

Kearley v Tabares

2007 NY Slip Op 31304(U)

May 14, 2007

Supreme Court, Suffolk County

Docket Number: 0027668/2004

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

P R E S E N T :

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 12-13-06
ADJ. DATE 2-14-07
Mot. Seq. # 002 MG; CASEDISP

-----X
MIGUEL KEARLEY and CONSUELO
BONILLA, :
 :
 Plaintiffs, :
 :
 - against - :
 :
 ANGELA M. TABARES and LUZ :
CASTANEDA, :
 :
 Defendants. :
-----X

:
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Upon the following papers numbered 1 to 45 read on this motion for summary judgment : Notice of Motion/
Order to Show Cause and supporting papers 1 - 13 ; Notice of Cross Motion and supporting papers _____; Answering
Affidavits and supporting papers 14 - 43 ; Replying Affidavits and supporting papers 44 - 45 ; Other _____; (and
after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion by defendants for summary judgment dismissing the complaint is granted.

This action was commenced to recover damages, both personal and derivative, for injuries allegedly sustained by plaintiff Miguel Kearly in a motor vehicle accident that occurred at the intersection of Route 111 and Peach Street in the Town of Islip on June 3, 2004. The bill of particulars alleges that plaintiff suffered various injuries as a result of the collision, including a herniated disc at level C5-C6; bulging discs at level C4-C5, C6-C7, and T11-L1; cervical and lumbar radiculopathy; cervical and lumbar myofascial derangement; and tendonitis in the right hip. It further alleges, among other things, that plaintiff was treated at the emergency department of Southside Hospital immediately after the accident, and that he was confined to home for four days of due to his injuries.

Defendants now move for summary judgment dismissing the complaint on the ground that plaintiff is precluded by Insurance Law §5104 from recovering for non-economic loss, as he did not sustain a "serious injury" within the meaning of Insurance law §5102 (d). Defendants' submissions in support of the motion include copies of the pleadings; a transcript of plaintiff's deposition testimony; and sworn medical reports prepared by Dr. Richard Pearl and Dr. Joseph Stubel. At defendants' request, Dr. Pearl, a neurologist, and Dr. Stubel, an orthopedist, examined plaintiff in June 2006, and reviewed various medical reports related to his alleged injuries.

Plaintiffs oppose the motion, arguing that the proof submitted by defendants fails to establish *prima facie* that plaintiff did not suffer an injury within the “permanent consequential” category or the “significant limitation of use” category. Alternatively, plaintiffs assert that medical evidence presented in opposition raises triable issues of fact as to whether plaintiff sustained spinal injuries within the scope of such categories. Plaintiffs’ medical evidence includes sworn reports from his treating orthopedist, Dr. Harshad Bhatt, and his treating physiatrist, Dr. Sima Anand; sworn magnetic resonance imaging (MRI) reports, dated July 2, 2004, concerning his cervical and lumbar regions; and various unsworn medical records. The Court notes that the unsworn office records from Dr. Bhatt and Caroline Hernandez, D.C. were not considered in the determination of this motion (*see, Grasso v Angerami*, 79 NY2d 813, 580 NYS2d 178 [1991]; *Legendre v Siquing Bao*, 29 AD3d 645, 816 NYS2d 495 [2d Dept 2006]; *Hernandez v Taub*, 19 AD3d 368, 796 NYS2d 169 [2d Dept 2005]).

Insurance Law § 5102 (d) defines “serious injury” as “a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a 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 constitute such person’s 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.”

A defendant seeking summary judgment on the ground that a plaintiff’s negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a *prima facie* case that the plaintiff did not sustain a “serious injury” (*see, Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 746 NYS2d 865 [2002]; *Gaddy v Eyley*, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant’s own witnesses, “those findings must be in admissible form, i.e., affidavits and affirmations, and not unsworn reports” to demonstrate entitlement to judgment as a matter of law (*Pagano v Kingsbury*, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992]). A defendant also may establish entitlement to summary judgment using the plaintiff’s deposition testimony and medical reports and records prepared by the plaintiff’s own physicians (*see, Fragale v Geiger*, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; *Torres v Micheletti*, 208 AD2d 519, 616 NYS2d 1006 [2d Dept 1994]; *Craft v Brantuk*, 195 AD2d 438, 600 NYS2d 251 [2d Dept 1993]; *Pagano v Kingsbury, supra*). Once a defendant meets this burden, the plaintiff must present proof in admissible form which creates a material issue of fact or demonstrate an acceptable excuse for failing to meet the requirement of tender in admissible form (*Gaddy v Eyley, supra; Pagano v Kingsbury, supra; see, Grasso v Angerami, supra; see generally, Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

