

Phillips v Hower

2007 NY Slip Op 34264(U)

December 31, 2007

Supreme Court, Ulster County

Docket Number: 0053569/2007

Judge: George B. Ceresia

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ULSTER

JAMES M. PHILLIPS,

Plaintiff,

-against-

WILLIAM C. HOWER,

Defendant.

All Purpose Term

Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding

RJI: 55-06-00762 Index No. 05-3569

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DECISION/ORDER

George B. Ceresia, Jr., Justice

The above-captioned action arises out of a motor vehicle accident which occurred on October 20, 2003 at approximately 3:00 p.m. at the intersection of State Route 209 and State Route 213 in the Town of Marbletown, Ulster County. It is alleged that the front of defendant's pickup truck came into contact with the rear of plaintiff's truck. Plaintiff asserts

that defendant's vehicle struck his vehicle from behind as plaintiff was stopped at the intersection. Defendant maintains that plaintiff abruptly stopped his vehicle to allow another vehicle to pass in front of him. The defendant has made a motion for summary judgment on grounds that plaintiff's injuries do not meet the no-fault serious injury threshold (see Insurance Law § 5102 [d]). Plaintiff opposes the motion, arguing that the defendant failed to satisfy his burden of proof on the motion and that there are triable issues of fact.

Under Insurance Law § 5102 (d) a serious injury is defined 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.” (Insurance Law § 5102 [d])

As the moving party, defendant, in the first instance, is required to present evidence in admissible form sufficient to establish that plaintiff did not, as a result of the motor vehicle accident, suffer a serious injury within the meaning of Insurance Law § 5102 [d] (see, Tankersley v Szesnat, 235 AD2d 1010, 1011; Tompkins v Burtnick, 236 AD2d 708 [3rd Dept., 1997]; Podwirny v De Caprio, 194 AD2d 1057 [3rd Dept., 1993]; Weaver v Derr, 242 AD2d 823, 824 [3rd Dept., 1997]; Kristel v Mitchell, 270 AD2d 598 [3rd Dept.,

2000]). Once such a showing is made, the burden shifts to plaintiff to proffer competent medical evidence based upon objective medical findings and diagnostic tests to support his or her claim (see, Gaddy v Eyler, 79 NY2d 955, 957 [1992]; Eisen v Walter & Samuels, 215 AD2d 149, 150 [First Dept., 1995]; Tankersley v Szesnat, *supra*; Jordan v Baine, 241 AD2d 894, 895 [3rd Dept., 1997]). The findings, in addition to being objective, must also be verifiable (see, Grossman v Wright, 268 AD2d 79 [2nd Dept., 2000]). A mild or minor limitation should be classified as insignificant (see, Grossman v Wright, *supra*). Subjective complaints of pain, absent other proof are insufficient to establish “serious injury” (Eisen v Walter & Samuels, *supra*; Tankersley v Szesnat, *supra*).

Plaintiff’s bill of particulars sets forth his injuries as follows:

“TMJ¹ on the right and left side of the jaw, clicking in the jaw, dizziness, dis-equilibrium, lightheadedness, burning and neck pain, loss of range of motion in the cervical spine

“Pain in the shoulder blades and in the lower back radiating into both legs, numbness in both feet, sciatic muscle pain, joint pain, cervical sprain, lumbar sprain, concussion, numbness in the right arm and hand.

“Facial pain on both sides, pain in the front of the right ear, crackling in both jaw joints, right side being worse than the left, difficulty chewing, headaches in the temple areas, headaches which originate at the base of the skull and extend to the forehead and eyes.

“Burning sensation between the shoulder blades, worsening of L5-S1 disc herniation, myositis, myofascial trigger points, temporal tendinitis, tension headaches, synovitis/tenosynovitis

¹Temporalar Mandibular Joint

capsulitis.”

It is alleged that plaintiff’s injuries fall within the following serious injury threshold categories: (1) permanent consequential limitation of use of a body organ or member; (2) significant limitation of use of a body function or system; and (3) 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.

With regard to the significant limitation of use serious injury threshold category, the term “significance” relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part (see Dufel v Green, 84 NY2d 795, 798 [1995]; Toure v Avis Rent A Car Systems, Inc., 98 NY2d 345, 353 [2002]). The permanent consequential limitation serious injury threshold category requires that the injury to the body organ or member not only be permanent, but also consequential, that is more than a mild, minor or slight limitation (see Oberly v Bangs Ambulance Inc., 271AD2d 135 [3rd Dept., 2000], affd Oberly v Bangs Ambulance Inc., 96 NY2d 295 [2001]). Under the 90/180 day threshold category, a plaintiff is required to establish, inter alia, that the plaintiff was prevented "from performing substantially all of the material acts which constitute [his or her] usual and customary daily activities" within the statutory time period (Insurance Law § 5201 [d]).

