

Jackson v Patel

2007 NY Slip Op 31983(U)

July 6, 2007

Supreme Court, Broome County

Docket Number: 0002417/2003

Judge: Ferris D. Lebus

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At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District in the Broome County Courthouse, 92 Court Street, City of Binghamton, New York, on the 22nd day of June, 2007.

PRESENT: HON. FERRIS D. LEBOUS
Justice Presiding.

STATE OF NEW YORK
SUPREME COURT : : BROOME COUNTY

DIRELL DONTE JACKSON,

Plaintiff,

-vs-

ASHOK PATEL, SMITABEN PATEL,
SHANE RYDER and ARENDA RYDER,

Defendant.

DECISION AND ORDER

Index No. 2003-2417
RJI No. 2004-0076-M

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FERRIS D. LEBOUS, J.S.C.

Plaintiff commenced this action seeking to recover for personal injuries suffered in two

separate car accidents. The first cause of action relates to a car accident that occurred on April 24, 2002 between plaintiff and defendant Ashok Patel. The second cause of action relates to a separate car accident that occurred between plaintiff and defendant Shane Ryder on May 2, 2002.

By way of this motion, defendant Ashok Patel¹ moves for an order granting summary judgment dismissing the complaint and any cross-claims based upon plaintiff's failure to establish a serious injury pursuant to Insurance Law 5102. Defendants Ryder join in defendant Patel's motion. A jury trial is scheduled to commence on August 27, 2007.

BACKGROUND

On April 24, 2002, at approximately 8:49 p.m., plaintiff Dirrell D. Jackson, age 20 at the time, was stopped for a red light at the intersection of Main Street and Beethoven Street in Binghamton, New York when his vehicle was rear-ended by a vehicle owned and operated by Ashok Patel (hereinafter sometimes "Patel Accident #1"). It is undisputed that defendant Patel fled the scene and was apprehended by a police officer in an unmarked car who had fortuitously witnessed the accident. Defendant Patel was arrested for driving while intoxicated and leaving the scene of an accident and later pled guilty to driving while intoxicated.

Only eight days after Patel Accident #1, plaintiff was involved in a second car accident. On May 1, 2002, at approximately 3:56 p.m., plaintiff was traveling on Susquehanna Street, east of Tudor Street, in Binghamton, New York and attempting to turn left when his vehicle was hit by a vehicle operated by defendant Shane Ryder and owned by defendant Arenda Ryder (hereinafter sometimes "Ryder Accident #2").

Plaintiff alleges he suffered serious injuries from both accidents to his dorsal and lumbar spine, as well as both legs. More specifically, plaintiff alleges his injuries fall under the following serious injury categories: (1) permanent loss of use of a body organ, member, function or system; (2) permanent consequential limitation of use of a body organ or member; (3) significant limitation of use of a body function or system; and (4) the so-called 90/180-day category (Plaintiff's Verified Bill of Particulars, ¶ 11; Insurance Law 5102).

Defendants arranged for a joint independent medical examination of plaintiff by David Hootnick, M.D., on August 17, 2006. In support of their position, defendants submit Dr. Hootnick's letter report of said examination, as well as an affirmation from Dr. Hootnick (Patel Exs C & D). In opposition, plaintiff submits an affidavit from his treating physician, Khalid A. Sethi, M.D. and medical records (Plaintiff's Ex B). These expert reports and opinions will be discussed in more detail below.

DISCUSSION

On a defense motion seeking summary judgment relative to the serious injury threshold, it is well-settled that the defendant "[b]ears the initial burden of establishing the absence of a serious injury as a matter of law by tendering sufficient evidence to eliminate any material issues of fact from the case [citations omitted]" (*McElroy v Sivasubramaniam*, 305 AD2d 944, 945 [2003]). Assuming a defendant meets this initial burden, then the burden shifts "[t]o plaintiff to demonstrate the existence of a triable issue of fact, through competent medical evidence based on objective findings and diagnostic tests [citations omitted]" (*Armstrong v Morris*, 301 AD2d 931, 932 [2003]).

