

Ssanson v McWilliams
2008 NY Slip Op 30598(U)
February 14, 2008
Supreme Court, New York County
Docket Number: 0118015/2004
Judge: Deborah A. Kaplan
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: Hon Deborah Kaplan
DEBORAH A. KAPLAN

PART 12

Index Number : 118015/2004 J.S.C.

SSANSON, MARCOS A. INDEX NO. _____

vs MOTION DATE 12-5-07

MCWILLIAMS, VEANA N. MOTION SEQ. NO. _____

Sequence Number : 004 MOTION CAL. NO. _____

SUMMARY JUDGMENT CAL # 110

The following papers, numbered 1 to 6 were read on this motion ~~to~~ for and cross motion for summary judgment dismissing complaint.

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...
Notice of Cross-motion
Answering Affidavits - Exhibits

PAPERS NUMBERED	
1	_____
2	_____
3, 4	_____
5, 6	_____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion and cross-motion are decided in accordance with the attached Opinion.

This constitutes the Decision and Order of the Court.

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

FILED
MAR 03 2008
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2-14-08

Deborah Kaplan
DEBORAH A. KAPLAN
J.S.C.

Check one: FINAL DISPOSITION DO NOT POST NON-FINAL DISPOSITION
Check if appropriate: REFERENCE

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

-----X
MARCOS A. SSANSON, ROSANNA M. ANTIGUA
and WILLY VENTURA,

Plaintiffs,

-against-

Index No. 118015/04

VEANA N. MCWILLIAMS and ANNIE M. DRAYTON,

Defendants.

-----X
DEBORAH KAPLAN, J.:

FILED
MAR 03 2008
NEW YORK
COUNTY CLERKS OFFICE

In this personal injury action, plaintiffs Marcos A. Ssanon (Sanson)¹ and Willy Ventura (Ventura)² seek damages for injuries they allegedly sustained in a motor vehicle accident on January 3, 2004. It is not disputed that the plaintiffs' vehicle was struck on the back left side by a vehicle operated by defendant Veana N. McWilliams and owned by defendant Annie M. Drayton while both vehicles were traveling on the Van Wyck Expressway in Queens County. At issue is the severity of the injuries sustained by plaintiffs as a result of the accident. The defendants now move for an order, pursuant CPLR 3212, dismissing the complaint on the ground that neither Sanson nor Ventura sustained "serious injury" as the term is defined by Insurance Law § 5102 (d). Sanson cross-moves for summary judgment, dismissing all claims, cross claims, and counterclaims against him.

¹The last name of plaintiff Marcos A. Ssanon is misspelled in the caption. The proper spelling is Sanson.

²By a prior order of the Court (Tingling, J), dated January 4, 2007, as amended by an order of the same Court dated February 20, 2007, the complaint was dismissed as to plaintiff Rosanna M. Antigua.

To prevail on a motion for summary judgment, the moving party must produce evidentiary proof in admissible form sufficient to show the absence of any material issue of fact and the right to judgment as a matter of law. See Kosson v Algaze, 84 NY2d 1019 (1995); Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Winegrad v New York Univ. Med Ctr., 64 NY2d 851 (1985); Zuckerman v City of New York, 49 NY2d 557 (1980). Where, as here, defendants seek summary judgment on the threshold “serious injury” issue (Insurance Law § 5102[d]), they bear the initial burden of establishing the absence of a “serious injury” as a matter of law. This is because, in enacting Insurance Law §5102(d), the Legislature intended to weed out frivolous claims and limit recovery to significant injuries arising from motor vehicle accidents. See Pommells v Perez, 4 NY3d 566 (2005); Toure v Avis Rent A Car Systems, 98 NY2d 345 (2002); Licari v Elliot, 57 NY2d 230 (1982). “Only in the event of ‘serious injury’ as defined in the statute can a person initiate suit against the car owner or driver for damages caused by the accident (Insurance Law § 5104 [a]).” Pommells v Perez, *supra* at 570.

