defendant's Exhibit F, Dr. Daniel's Report.] Additionally, Plaintiff himself testified that he returned to work in either June or July of 2012 and has since worked a full work shift with only occasional pain in his left leg. Thus, the Court also finds that Defendant is entitled to judgment as a matter of law, pursuant to N.J.S.A. 59:9-1, et. seq.

Accordingly, Defendant's motion for summary judgment is GRANTED. A summary judgment order has been entered. Conformed copies accompany this Memorandum.

Nelson C. Johnson
NELSON C. JOHNSON, J.S.C.

Date of Decision:

7-11-14

29404
Motion

L. Patricia Sampoli, Esquire
Attorney ID: 015741986

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COM C. JOHNSON, J.S.C.

Attorneys for Defendant, City of Pleasantville
Our File No. N29604-PS

RODNEY BROOKS,

Plaintiff(s)

SUPERIOR COURT OF NEW JERSEY
ATLANTIC COUNTY
LAW DIVISION

Docket No.: ATL-L-494-13

-VS-

CITY OF PLEASANTVILLE,

Defendant(s)

CIVIL ACTION

ORDER TO BAR LATE PERMANENCY
EVALUATION
PURSUANT TO RULE 4:17-7

This matter having come before the court upon Notice of Motion by L. Patricia Sampoli, Esquire of the firm Youngblood, Franklin, Sampoli & Coombs, P.A., attorneys for the defendant, City of Pleasantville, and the court having considered the papers as well as any opposition and for good cause having been shown;

It is on this 11th day of July, 2014 ORDERED AND ADJUDGED that the permanency evaluation served by plaintiff upon defendant beyond the discovery end date of April 27, 2014 is hereby barred and precluded at time of trial; and

It is further ORDERED AND ADJUDGED that a copy of this Order shall be served upon all parties within seven days of its entry.


J.S.C.



FILED

JUL 11 2014

NELSON C. JOHNSON, J.S.C.

SUPERIOR COURT OF NEW JERSEY

NELSON C. JOHNSON, J.S.C.

1201 Bacharach Boulevard
Atlantic City, NJ 08401-4527
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MEMORANDUM OF DECISION ON MOTION

Pursuant to Rule 1:6-2(f)

TO: L. Patricia Sampoli, Esq.
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609-601-6600
Attorney for Defendant, City of
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Albert Brooks, Esq.
Fodera & Long
1500 Walnut Street, Suite 900
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Attorney for Plaintiff, Rodney Brooks

RE: Brooks v. City of Pleasantville

DOCKET NO. ATL-L-494-13

NATURE OF MOTION: Bar Discovery

HAVING CAREFULLY REVIEWED THE MOVING PAPERS AND ANY RESPONSE FILED, I HAVE RULED ON THE ABOVE CAPTIONED MOTION(S) AS FOLLOWS:

This matter arises from a slip and fall accident that occurred on January 21, 2012. Defendant, City of Pleasantville, brings this motion to bar the expert report of Dr. Lawrence Barr, dated June 4, 2014. Plaintiff, Rodney Brooks, does not oppose this motion.

Plaintiff filed his Complaint on January 28, 2013. Defendant filed its answer on May 2, 2013. The discovery period ended on April 27, 2014. Arbitration is currently scheduled for June 17, 2014.

In support of its motion, Defendant states that on January 21, 2012 Plaintiff underwent x-rays on the left ankle, tibia and fibula at Altanticare Regional Medical Center Mainland. A radiologist interpreted the x-ray to reveal no evidence of an acute fracture, lateral soft tissue swelling at the ankle, or degenerative changes. On March 27, 2012, Plaintiff underwent a left ankle MRI at Altanticare Medical Imaging. A radiologist interpreted the MRI to reveal a sprain of the anterior talofibular ligament and posterior inferior talofibular ligament with fluid in the

syndesmosis; questionable slight widening; bone contusions and/or reactive edema involving the talus, medial malleolus and lateral malleolus; a small tear of the peroneal brevis; and a sprain of the tibial spring ligament. Thereafter, Plaintiff treated with Dr. Richard Islinger at Shore Orthopedic University Associates. Dr. Islinger diagnosed Plaintiff with a severe ankle sprain and recommended physical therapy and transitioned Plaintiff from a walking boot to an ankle lace up brace.

Defendant further states that on April 17, 2012, Plaintiff consulted with Dr. Joseph Daniel at the Rothman Institute. Dr. Daniel diagnosed Plaintiff with an intrasubstance tear of the left peroneus brevis tendon and an asymptomatic syndesmotic widening of the left ankle. Dr. Daniel also recommended immobilization and subsequent re-evaluation. On February 12, 2014, Dr. Daniel authored a narrative report opining that Plaintiff's injuries completely healed and further opining that Plaintiff shows no permanency in his injury whatsoever.

Additionally, Defendant states that it filed a motion for summary judgment on the basis that Plaintiff failed to provide any certification of permanency of his injuries. Defendant's summary judgment motion is returnable on the same date as the instant motion – July 11, 2014. Thereafter, on June 6, 2014, Plaintiff provided a report from Dr. Lawrence Barr opining that Plaintiff's injury is permanent in nature and resulted from the subject accident. Aside from Dr. Barr's report being untimely, Defendant also points out that Plaintiff failed to provide a certification of due diligence for the untimely submission. Defendant further points out that Dr. Barr only reviewed the records of Plaintiff's prior treating physicians, but failed to review any diagnostic studies. Thus, in light of the foregoing, Defendant requests that the Court bar Dr. Barr's report as untimely.

R. 4:17-7 provides,

[I]f a party who has furnished answers to interrogatories thereafter obtains information that renders such answers incomplete or inaccurate, amended answers shall be served not later than 20 days prior to the end of the discovery period, as fixed by the track assignment or subsequent order. Amendments may be allowed thereafter only if the party seeking to amend certifies therein that the information requiring the amendment was not reasonably available or discoverable by the exercise of due diligence prior to the discovery end date. In the absence of said certification, the late amendment shall be disregarded by the court and adverse parties. Any challenge to the certification of due diligence will be deemed waived unless brought by way of motion on notice filed and served within 20 days after

service of the amendment. Objections made thereafter shall not be entertained by the court.

Here, Plaintiff failed to provide/amend his answers to interrogatories to identify Dr. Barr as an expert and to include Dr. Barr's expert report within the twenty day filing period prescribed by the rule above. Plaintiff further failed to attach a certification of due diligence to his untimely amendment. To date, Plaintiff has yet to provide, to opposing counsel or the Court, any explanation whatsoever for the untimely submission. Furthermore, Plaintiff provided Dr. Barr's report over a month after the discovery end date.

Accordingly, Defendant's motion to bar the expert report of Dr. Barr in its entirety is GRANTED. An appropriate order has been entered. Conformed copies accompany this Memorandum of Decision.



NELSON C. JOHNSON, J.S.C.

Date of Decision:

7-11-14