**Mella v Biendenid**

2007 NY Slip Op 34295(U)

December 27, 2007

Supreme Court, New York County

Docket Number: 0100684/2006

Judge: Deborah A. Kaplan

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SCANNED ON 1/7/2008

[*1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon Deborah Kaplan DEBORAH A. KAPLAN J.S.C. PART 22

Index Number : 100684/2006

MELLA, ALVIN

VS

BIENDENID, VILLANUEVA

Sequence Number : 002

SUMMARY JUDGMENT

CAL #54

INDEX NO. _____

MOTION DATE 10-17-07

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for summary judgment

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | |
| Answering Affidavits — Exhibits | |
| Replying Affidavits | |

**Cross-Motion:** ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and cross-motion for summary judgment are denied in accordance with the attached Decision/Opinion, and it is further,

ORDERED that the parties shall appear for a pre-trial conference on 2-7-08, 9:30 am at Part 22, 80 Centre St. Room 136.

This constitutes the Decision and Order of the Court.

FILED

JAN 07 2008

NEW YORK COUNTY CLERK'S OFFICE

Dated: 12-27-07

Deborah Kaplan

DEBORAH A. KAPLAN J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 22

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ALVIN MELLA,

Plaintiff,

Index No. 100684/06

-against-

VILLANUEVA BIENDENID and JFG TRUCKING, INC.,

Defendants.

----------x

FILED
JAN 07 2008
COUNTY CLERK'S OFFICE
NEW YORK

DEBORAH A. KAPLAN, J.:

Defendants Villanueva Biendenid (Biendenid) and JFG Trucking, Inc. (JFG) move, pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint on the ground that plaintiff Alvin Mella (Mella) has failed to make a prima facie showing of "serious injury" as defined under the New York State Insurance Law § 5102 (d).

This is an action for personal injuries allegedly sustained by Mella on July 8, 2005, as a result of a motor vehicle accident which occurred on West 206th Street at or near its intersection with 9th Avenue in New York county. Mella alleges that he was sitting in his parked car when it was struck by a truck owned by JFG and operated by Biendenid.

On the same day, plaintiff sought medical care at Crotona Heights Medical, P.C. After complaining of pain in his neck, lower back, left ankle, and shoulders, plaintiff was examined by Dr. Andrew Cardaro, who recommended, among other things, that

plaintiff have x-rays and MRIs, and undergo physical therapy. Dr. Cardaro gave plaintiff prescriptions for pain, and various medical devices to use at home.

That same day, Dr. Tarakhchyan, a chiropractor, conducted a physical examination and performed various tests on plaintiff. Plaintiff received about three or four months of chiropractic therapy and treatments following the accident. On August 19, 2005, plaintiff had two MRIs taken. In his written account, Dr. Ronald Roskin, a board certified radiologist, reports that the MRI of the cervical spine showed a "reversal of the cervical curve . . . [and] posterior bulging of the intervertebral discs at C5-C6 causing impingement of the cervical spinal cord." The MRI of the lumbar spine revealed "posterior bulging of the intervertebral disc at L5-S1 causing impingement of anterior thecal space."

In his affidavit, plaintiff contends that, at the time of the accident, he was 31 years old, employed full-time as a marketing representative, and in excellent health. He claims that, as a result of the accident, he continues to suffer pain in his neck and lower back, and that the pain interferes with the daily activities of his life. Specifically, he alleges that he cannot exercise or stand or sit for long periods at a time, that he has trouble sleeping, lifting, and bending, and that he continues to take pain medications. Plaintiff claims that he stopped treatment

with his doctors and therapists when his "no-fault" insurance ran out, since he could not afford to pay the bills.

In his verified bill of particulars, dated April 6, 2006, plaintiff alleges that he sustained, among other things, the following injuries: bulging discs at C5-C6 and C6-C7 with impingement of the cervical spinal cord; a bulging disc at L5-S1 with impingement of the thecal space; reversal of the cervical curve; cervical radiculopathy; cervical sprain/strain; lumbosacral radiculopathy; and lumbar strain/sprain. Plaintiff claims that these injuries constitute a permanent injury, a serious disfigurement, a disabling injury for a period in excess of 90 days out of the first 180 days following the accident, and a permanent consequential limitation of use of a bodily organ and/or member. It is further alleged that, following the accident, plaintiff was confined to bed for a period of approximately one week, and confined to his home for approximately three weeks, except for necessary and essential purposes.