If the moving party makes the requisite showing, the burden then shifts to the opposing party to come forward with proof in admissible form to raise a triable issue of fact requiring a trial. See Kosson v Algaze, *supra*; Alvarez v Prospect Hospital, *supra*; Winegrad v New York Univ. Med Ctr., *supra*; Zuckerman v City of New York, *supra*. The party opposing a motion for summary judgment on the threshold “serious injury” issue must come forward with objective proof of his injury to raise a triable issue. See Toure v Avis Rent A Car Systems, *supra*; Dufel v Green, 84 NY2d 795 (1995). Subjective complaints alone are not sufficient. See Toure v Avis Rent A Car Systems, *supra*; Gaddy v Eyster, 79 NY2d 955 (1992).

In his portion of the complaint, Sanson, the driver of the struck vehicle, alleges that, as a result of the impact, he sustained bulging annulus fibrosis, or bulging discs, at L4-L5 and L5-S1, with impingement on his thecal sac at both locations, as well as a contusion and/or sprain and/or strain to his right knee. Ventura, who was a passenger in the back seat of Sanson's vehicle, alleges in his portion of the complaint that he sustained an acute cervical musculo-ligamentous sprain/strain; an acute lumbosacral musculo-ligamentous sprain/strain; a contusion to his left clavicle; and "an adjustment disorder with mixed anxiety and depressed mood." Both plaintiffs sought and received medical treatment, which included diagnostic tests, physical therapy, and pain medication, and both claim to have sustained a permanent consequential limitation of use of a body organ or member, and a significant limitation of use of a body function or system (Insurance Law § 5102[d])³, entitling them to compensation beyond that provided for under New York's No-Fault insurance scheme. See New York Insurance Law §§ 5101 et seq. (New York's Comprehensive Motor Vehicle Insurance Reparation Act).

With respect to Sanson's allegations that his knee injury and bulging discs caused him to be confined to his bed and/or home for one day,⁴ and continue to cause him to suffer pain, defendants offer the sworn orthopedic and neurologic IME reports of Dr. Robert Israel and Dr.

³Pursuant to Insurance Law § 5102 (d), "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.

⁴Sanson does not claim that his injuries prevented him performing his usual and customary daily activities for 90/180 days immediately following the accident.

Robert April, respectively, whose opinions confirm that Sanson's injuries, which are now resolved, do not, and did not, meet the serious injury threshold.

According to his narrative report, Dr. Israel reviewed Sanson's medical history and documentation and performed an orthopedic examination on February 9, 2007. Dr. Israel noted, among other things, that Sanson, who did not appear to be in acute distress or discomfort, spoke of the injuries to his back and neck, and denied any history of a similar condition, or of another automobile accident. Upon examination, Dr. Israel found no evidence of an existing cervical injury, noted a normal lordosis along the cervical spine, without paraspinal or trapezius muscle spasm. Sanson's cervical compression testing was negative, and his cervical range of motion revealed flexion to 45°, 45° being normal; extension to 45°, 45° being normal; right rotation to 70°, 70° being normal; left rotation to 70°, 70° being normal; right lateral flexion to 45°, 45° being normal; and left lateral flexion to 45°, 45° being normal. Sanson's muscle strength tested at 5/5 (five out of five) in his biceps, triceps, wrist flexors and extensors bilaterally; that his deep tendon brachioradialis, biceps, and triceps reflexes were symmetrical; that grasping power was firm in both hands; and that Sanson exhibited normal proprioception without sensory deficit, and without radiation of pain or paresthesias.

Sanson's lumbar spine examination also revealed a normal lordotic curve, without spasm or tenderness over the paraspinal musculature on palpation. A sitting Lasegue's testing was negative bilaterally to 80° with 80° being normal, and a straight leg raising test was bilaterally negative to 75° in both the seated and supine positions with 75° being normal. Lumbar spine range of motion tests revealed forward flexion to 90°, 90° being normal; extension to 30°, 30° being normal; right lateral flexion to 45°, 45° being normal; and left lateral flexion to 45°, 45°

being normal. Bilateral patella and Achilles' deep tendon reflexes were symmetric, proprioception was normal with no sensory deficit on light touch and pinprick, his muscle strength of both lower extremities was graded at 5/5. No atrophy was noted in the muscles of the lower extremities, nor was there radiation of pain, numbness or tingling. Dr. Israel's stated impression was of a resolved sprain of the cervical spine and a resolved sprain of the lumbar spine, and that based on his "examination from an orthopedic point-of-view, the claimant has no disability as a result of the accident of record."