As mentioned above, defendants’ motion for summary judgment is based on plaintiff’s deposition testimony, which was taken on March 28, 2006, and medical reports prepared by their experts. Plaintiff testified that he was employed by Suffolk Transportation Company as a bus driver, and that he missed three days of work due to the injuries he suffered in the accident. He testified that he sought medical treatment from Liberty Orthopedics the day after the accident, and that he was referred to this orthopedic group by his attorney. Plaintiff testified that he was examined by physicians at Liberty Orthopedics, and

that he received physical therapy treatments at the same office during the period from June 2004 to February 2005. He also testified that he was referred by his treating physicians to other medical providers for MRI scans and EMG/NV studies. When questioned about his present condition, plaintiff testified that he continues to experience intermittent back and neck pain, and that he is no longer able to play soccer, lift heavy boxes or do push-ups as a result of his injuries. He also testified that his physicians did not advise him to limit his activities.

Dr. Pearl's report states, in relevant part, that plaintiff exhibited normal range of motion in his cervical and lumbar region, and that the straight leg raise test was negative. It states that plaintiff's gait was normal, and that he could walk well on both his heels and toes. It further states that plaintiff's muscle strength and tone were normal, that his deep tendon reflexes were normal, and that his sensation was intact. Dr. Pearl concludes that plaintiff suffered cervical and lumbosacral sprains due to the accident, and that the examination revealed no objective evidence of neurological injury or disability.

Dr. Stubel's report states that plaintiff presented with complaints of neck and back pain. It states, in relevant part, that plaintiff exhibited normal range of motion in the cervical and lumbar regions, with no evidence of muscle spasm or tenderness on palpation. It states that palpation of the cervical nerve roots did not evoke any radicular signs. The report also states that plaintiff had normal and symmetrical reflexes, normal muscle strength, and normal sensation in his extremities. Dr. Stubel concludes that plaintiff suffered neck and back sprains due to the accident. He further states in the report that plaintiff demonstrated no objective signs of disability, that there is no need for orthopedic treatment or physical therapy, and that plaintiff is able to perform his usual work and the usual activities of daily living.

The medical evidence presented by defendants establishes prima facie that plaintiff did not suffer a serious injury as a result of the accident (*see, Hasner v Budnik*, 35 AD3d 366, 826 NYS2d 387 [2d Dept 2006]; *Kearse v New York City Tr. Auth.*, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2006]; *Meely v 4 G's Truck Renting Co.*, 16 AD3d 26, 789 NYS2d 277 [2d Dept 2005]; *Abrahamson v Premier Car Rental of Smithtown*, 261 AD2d 562, 691 NYS2d 83 [2d Dept 1999]). The Court notes that a defendant who submits admissible proof that a plaintiff has full range of motion and suffers no disabilities as a result of the subject accident establishes a prima facie case that the plaintiff did not sustain a serious injury, despite the existence of an MRI report showing a herniated or bulging disc (*see, Kearse v New York City Tr. Auth.*, *supra*; *Meely v 4 G's Truck Renting Co.*, *supra*; *Diaz v Turner*, 306 AD2d 241, 761 NYS2d 93 [2d Dept 2003]). The burden, therefore, shifted to plaintiff to raise a triable issue of fact (*see, Gaddy v Eycler*, *supra*).

A plaintiff claiming injury within the "limitation of use" categories must substantiate his or her complaints of pain with objective medical evidence showing the extent or degree of the limitations of movement and their duration (*see, Laruffa v Yui Ming Lau*, 32 AD3d 996, 821 NYS2d 642 [2d Dept 2006]; *Cerisier v Thibiu*, 29 AD3d 507, 815 NYS2d 140 [2d Dept 2006]; *Meyers v Bobower Yeshiva Bnei Zion*, 20 AD3d 456, 797 NYS2d 773 [2d Dept 2005]). He or she must present medical proof contemporaneous with the accident showing the initial restrictions in movement or an explanation for its omission (*see, Bell v Rameau*, 29 AD3d 839, 814 NYS2d 534 [2d Dept 2006]; *Suk Ching Yeung v Rojas*, 18 AD3d 863, 796 NYS2d 661 [2d Dept 2005]; *Ifrach v Neiman*, 306 AD2d 380, 760 NYS2d 866 [2d Dept 2003]), as well as objective medical findings of limitations that are based on a recent