This requires a demonstration that plaintiff's usual or customary activities were curtailed "to a great extent rather than some slight curtailment" (Licari v Elliott, 57 NY2d 230, 236; see, Balshan v Bouck, 206 AD2d 747 [3rd Dept., 1994]; Lanuto v Constantine, 192 AD2d 989, 991, lv denied 82 NY2d 654). This also requires competent supporting medical evidence to demonstrate that the injury was caused by the accident (see, La Rue v Tucker, 247 AD2d 702, 704 [3rd Dept., 1998]); and that there is a causal connection between the accident and the asserted curtailment of specific activities (see e.g., Bennett v Reed, 263 AD2d 800, 801 [3rd Dept., 1999]).

Defendant supports his motion with the report of Arnold Goran, M.D. F.A.C.S. who performed an independent medical examination of plaintiff on September 12, 2006 with respect to all of plaintiff's symptoms other than TMJ; and the report of Kenneth S. Roll, D.D.S., who performed an examination of plaintiff on April 12, 2007 with regard to TMJ. The report of Dr. Goran's neurological examination recites as follows:

"Mr. Phillips stated height and weight are 5'11", 240 pounds. He is right handed.

"He has full range of motion of head and neck. He is able to lift his hands above his head and place his palms together, although with some mild difficulty in regards [to] the right upper extremity. The motor examination of the upper extremities including manual testing of the flexor pollicis brevis, opponens pollicis, abductor pollicis brevis, adductor pollicis brevis, flexor digiti quinti, flexor digitorum sublimis, opponens digiti quinti, abductor digiti quinti, interossei, extensor pollicis brevis, extensor pollicis longus, extensor carpi radialis, extensor carpi brevis, extensor digitorum communis,

extensor carpi ulnaris, flexor carpi radialis, flexor carpi ulnaris, flexor pollicis longus, lumbricales and flexor digitorum brevis were all within normal limits². The biceps and triceps jerks are diminished. The sensor examination is unremarkable.

“Motor examination for lower extremities is within normal limits. Knee and ankle jerks are 2+. Sensory examination for lower extremities is within normal limits. There are no pathologic reflexes. Station and gait are unremarkable. He did not have any difficulty getting on and off the examining table or removing his shirt or shoes or socks. . . .

“Diagnosis:

1. Cervical sprain, mild, associated with pain in the right shoulder; casually related to the motor vehicle accident of 10/20/03
2. Chronic low back sprain, pre-existing and not aggravated by the motor vehicle accident of 10/20/03.”

A careful review of Dr. Goran’s report reveals that Dr. Goran’s findings with respect to the range of motion of plaintiff’s head and neck, and the examination of plaintiff’s upper and lower extremities are non-factual and conclusory, as he does not describe the objective tests he performed³ (see Schacker v County of Orange, 33 AD3d 903 [2nd Dept., 2006] [Held: It was insufficient for the examining orthopedist to merely indicate that the plaintiff had a full range of motion of his cervical, lumbar spine, and shoulders without setting forth the objective testing the doctor performed to reach this conclusion]). In addition, Dr. Goran

²All of the muscles are located in the hand and arm.

³The muscles Dr. Goran which describes appear to be located in the hand and arm. Dr. Goran does not specify the tests he performed with regard to plaintiff’s head, neck and shoulder.

fails to address the alleged pain and burning sensation in plaintiff's shoulder blades (mentioned in plaintiff's bill of particulars). While Dr. Goran indicates that during the examination the plaintiff was able to lift his hands above his head and place his palms together, he does not quantify the degree of the extension of plaintiff's arms. The Court finds that the defendant failed to satisfy his burden of proof on the motion as to the foregoing injuries, with respect to the significant limitation serious injury threshold category or the permanent consequential limitation serious injury threshold category.

Turning to the affidavit of defendant's expert, Kenneth S. Doll, D.D.S., Dr. Roll indicates that he examined plaintiff on April 12, 2007. At that time he took x-rays of plaintiff's temporal mandibular joint. Based upon his review of the x-rays, and an MRI performed on November 5, 2003, Dr. Roll found that plaintiff's jaw to be normal in both the open and closed position. He concluded that there was no evidence of disc displacement and no internal derangement of the temporal mandibular joint. Dr. Roll indicates that radiographic studies show normal TMJ function. During his physical examination of plaintiff he found plaintiff to have a 45 millimeter maximal incisal opening of the TMJ which was straight. Dr. Roll indicated that this was within the normal range for adults and the straightness shows the lack of any deviation. He also indicated that plaintiff did not exhibit any tenderness to palpation of the masseter, temporalis, or pterygoid muscles. He did find some positive right medial pterygoid muscle tenderness which he estimated was only a two or three on a scale of one to ten (which in his view was not significant). Dr. Roll also

pointed out that it appeared from records of one of plaintiff's treating physicians (Dr. Cho) that plaintiff had a pre-existing problem with regard to his temporal mandibular joint area on August 27, 2001.