On February 12, 2007, Sanson appeared for a neurologic IME at the office of Dr. April. According to his report, Dr. April reviewed Sanson's medical documents, studies, and reports, took a history, and performed a neurologic exam. Dr. April noted that Sanson was able to sit, stand up, walk alone from the consultation room to the examining room, disrobe, get on and off the examining table, lie down, sit up, and stand without difficulty or indication of pain.

The cranial nerve examination revealed that the range of motion of Sanson's neck was "90° lateral rotation, with 40° extension and full flexion to chest.⁵ The neck movement was not associated with radiating pain to the neck and shoulder. Shoulder shrug was full. The plaintiff had no problems with hearing or vision."

The results of his motor examination were unremarkable, with motor power assessment at 5/5 in the muscles of the upper and lower limbs, reflexes present and equal in the upper and lower limbs, and no evidence of atrophy, fasciculations (twitching, spasm), tremor or rigidity.

⁵Although Dr. April does not provide data as to the accepted norms for the lateral rotation (90°) and extension (40°) range of motion findings, plaintiff does not challenge or explain the meaning of these findings.

Babinski sign was absent, as were any problems with his gait, stance, tandem walking, or walking on his toes and heels, or running in place.

The mechanical examination revealed: straight leg raising negative to 80° bilaterally, with normal range of 75° to 90°; Bowstring sign absent; percussion and palpation of the vertebral column unremarkable; no spasm of the paraspinal musculature; and no evidence that Sanson had difficulty sitting unaided. His lumbar spine range of motion was normal, that being 85° flexion, 30° extension, 30° left and right lateral bending, and 30° right and left thoracolumbar rotation. His ranges of motion of his upper limbs (measured by an orthopedic caliper) were found to be normal, that being 180° extension at the shoulder and full reach behind the back, without limitation in pronation, or supination; elbow flexion at 130° and wrist flexion at 90°, and there was no Tinel sign, and no indication of carpal tunnel syndrome.

Finally, during the sensory portion of the examination, Sanson exhibited normal and symmetrical perception of touch, pin, and vibration in all parts of his body that were stimulated, and Dr. April found no evidence of mottling of skin or changes in local temperature or skin turgor.

Dr. April opined that, “based upon the history and examination as well as review of documents, it is concluded with reasonable medical certainty, that the accident of record did not produce a neurological diagnosis, disability, limitation or need of further intervention.”

The IME reports constitute prima facie evidence that plaintiff has minimal, if any, limitations of movement and does not suffer from one or more serious injuries as a result of the accident. Accordingly, the burden shifts to Sanson to demonstrate, through the submission of objective evidence, that a question of fact exists as to whether he sustained a serious injury as

defined by Insurance Law § 5102(d). To defeat a motion for summary judgment “an opponent . . . must make his showing by producing evidentiary proof in admissible form” or an acceptable excuse for his failure to meet this stringent requirement. See Zuckerman v City of New York, supra.

In response to defendants’ motion, Sanson offers, in addition to his own sworn affidavit and deposition testimony, copies of unsworn and unaffirmed medical records, reports, and studies which cannot be considered because they are not in admissible form. See Grasso v Angerami, 79 NY2d 813 (1991). Although the absence of admissible objective evidence is fatal to Sanson’s cause of action, a review of his submissions confirms defendants’ contentions that his purported injuries did not and do not meet the statutory definition of “serious injury.”