Before proceeding to the parties' arguments on the merits, the court notes that both defendants rely, in part, upon Dr. Hootnick's opinion that plaintiff is a malingerer. It is well-settled that it is not the court's function in ruling on summary judgment motions to assess credibility unless untruths are clearly apparent (*Whiteford v Smith*, 168 AD2d 885, 886 [1990]; *Glick & Dolleck, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]). Here, the court finds any alleged untruths by plaintiff are not so clearly apparent as to warrant an exception from the general rule that credibility determinations are not proper on summary judgment. As such, the court will set aside Dr. Hootnick's opinions relative to plaintiff's credibility and proceed with an analysis of the medical evidence presented.

1. Permanent loss of use of a body organ, member, function or system

In order to establish a prima facie case relative to permanent loss of use of a body organ, member, function or system, a plaintiff must establish that the "loss of use" is permanent and total (*Collins v McGinley*, 158 AD2d 151 [1990], *lv dismissed* 77 NY2d 902 [1991], *lv dismissed* 78 NY2d 1002 [1991]; *Oberly v Bangs Ambulance, Inc.*, 96 NY2d 295 [2001]). The term "total" has been deemed to mean just what it implies, that a partial loss of use is insufficient to qualify under this category (*Trotter v Hart*, 285 AD2d 772 [2001]).

Dr. Hootnick's report and affirmation detail the objective medical tests he performed in which plaintiff demonstrated, among other things, a partial use of his dorsal and lumbar spine and legs (Hootnick Affirmation, ¶¶ 8 & 9). The court finds that defendants have met their initial burden by tendering sufficient evidence to eliminate any material issues of fact from the case regarding this category. As such, the burden shifted to plaintiff to come forward with objective medical proof of a permanent loss of use. Plaintiff's submission of Dr. Sethi's

affirmation fails to meet his burden since it does not address this category in any respect nor do plaintiff's medical records reveal a total loss of use of plaintiff's dorsal and lumbar spine or legs. As such, defendants' motion to dismiss plaintiff's claim of a serious injury under the permanent loss of use category will be granted.

2. (A) Permanent consequential limitation of use of a body organ or member; and
(B) Significant limitation of use of a body function or system.

The Court of Appeals has explained that the "limitation of use" under both of these categories may be established in one of two ways, namely medical proof of a *quantitative* percentage (e.g., a numeric percentage of a loss of range of motion) or, in the alternative, medical proof of a functional impairment, excluding loss of range of motion, by way of a medical expert's *qualitative* assessment of the current condition as compared to the normal function (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]). Moreover, it is well-settled that the terms "consequential" and "significant" in both categories relative to "limitation of use" must be more than minor, mild or slight as established by expert medical proof (*Licari v Elliott*, 57 NY2d 230, 236 [1982]). Also, both the durational and causation elements of this category must be demonstrated by competent medical proof as well (*Albanese v Stevens*, 148 AD2d 805, 806 [1989]).

Again, defendants rely upon Dr. Hootnick's affirmation and report in which he acknowledges certain objective findings such as a disc herniation, but concludes plaintiff's injuries are only minor, mild or slight (Hootnick Affirmation, ¶ 11). Additionally, Dr. Hootnick found no injuries related to Ryder Accident #2 (Hootnick Affirmation, ¶ 8). The court finds that defendants have met their initial burden of establishing that plaintiff's injuries are only minor,

mild or slight, thus shifting the burden to plaintiff to come forward with objective medical proof of a limitation of use of either of the permanent consequential limitation of use of a body organ or member or the significant limitation of use of a body function or system categories.

In response, plaintiff relies on Dr. Sethi's affirmation in which he recites his findings from his examinations of plaintiff from December 10, 2002 through June 25, 2003 showing, among other things, a large disc herniation, spondylolysis, and stenosis (Sethi Affirmation, ¶ 8).

The court finds that plaintiff's proof fails to meet either the quantitative or qualitative standards. Dr. Sethi fails to provide medical proof of a quantitative percentage or qualitative assessment of plaintiff's current condition as compared to normal functioning. Moreover, "[p]roof of a herniated disc, without additional objective medical evidence establishing that the accident resulted in significant physical limitations, is not alone sufficient to establish a serious injury" (*Pommells v Perez*, 4 NY3d 566, 574 [2005]). In and of itself, the court finds Dr. Sethi's omission of a quantitative percentage or a qualitative assessment results in plaintiff's failure to meet his burden.

Additionally, however, defendants point out other deficiencies with Dr. Sethi's affirmation including that he mentions only the significant limitation of use category but fails to address the permanent consequential limitation of use of a body organ or member category; the affirmation is stale; fails to explain a four year gap in treatment; and fails to address the exaggeration of a pre-existing injury standard applicable to Ryder Accident #2.