Plaintiff has submitted the report of Dr. Barry M. Mark D.D.S., Lac, CAc, who examined plaintiff on August 3, 2007. Dr. Mark indicates that his examination of plaintiff's temporomandibular joints revealed a pronounced tenderness to palpation in both lateral poles (the areas in front of the ears). He indicates that he found moderate tenderness in the posterior walls. While range of motion was not limited, he indicates that there was facial pain with inter-incisal opening, right and left lateral exclusive movement and protrusive movement. With respect to causal relationship of the TMJ to the subject accident, Dr. Mark states:

“It is my opinion that the present chief complaints are the result of injuries sustained in the motor vehicle accident which occurred in 10/20/03. Further treatment is indicated as mentioned above. Masticatory function has been impaired in that there is pain with all mandibular movements. There is, therefore, a decreased ability to masticate and speak. It is my opinion that this patient's masticatory function is seventy-five percent of his pre-accident status. There is also cervical involvement and there is limitation in regard to any bending and lifting.”

Notably, at another place in the same report, Dr. Mark comments that “[the plaintiff] states that none of the aforementioned symptoms were present before the Motor Vehicle Accident.” In contrast, as noted above, the defendant points out that the records of plaintiff's treating physician, Dr. Cho, contains an entry dated August 27, 2001 concerning

headaches and pain in the TMJ area below plaintiff's eye (which reportedly commenced after dental work was performed on the plaintiff). The symptoms and area affected, as described by Dr. Cho in his August 27, 2001 entry, are very similar to those mentioned by the plaintiff during his pre-trial deposition. The report of Dr. Mark does not acknowledge any awareness on the part of Dr. Mark with regard to plaintiff's history involving TMJ. As such, it fails to differentiate between plaintiff's pre-accident complaint involving TMJ and his current one, with regard to the issue of causation. In a similar fashion, it is uncontroverted that plaintiff suffered a previous accident in 1996 in which he sustained a disc herniation at L5-S1. Plaintiff's expert, Dr. Mark, fails to adequately discuss lower back injuries in his report⁴. The issue of causation with regard to these pre-existing injuries is never addressed.

It is well settled that where the defendant demonstrates that there was a pre-existing medical condition, the burden shifts to the plaintiff to come forward with evidence addressing defendant's claimed lack of causation (see Franchini v Palmieri, 1 NY3d 536, 537 [2003]; Pommells v Perez, 4 NY3d 566, 580 [2005]; Knoll v Seafood Express, 5 NY3d 817, [2005]). In this instance, because plaintiff's expert failed to present objective medical evidence to causally link injuries which have been shown to have pre-existed the accident which occurred on October 20, 2003, the Court finds that plaintiff's complaint as it relates

⁴Dr. Mark is a dentist and acupuncturist. The Court finds it unnecessary, here, to address the issue of Dr. Mark's qualifications to render an expert opinion regarding matters outside the practice of dentistry.

to such injuries, must be dismissed.

With regard to the 90/180 day serious injury threshold category, it is the Court's view that Dr. Goran (who examined plaintiff well over two years after the date of the accident) did not adequately address plaintiff's limitations during the 180 days immediately following the accident. The Court finds that defendant failed to carry his burden of proof as to this serious injury threshold category (see Ames v Paquin, 40 AD3d 1379, 1380 [3rd Dept., 2007]).

Accordingly, it is

ORDERED, that defendants' motion for summary judgment is granted in part and denied in part; and it is further

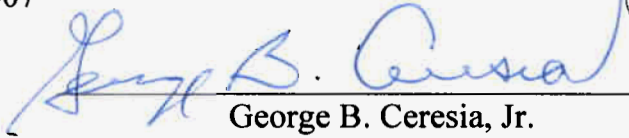
ORDERED, that defendant's motion for summary judgment is granted with respect to the following of plaintiff's injuries: headaches in the temple areas, TMJ, dizziness, facial pain on both sides, cracking in both jaw joints, difficulty chewing, pain while chewing, headaches in the temporal area, pain while smiling, temporal tendinitis, pain in the lower back including L5-S1, herniated disc, worsening of L5-S1 disc herniation, lumbar sprain; and it is further

ORDERED, that defendant's motion for summary judgment is denied with regard to plaintiff's complaints regarding his neck, cervical spine and right shoulder.

This shall constitute the decision and order of the Court. All papers are returned to the attorney for the plaintiff, who is directed to enter this Decision/Order without notice and

to serve all attorneys of record with a copy of this Decision/Order with notice of entry.

Dated: December 31, 2007
Troy, New York



George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Notice of Motion dated July 25, 2007, Supporting Papers and Exhibits
2. Affirmation in Opposition of Derek J. Spada, Esq., dated August 30, 2007, Supporting Papers and Exhibits
3. Affidavit of James M. Phillips, sworn to August 31, 2007
4. Reply Affirmation of Kerry-Ann Lawrence, Esq., dated September 21, 2007, Supporting Papers and Exhibits