

Broderick v Tec-Crete Tr. Mix Corp.

2007 NY Slip Op 32031(U)

June 29, 2007

Supreme Court, Queens County

Docket Number: 0021492/2003

Judge: David Elliot

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT IAS PART 14
Justice

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DONALD BRODERICK AND	No. 021492/03
MARLON RICHARDS,	
	Motion
Plaintiffs,	Date May 1, 2007
-against-	
	Motion
TEC-CRETE TRANSIT MIX CORP.	Cal. No. 4
AND ROBERT J. YEPEZ,	
	Motion
Defendants.	Seq. No. 3

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In this action by plaintiffs to recover for injuries alleged to have been sustained in a motor vehicle accident, plaintiffs move for leave to reargue and, upon re-argument, vacating the order of the court dated September 8, 2005 (Polizzi, J.), which granted defendants' motion for summary judgment, without opposition and denying said motion.

Contentions of the Parties

The plaintiffs' complaint seeks to recover damages for personal injuries alleged to have been sustained as a result of a motor vehicle accident which occurred on November 5, 2002 on the southbound Van Wyck Expressway service road near its intersection with Linden Boulevard, in the County of Queens, City and State of New York.

Defendants assert that, as to plaintiff Donald Broderick (Broderick), his bill of particulars alleges disc bulging at C4-C5 and C5-C6; herniation at L4-5; and partial tear in left shoulder. The affirmation of Dr. Edward A. Toriello, an orthopedist, was submitted. He examined

plaintiff Broderick on January 17, 2005. He sets forth specific ranges of motion within normal limits as to the cervical spine, right shoulder, left shoulder, right and left elbows, right and left wrists and hands and the lumbosacral spine. He found evidence of a resolved hyperextension injury, resolved low back strain and resolved left shoulder strain. There was no evidence of continued disability from the orthopedic injuries. No further treatment or physical therapy was indicated. It was his opinion that said plaintiff was able to perform the duties of his occupation.

In addition, Dr. Monette G. Basson, a neurologist, examined plaintiff Broderick on January 27, 2005. Based upon such examination, she found full range of motion of the cervical and lumbar spines. There was no muscle spasm, no focal tenderness or sciatic notch tenderness and straight leg raising was normal. Neurological examination was completely normal and his MRI films were independently read as normal. She found resolved sprains but no objective evidence of disability or need for further tests or treatments. There were no signs or symptoms of a radiculopathy and she was of the opinion that the tests therefor were not indicated nor were the results valid. He could work at any job he chooses with no disability.

Defendants assert that as to plaintiff Marlon Richards, his bill of particulars alleges disc bulges at C5-C6 and C6-C7; disc herniation at L5-S1; and lumbosacral radiculopathy. The affirmation of Dr. Edward A. Toriello, an orthopedist, was submitted. He examined plaintiff Richards on January 17, 2005. He sets forth specific ranges of motion within normal limits as to the cervical spine, right shoulder, left shoulder, right and left elbows, right and left wrists and hands and the lumbosacral spine. He found evidence of a resolved hyperextension cervical injury, resolved low back strain and resolved left shoulder strain. There was no evidence of continued disability from the orthopedic injuries. No further treatment or physical therapy was indicated. It was his opinion that said plaintiff was able to perform his usual and customary activities.

In addition, Dr. Monette G. Basson, a neurologist, examined plaintiff Richards on January 27, 2005. Based upon such examination, she found full range of motion of the cervical and lumbar spines. There was no muscle spasm, no focal tenderness or sciatic notch tenderness and straight

leg raising was normal. Neurological examination was completely normal. She found resolved sprains but no objective evidence of disability or need for further tests or treatments. There were no objective signs or symptoms of disability.

Defendants argue that neither plaintiff has sustained a serious injury as defined by Insurance Law § 5102. Plaintiff Broderick testified at his examination before trial that he missed, at most, about a month from work due to the accident. However, he had previously indicated that he only missed a week of work. He further testified that he has been able to jog when he gets a chance, can do multiple push ups as a form of exercise and was even attempting to play soccer a couple of months in the future. Plaintiff Richards testified that he was unemployed prior to and subsequent to the accident for unrelated reasons. His daily activities consisted of going to the movies or the park, shopping and doing housework. He also plays football, soccer, basketball, runs and jogs.

In opposition to the motion, plaintiffs' counsel states that defendant Broderick underwent conservative physical therapy at Absolute Medical Care, P.C. from November 5, 2002 through April 2, 2003. On November 9, 2002 an MRI was taken of his left shoulder which revealed "intermediate increased signal with thickening supraspinatus tendon consistent with partial tear. There is no retraction." On November 23, 2002 an MRI of his cervical spine revealed "straightening and reversal of usual spinal curvature suggesting muscular spasm. Bulging discs at C4-C5 and C5-C6 levels." As affirmed by the same radiologist. On November 30, 2002 an MRI of the lumbosacral spine revealed that "the lordosis of the lumbar spine is exaggerated suggesting muscular and/or ligamentous laxity; central herniation of L4-L5 discs with compression of thecal sac." Affirmations by Dr. A. Ramasubramanian, a radiologist, were submitted with respect to such results.