Defendants argue that plaintiff's complaint should be dismissed because plaintiff's alleged injuries do not meet the statutory serious injury threshold under Insurance Law § 5102 (d). Pursuant to New York's Comprehensive Motor Vehicle Insurance Reparation Act (Insurance Law § 5101, et seq. - the "No Fault" statute), a party seeking damages for pain and suffering arising out of a motor vehicle accident must establish that he or she has

suffered a "serious injury" as contemplated by New York State Insurance Law § 5102 (d). Serious injury is considered by the courts to be a "threshold" issue, and thus, a necessary element of plaintiff's prima facie case (Licari v Elliott, 57 NY2d 230 [1982]; Toure v Harrison, 6 AD3d 270 [1st Dept 2004]; Reid v Brown, 308 AD2d 331 [1st Dept 2003]; Insurance Law § 5104 [a]). This is in accord with the original intent of the No-Fault law, which was to eliminate recovery in common-law tort actions for minor personal injuries (Rubensccastro v Alfaro, 29 AD3d 436 [1st Dept 2006]).

On a motion for summary judgment for the failure to sustain a "serious injury," within the meaning of Insurance Law § 5102(d), the defendants bear 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 (see Pommells v Perez, 4 NY3d 566 [2005]; Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]; Pirrelli v Long Island Railroad, 226 AD2d 166 [1st Dept 1996]).

In support of their claim that plaintiff did not sustain a serious injury, defendants may rely either on the sworn statements of their examining doctor wherein the physician affirms that plaintiff had a normal examination (see Gaddy v Eyler, 79 NY2d 955, supra), or plaintiff's deposition testimony and the unsworn reports prepared by plaintiff's examining physician (Fragale v

Geiger, 288 AD2d 431 [2d Dept 2001]; Pagano v Kingsbury, 182 AD2d 268 [2d Dept 1992]).

Once defendants meet this burden, the burden shifts to the plaintiff to demonstrate, by the submission of objective proof of the nature and degree of the injury, that he/she did sustain such an injury, or that there exists an issue of fact as to whether the purported injury was "serious" (Pommells v Perez, 4 NY3d 566, supra; Toure v Avis Rent-A-Car Sys., Inc., 98 NY2d 345, supra). Subjective complaints alone are insufficient (see Toure v Avis Rent A Car Systems, Inc., supra; Gaddy v Eyler, 79 NY2d 955, supra).

In the first instance, the court makes the determination as to whether the injuries sustained by the plaintiff fall within the definition of a "serious injury" (see Licari v Elliott, 57 NY2d 230, supra). 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.

In support of their motion to dismiss, defendants proffer, among other things, the affirmed medical report of Dr. Daniel J. Feuer, defendant's examining neurologist, who reviewed plaintiff's bill of particulars, the MRI reports by Dr. Ronald Roskin, and plaintiff's medical records and history, including plaintiff's treating physicians' notes. During his neurological examination, Dr. Feuer conducted range of motion tests of the cervical spine and the lumbosacral spine, and found them to be within normal ranges.[1] The straight leg raising test was negative. He noted no clinical deficits which would support a diagnosis of cervical or lumbosacral radiculopathy, and that MRI testing failed to document any nerve root impingement to support radiculopathy. Dr. Feuer opined that there was no objective neurological disability or permanency which was causally related to the subject accident, and that plaintiff had the ability to engage in full and unrestricted daily activities.