With respect to the time gap, the court finds that Dr. Sethi's affirmation is stale in view of the four year gap between Dr. Sethi's last treatment of plaintiff in June 2003 and the date of his

affirmation in June 2007 (*Quezada v Luque*, 27 AD3d 205 [2006]). "The passage of time between the doctor's findings and [his] affirmation, with no indication of any further examination, follow-up or course of treatment, renders plaintiff's medical evidence stale and inadequate to establish a serious injury [citation omitted]" (*Medina-Santiago v Nojovits*, 5 AD3d 253 [2004]).

With respect to Ryder Accident #2, Dr. Sethi characterizes plaintiff's injuries as an exaggeration of the injuries received from the Patel Accident #1. However, it is well-settled that objective evidence is required to distinguish aggravation of a pre-existing condition from the pre-existing condition itself (*Dabiere v Yager*, 297 AD2d 831, 832 [2002], *lv denied* 99 NY2d 503 [2002]). A review of plaintiff's proof reveals a total lack of any objective evidence, expert or otherwise, by which the claimed aggravation of the Patel Accident #1 injuries can be measured (*Pinkowski v All-States Sawing & Trenching, Inc.*, 1 AD3d 874, 876 [2003]). Stated another way, Dr. Sethi does not provide any objective evidence by which to establish an aggravation of injuries caused by Ryder Accident #2 as opposed to the underlying condition caused by Patel Accident #1 (*Hines v Capital Dist. Transp. Auth.*, 280 AD2d 768 [2001]).

The court finds that plaintiff has failed to come forward to demonstrate the existence of a triable issue of fact, through competent medical evidence based on objective findings and diagnostic tests. As such, defendants' motion to dismiss the permanent consequential limitation of use of a body organ or member or the significant limitation of use of a body function or system categories is granted.

3. 90/180-days

The so-called 90/180-day category requires proof of a "[m]edically 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" (Insurance Law, 5102 [d]). A plaintiff must establish his usual activities were curtailed "to a great extent rather than some slight curtailment," as well objective medical findings of a medically determined injury or impairment of a nonpermanent nature which caused the alleged limitations on his daily activities (*Licari*, 57 NY2d at 236; *Monk v Dupuis*, 287 AD2d 187, 191 [2001]).

For the same reasons noted above, the court finds defendants submissions meet their initial burden of establishing that plaintiff did not suffer a medically determined injury under this category. In opposition, plaintiff did not submit an affidavit, but rather relies on his deposition testimony. The court has reviewed plaintiff's deposition testimony but finds it fails to adequately detail what his usual activities were and which of those were curtailed as a result of either or both accidents. In short, the court finds that this record is devoid of any evidence that substantially all of plaintiff's usual and customary daily activities were curtailed for 90 out of the 180 days immediately following either accident (*Gaddy v Eycler*, 79 NY2d 955, 959 [1992]).

Additionally, Dr. Sethi's treatment of plaintiff did not occur until after the 180-day statutory period had passed and, as such, lacks any probative value with respect to the 90/180 day category (*Gonzalez v Green*, 24 AD3d 939 [2005]; *Tuna v Babendererede*, 32 AD3d 574 [2006]). Thus, plaintiff failed to meet his burden of submitting competent medical evidence from the first 180 days indicating that he was medically prevented from performing substantially

all of his usual and customary daily activities during that time frame (*Monk*, 287 AD2d 187).

CONCLUSION

In view of the foregoing, the court finds that defendants' motions for summary judgment dismissing plaintiff's complaint and all cross-claims should be granted in their entirety and the complaint dismissed.

The jury trial scheduled to commence on August 27, 2007 is stricken from the court's trial calendar.

The foregoing constitutes an order of the court upon which judgment may be entered according to its terms.

It is so ordered.

July 6, 2007
Binghamton, New York

s/ Ferris D. Lebous
Hon. Ferris D. Lebous
Justice, Supreme Court

ALL PAPERS SUBMITTED IN CONNECTION WITH THIS MOTION HAVE BEEN FILED, ALONG WITH THE ORIGINAL DECISION AND ORDER, WITH THE BROOME COUNTY CLERK

¹The claim against Smitaben Patel was voluntarily discontinued by way of a partial Stipulation of Discontinuance filed with the Broome County Clerk's Office on February 19, 2004.