The affirmation of Dr. Yury Koyen, plaintiff Broderick's treating physician, indicates that he reviewed the MRI films and concurred with the radiologist's evaluations. On December 10, 2002 he performed NCV/EMG testing of the cervical spine and upper extremities which revealed evidence of moderate C5-C6 radiculopathy on the right. At a recent evaluation on February 27, 2007, he performed a series of objective tests on this patient's cervical and lumbar spines and left shoulder. He sets forth

the normal ranges for each test and indicates that this plaintiff's results were below normal in every respect. His diagnosis is that plaintiff Broderick suffers from the following as a result of the subject accident, to wit: bulging discs at C4-C5 and C5-C6 with myofascitis; central disc herniation at L4-L5 with compression upon the thecal sac; C5-C6 radiculopathy; lumbar myofascitis; and left shoulder partial tear of the supraspinatus tendon. Said plaintiff suffers from a partial disability related to his loss of range of motion which may be permanent in nature and will continue to suffer a permanent significant limitation of the use of his cervical and lumbar spine as well as his left shoulder. Plaintiff's course of treatment ended in May 2003 when he had reached maximum medical benefit from physical therapy and his recovery had reached a plateau.

As to plaintiff Richards, the affirmation of Dr. Yury Koyen, his treating physician, sets forth that plaintiff Richards underwent an MRI of the cervical spine on November 9, 2002 which revealed straightening and reversal of usual spinal curvature suggesting muscular spasm and bulging discs at C5-C6 and C6-C7 levels. An MRI of the lumbosacral spine on November 23, 2002 revealed an exaggerated lordosis suggesting muscular and/or ligamentous laxity and central herniation of L5-S1 discs with compression of the thecal sac. On January 15, 2003, he performed NCV/EMG testing of the upper and lower extremities revealing evidence of mild acute L5-S1 radiculopathy on the left. The patient underwent a rigorous course of physical therapy. Treatment ended in May 2003 as he had derived maximum medical benefit and his recovery had reached a plateau. A follow-up examination was conducted on February 27, 2007. He performed a series of objective tests and sets forth the normal ranges and said plaintiff's subnormal testing results. Based upon a review of the medical records and his personal examination, he states that plaintiff Richards suffers the following: bulging discs at C5-C6 and C6-C7; cervical myofascitis; central herniation L5-S1 discs compressing thecal sac; L5-S1 lumbar radiculopathy.

In reply, defendants assert that the affirmations of Dr. Koyen as to the plaintiffs are insufficient in that they fail to identify any objective testing used to determine limitations in range of motion. He fails to correlate limitations in each plaintiffs' range of motion with limitations in their activities. He relies on unannexed medical records and unsworn MRI reports. There is a nearly

four year gap in treatment which is inadequately addressed by plaintiffs' doctor. Plaintiff Broderick testified that he stopped receiving medical care at the end of his five or six months of treatment when he started dating a girl in upstate New York and his treatment was interfering with his ability to travel upstate. His decision to stop treatment was his own based upon his own social concerns and had nothing to do with his doctor's explanation that he had reached maximum medical improvement. Plaintiff Richards testified that he stopped going for treatment when he became tired of going. It was his own decision which contrasts with his doctor's purported explanation that he had reached maximum medical improvement.

Decision of the Court

The motion for re-argument is granted and, upon re-argument, the prior order of the court dated September 8, 2005 and the judgment entered thereon are hereby vacated and the prior motion by defendants for summary judgment based upon each plaintiffs' failure to sustain a serious injury as defined by Insurance Law § 5102 is denied.

"A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, producing sufficient evidence to demonstrate the absence of any material issue of fact. Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." Giuffrida v. Citibank, 100 NY2d 72 at 81.

In the instant case, the defendants established their entitlement to judgment as a matter of law by submitting affirmed reports by their examining neurologist and orthopedist with respect to each plaintiff showing that they failed to sustain a serious injury as defined by Insurance Law § 5102.

However, in opposition to the motion, the plaintiffs have submitted sufficient evidence in admissible form to warrant denial of the motion. Plaintiffs submit affirmations from the radiologist who performed the MRI tests upon them in 2002 after the accident. Plaintiffs' examining physician Dr. Yury Koyen submitted his

affirmations with respect to the treatment rendered to each plaintiff after the accident and set forth a recent evaluation thereof. He specifically stated that he reviewed the MRI films of each plaintiff and agreed with the diagnoses of the radiologist. He incorporates the records maintained at his office which were prepared at or near the time of each plaintiffs' exams and certifies in his affirmation that they are true and accurate copies. Such records include his narrative reports, concerning each plaintiff, wherein he sets forth specific objective tests and his findings of subnormal results with respect to the neck and cervical spine, left shoulder as well as positive results on various special tests. Muscle spasm was found in certain areas with respect to both plaintiffs. With respect to the gap in treatment, the court notes that plaintiff Richards testified that he was tired physically at the time he stopped going to treatment and not just "tired of going" as characterized by defendants' attorney. Further, plaintiff Broderick testified that his treatments were slowing down after about six months at the time he was visiting someone upstate. The plaintiffs' treating physician clearly states in his affirmations that each plaintiff had reached maximum medical benefit at the time treatment was ended.

Accordingly, the motion for re-argument is granted and, upon re-argument, the prior order of the court dated September 8, 2005 and the judgment entered thereon are hereby vacated and the prior motion by defendants for summary judgment based upon each plaintiffs' failure to sustain a serious injury as defined by Insurance Law § 5102 is denied.

Dated: June 29, 2007

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HON. DAVID ELLIOT