Defendants also submit the medical report of Dr. Leon Sultan, an orthopedist, who performed an independent medical examination of the plaintiff on January 22, 2007, at defendants' request. Dr. Sultan reviewed plaintiff's medical records and history. During his examination of plaintiff, Dr. Sultan conducted, among other things, range of motion tests of

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[1] Dr. Feuer compares plaintiff's degrees of ranges of motion with normal ranges of motion by designating numeric percentages to the ranges of motion.

plaintiff's cervical spine, and thoracolumbar spine. He also conducted the Trendelenburg test, the straight leg raising test, and the Patrick test. Dr. Sultan found that plaintiff's ranges of motion were all within normal ranges[2], and that the straight leg raising test in the supine position was negative. Dr. Sultan concluded that the examination failed to "confirm any residual causally related orthopedic or neurological impairment in regard to the [subject accident]. . . [and] there is no correlation between today's spinal examination and the above-described spinal MRI readings."

Plaintiff argues that Drs. Feuer's and Sultan's reports fail to establish a prima facie case because they did not perform objective range of motion tests. Plaintiff points to Dr. Sultan's report wherein he states that he obtained his range of motion findings by "visual measurements," and Dr. Feuer's failure to identify what, if any, objective range of motion tests he performed on plaintiff. Indeed, the record is unclear as to what extent objective tests were used by defendants' experts. See Palladino v Antonelli, 40 AD3d 944 (2nd Dept. 2007); Park v Champagne, 34 AD3d 274 (1st Dept. 2006); Taylor v Terrigno, 27 AD3d 316 (1st Dept. 2006); Nagbe v Mini Green Hacking Corp., 22 AD3d 326 (1st Dept. 2005). Thus, plaintiff correctly argues that

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[2] Dr. Sultan compares plaintiff's degrees of ranges of motion with normal ranges of motion by designating numeric percentages to the ranges of motion.

defendants have failed to demonstrate a prima facie case that plaintiff did not sustain a serious injury.

Even if the defendants had met their burden of proof on the motion, the plaintiff's submissions in opposition raise a triable issue of fact.

In opposition, plaintiff submits, in addition to his own affidavit, an affirmed affirmation of Dr. Aric Hausknecht, a neurologist, dated November 7, 2006. Dr. Hausknecht initially examined plaintiff on November 8, 2005, and re-evaluated and examined plaintiff on January 4, 2006, August 2, 2006, and November 7, 2006.

On November 8, 2005, Hausknecht performed a physical examination of plaintiff which revealed "cervical paravertebral tenderness and associated muscular spasm ... lumbosacral paravertebral tenderness and associated muscular spasm ... [a] 20 percent loss of lateral flexion in the cervical spine on both sides ... [and a] 33 percent loss of forward flexion in the lumbar spine." On January 4, 2006, and August 2, 2006, Dr. Hausknecht noted no significant clinical improvement, and that plaintiff had reached maximal medical improvement from rehabilitation. He advised plaintiff to undergo a series of lumbosacral epidural steroid injections[3], instructed plaintiff to perform stretching

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[3] Plaintiff states that he did not undergo the steroid injections, believing that the risks were too high.

exercises at home, and advised him to take over-the-counter anti-inflammatory drugs as needed.

On November 7, 2006, Dr. Hausknecht performed various tests on plaintiff. The mechanical test showed cervical and lumbosacral paravertebral tenderness and associated muscular spasm. The Spurling maneuver was positive on the left, and the seated straight leg raising tested positive on the left at 60 degrees. The range of motion test of the cervical spine[4] revealed the following: L lateral flexion: 40 degrees (normal: 50 degrees) and R lateral flexion: 35 degrees (normal: 50 degrees). The L rotation, R rotation, forward flexion, and extension were all normal. The range of motion of the lumbar spine measured normal except for forward flexion, which measured 65 degrees (normal: 90 degrees).

Dr. Hausknecht's impression of the plaintiff was that he had cervical derangement with C5-6 and C6-7 disc bulges with associated spinal cord impingement, and lumbosacral derangement with L5-S1 disc bulge with associated left L5-S1 radiculopathy. He opined "with a reasonable degree of medical certainty [that plaintiff's] injuries are causally related to the motor vehicle accident that occurred on July 8, 2005." He further opined that

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[4] Dr. Hausknecht's report notes that he measured plaintiff's ranges of motion using an arthroidal protractor and goniometer, and analyzed the results pursuant to the guidelines by the NYS Division of Disability Determination and the American Medical Association.

the objective test results demonstrate that plaintiff has sustained permanent consequential limitation of use of his cervical and lumbosacral spine, that his prognosis is poor for further recovery, and that plaintiff's injuries have limited the activities of his daily living.