examination of plaintiff (*see, Laruffa v Yui Ming Lau, supra; Murray v Hartford*, 23 AD3d 629, 804 NYS2d 416 [2d Dept 2005], *lv denied* 6 NY3d 713, 816 NYS2d 748 [2006]; *Batista v Olivo*, 17 AD3d 494, 795 NYS2d 54 [2d Dept 2005]; *Kauderer v Penta*, 261 AD2d 365, 689 NYS2d 190 [2d Dept 1999]). Moreover, a plaintiff claiming serious injury who ceases treatment after the accident must offer a reasonable explanation for having done so (*Pommells v Perez*, 4 NY3d 566, 574, 797 NYS2d 380 [2005]; *see, Joseph v Layne*, 24 AD3d 516, 808 NYS2d 253 [2d Dept 2005]; *Ali v Vasquez*, 19 AD3d 520, 797 NYS2d 528 [2d Dept 2005]; *Batista v Olivo, supra*).

Here, a review of the various sworn medical reports offered in opposition to the motion indicates that plaintiff was examined by his treating orthopedist, Dr. Bhatt, on six occasions during the period from June 4, 2004 to January 27, 2005. These reports also show that plaintiff was examined in July 2004 by Dr. Sima Anand, a physiatrist, and in August 2004 by Dr. Luz Del Carmen Cespedes, an internist. Dr. Anand and Dr. Cespedes apparently are employed or affiliated with Liberty Orthopedics. Also submitted by plaintiff is a sworn medical report prepared by Dr. Bhatt dated January 25, 2007, which provides a brief “summary of [plaintiff’s] care in this office per review of the records,” and details the findings of an examination conducted by Dr. Bhatt on December 14, 2006. The Court notes that Dr. Bhatt’s January 2007 report states that plaintiff’s examination on June 4 was conducted by Dr. Cespedes.

Most of the reports prepared by Dr. Bhatt include range of motion measurements for plaintiff’s cervical and lumbar regions. Dr. Bhatt’s report regarding the June 29, 2004 examination of plaintiff states, among other things, that range of motion testing of the cervical spine showed 55 degrees of flexion, 50 degrees of extension, 35 degrees of lateral extension, 70 degrees of right rotation and 60 degrees of left rotation. It states that testing of plaintiff’s lumbar region revealed 40 degrees of flexion, 20 degrees of extension, 20 degrees of lateral flexion, and 20 degrees of rotation. Further, it indicates the results of other clinical tests, and sets forth a diagnosis of cervical and lumbar radiculopathy, cervical and lumbar muscle spasms, sciatica, and lumbar disc disease. The report concludes that plaintiff has a “moderate and partial disability,” and recommends additional testing, physical therapy and chiropractic treatments. A medical report prepared by Dr. Bhatt following an examination on August 19, 2004 indicates that range of motion testing of plaintiff’s cervical and lumbar regions showed mild to moderate restrictions, with the greatest limitations measured in cervical rotation (50 degrees) and lumbar flexion (45 degrees).

The next examination by Dr. Bhatt apparently occurred on January 27, 2005. The report prepared by Dr. Bhatt regarding such examination states, in part, that plaintiff exhibited 40 degrees of flexion, 30 degrees of extension, 20 degrees of lateral flexion, and 50 degrees of rotation in his cervical spine. It states that plaintiff exhibited 45 degrees of flexion, 15 degrees of extension, 10 degrees of lateral flexion, 15 degrees of right rotation and 20 degrees of left rotation in his lumbar spine. The report sets forth a diagnosis of cervical and lumbar muscle spasm, cervical radiculopathy, and sciatica, and concludes that plaintiff is totally disabled. Finally, Dr. Bhatt’s medical report prepared in January 2007 states, in part, that plaintiff demonstrated 20 degrees of flexion, 45 degrees of extension, 30 degrees of right lateral flexion, 25 degrees left lateral flexion, 50 degrees of right rotation and 45 degrees of left rotation in his cervical spine. It further states that testing of plaintiff’s lumbar regions revealed 45 degrees of flexion, 20 degrees of extension, 10 degrees of right lateral flexion, 20 degrees of left lateral flexion, 10 degrees of right rotation and 15 degrees of left rotation. The report concludes that plaintiff suffers from cervical and