In order to establish a permanent consequential limitation of use of a body organ or member, and/or a significant limitation of use of a body function or system, the plaintiff must show more than "a minor, mild or slight limitation of use [citation omitted]" (see Grossman v Wright, 268 AD2d 79, 83-84 [2d Dept 2000]). Although a bulging or herniated disc may constitute a serious injury within the meaning of Insurance Law § 5102 (d) (see Pommels v Perez, 4 NY3d 566, supra; Nagbe v Minigreen Hacking Group, Inc., 22 AD3d 326 [1st Dept 2005]; Arjona v Calcano, 7 AD3d 279 [1st Dept 2004]), plaintiff must submit objective evidence of the extent of the alleged physical limitations resulting from the disc injury and its duration (id.; Simms v APA Truck Leasing Corp., 14 AD3d 322 [1st Dept 2005]).

A CT scan or positive MRI may constitute objective evidence to support subjective complaints (see Arjona v Calcano, supra; Lesser v Smart Cab Corp., 283 AD2d 273 [1st Dept 2001]). Furthermore, evidence of range of motion limitations, and straight leg raising tests are objective evidence which can be used to substantiate a claim of serious injury sufficient to defeat a

motion for summary judgment (see Toure v Avis Rent A Car Systems, 98 NY2d 345, supra; Brown v Achy, 9 AD3d 30, supra; Toledo v A.P.O.W. Auto Repair/Towing, 307 AD2d 233 [1st Dept 2003]).

With respect to plaintiff's claims of a permanent consequential limitation and a significant limitation of use within the meaning of the Insurance Law, this court finds that plaintiff has provided sufficient objective medical proof to defeat defendants' motion for summary judgment. The conflicting evidence proffered by the parties' experts on the issue of serious injury and the issue of the permanency and significance of plaintiff's injury should properly be resolved at trial, and thus, is a sufficient basis to deny summary judgment (Noble v Ackerman, 252 AD2d 392 [1st Dept 1998]).

Plaintiff's submission of Dr. Hausknecht's affirmed medical report, which found positive straight leg raising, and offered a numeric percentage of plaintiff's loss of range of motion and the specific tests that were used, together with the positive MRI tests which were taken contemporaneous with the accident, constitute objective admissible evidence of serious injury, and raise an issue of fact as to whether plaintiff's injuries are permanent or sufficiently significant to meet the serious injury threshold (Bent v Jackson, 15 AD3d 46 [1st Dept 2005]).

However, plaintiff has failed to demonstrate that he suffered a serious disfigurement, or that he could not perform

substantially all of his daily tasks for 90 of the first 180 days due to an injury or impairment caused by the accident, as is claimed in the bill of particulars. In light of plaintiff's admission that he only missed three weeks of work, and his unsubstantiated claim that his injuries prevented him from performing substantially all of the material acts constituting his customary daily activities during at least 90 of the first 180 days following the accident, plaintiff has failed to raise a triable issue of fact regarding these issues (see Graham v Shuttle Bay, 281 AD2d 372 [1st Dept 2001].

Finally, with regard to plaintiff's gap in treatment, Dr. Hausknecht affirmed that plaintiff had "reached maximal medical improvement" (see Brown v Achy, 9 AD3d at 34). This, combined with plaintiff's adequate explanation as to why he could not afford to continue treatment after his no-fault insurance terminated, is sufficient to explain the reason for plaintiff's gap in treatment (see Pommells v Perez, 4 NY3d 566, supra).

Accordingly, it is

ORDERED that defendants Villanueva Biendenid's and JFG Trucking, Inc.'s motion for summary judgment dismissing the complaint is granted as to the category of disfigurement, and as to the "90/180" category of serious injury; and it is further

ORDERED that the remainder of defendants' summary judgment motion is denied.

DATED: December 27, 2007

ENTER:

Deborah Kaplan

J.S.C. DEBORAH A. KAPLAN J.S.C.

FILED
JAN 07 2008
NEW YORK
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