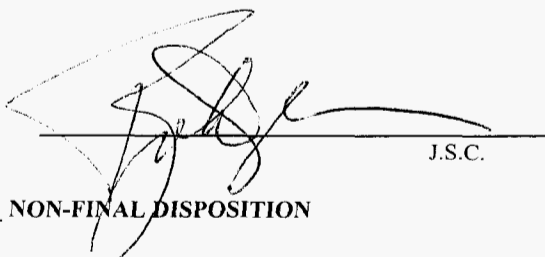
lumbar radiculopathy, a herniated disc at C5-C6, bulging discs at T12-L1, C4-C5 and C6-C7, and muscle spasms; that such injuries were the direct result of the June 3, 2004 motor vehicle accident; and that plaintiff is moderately disabled due to these injuries.

Here, plaintiff failed to provide a reasonable explanation for the cessation of medical treatment for his alleged injuries approximately eight months after the subject accident (*see, Pommells v Perez, supra; Phillips v Zilinsky*, __ AD3d __, 2007 WL 1147395 [2d Dept, April 17, 2007]; *Osgood v Martes*, __ AD3d __, 831 NYS2d 724 [2d Dept 2007]; *D’Alba v Yong-Ae Choi*, 33 AD3d 650, 823 NYS2d 423 [2d Dept 2006]; *Bycinthe v Kombos*, 29 AD3d 845, 815 NYS2d 693 [2d Dept 2006]). Plaintiff avers in an affidavit that he stopped seeking medical care for his injuries shortly after No Fault benefits were terminated, and that he does not have any health insurance coverage. However, there is no evidence substantiating his allegations that the insurance carrier “unilaterally terminated my no fault benefits arising out of the accident effective November 9, 2004,” and that he could not afford to pay for any additional medical treatment (*see, Mohamed v Siffrain*, 19 AD3d 561, 797 NYS2d 532 [2d Dept 2005]; *Neugebauer v Gill*, 19 AD3d 567, 797 NYS2d 541 [2d Dept 2005]; *Villalta v Schechter*, 273 AD2d 299, 710 NYS2d 87 [2d Dept 2000]).

Further, contrary to the assertions by plaintiff’s counsel, the medical reports prepared by Dr. Bhatt are insufficient to raise a triable issue as to whether plaintiff suffered injury within the significant limitation of use category. Significantly, while range of motion testing performed during the period from June 29, 2004 through January 27, 2005 indicates that plaintiff was experiencing various limitations in cervical and lumbar joint function, Dr. Bhatt fails to provide an explanation in his January 2007 report for the nearly two-year gap from the cessation of medical care eight months after the accident to the re-examination conducted after the motion for summary judgment was made approximately nine months after the accident (*see, Pommells v Perez, supra; Barzey v Clarke*, 27 AD3d 600, 815 NYS2d 106 [2d Dept 2006]; *Barnes v Cisneros*, 15 AD3d 514, 790 NYS2d 513 [2d Dept 2005]; *Sibrizzi v Davis*, 7 AD3d 691, 776 NYS2d 843 [2d Dept 2004]). He also fails to discuss in his reports the nature of the medical treatment plaintiff received for his spinal injuries (*see, Hasner v Budnik, supra; Nixon v Muntaz*, 1 AD3d 329, 766 NYS2d 593 [2d Dept 2003]; *Smith v Askew*, 264 AD2d 834, 695 NYS2d 405 [2d Dept 1999]), or to explain the finding in January 2005 that plaintiff, who missed only three days of work immediately after the accident, was totally disabled (*see, Sibrizzi v Davis, supra*). Dr. Bhatt’s conclusions regarding causation, duration and significance of plaintiff’s injuries, therefore, are rejected as speculative and tailored to meet the statutory requirements (*see, Zinger v Zylberberg*, 35 AD3d 851, 828 NYS2d 128 [2d Dept 2006]; *Hasner v Budnik, supra; Bennett v Genas*, 27 AD3d 601, 813 NYS2d 446 [2d Dept 2006]; *Vaughan v Baez*, 305 AD3d 101, 758 NYS2d 648 [1st Dept 2003]; *Medina v Zalmen Reis & Assocs.*, 239 AD2d 394, 658 NYS2d 36 [2d Dept 1997]).

Accordingly, summary judgment dismissing the complaint based on plaintiff Kearley’s failure to meet the serious injury threshold is granted.

DATED: MAY 14 2007



J.S.C.

 X FINAL DISPOSITION NON-FINAL DISPOSITION