On January 12, 2004, Sanson complained to Dr. Noel Howell of Inwood Hill Medical, P.C. of pain in his lower back and to his right knee. Dr. Howells’ records reveal that Sanson underwent surgery with the insertion of internal fixation (screws) to the same knee back in 2003 to repair injuries he sustained in one or more prior automobile accidents. In addition to a limp, Dr. Howell noted, without specifics, limited range of motion of the lumbosacral spine with spasm, as well as a contusion and/or sprain and/or strain of the right knee. He treated Sanson with analgesics, muscle relaxants and physical therapy, and referred him for diagnostic tests which were performed between January and February 2004. According to the diagnostic reports, x-rays revealed that Sanson did not sustain a fracture to his lumbar spine, right hip, or left hip; a CT scan of his right knee revealed only the presence of orthopedic screws within the patella transfixing an old fracture; a CT scan of the lumbar spine was positive for bulging discs at L4-L5 and L5-S1 with impingement on the thecal sac at both locations; and the results of

electromyography and nerve conduction velocity testing (EMG/NCV) of his upper and lower extremities were largely normal. The unsworn, unaffirmed report of a physiatrist revealed muscle spasm and tenderness of the lumbar spine with reduced flexion and extension, and reduced left and right lateral flexion range of motion, for which the physiatrist recommended physical therapy for one month to his lower back.

In his final narrative report (also neither sworn to nor affirmed), dated April 28, 2004, Dr. Howell reported that Sanson was making slow progress, recommended continued physical therapy, and stated that it was his opinion that the injuries Sanson sustained were consistent with the accident.

Not only do Sanson's medical documents fail to distinguish between his current claims of injury, pain, and limitations, from his past claims of injury, pain, and limitations which came about as a result of his prior automobile accident and knee surgery, but he inexplicably fails to submit any recent medical tests or reports to support his allegations. Sanson's sworn affidavit and deposition testimony relate subjective complaints of pain, and suggest that the only real curtailment on his daily activities is his inability to walk without tiring, and his inability to play baseball in a pick-up game, although he acknowledges participating in baseball practice. There is no evidence that he sought any treatment for his claimed injuries after the spring 2004, and his contention that he was told that further treatment would be of no avail, is hearsay and insufficient. Neither his affidavit nor his deposition testimony make up for the lack of objective medical proof necessary to substantiate his claims and to defeat defendants' motion for summary judgment. See Pommells v Perez, supra at 574.

With respect to Ventura's allegations of serious injuries, movants again offer an affirmed

orthopedic IME report by Dr. Israel and an affirmed neurologic IME report by Dr. April, in which both physicians opine that Ventura's claimed injuries are resolved.

According to his December 15, 2006 report, Dr. Israel reviewed Ventura's prior testing results, reports, and studies, and he performed an orthopedic physical examination of Ventura's lumbar spine and left shoulder. During the IME, Ventura exhibited a full range of motion of the shoulder (anterior flexion to 170°, 170° being normal; abduction to 180°, 180° being normal; adduction to 45°, 45° being normal; external rotation to 45°, 45° being normal; internal rotation to 45°, 45° being normal; and posterior extension to 45°, 45° being normal), and he lacked symptoms of spasm, tenderness, radiation of pain, numbness, impingement, tingling, instability, or atrophy, and his drop arm, Yergason, apprehension, and speed tests were negative. Based on these findings, coupled with his medical history, Dr. Israel's medical impression was of a resolved sprain of both the lumbar spine and the left shoulder, and he concluded that Ventura does not have a physical disability as a result of the accident.

The results of Ventura's neurologic examination are set forth in the December 20, 2006 IME report by Dr. April, in which he states that he reviewed Ventura's medical history, including psychological testing, psychiatric, chiropractic, electrodiagnostic studies, and radiologic reports, and that he performed a physical examination of Ventura. The neurologic report notes that Ventura appeared to be an alert and cooperative young man who missed six days of school because of the accident⁶, and that Ventura did not show any signs of depression or mood alteration. Dr. April reported that Ventura's cranial nerve, motor, mechanical, and sensory

⁶Ventura does not claim that his injuries prevented him performing his usual and customary daily activities for 90/180 days immediately following the accident.

examinations were 'normal,' and that he found no evidence of atrophy or fasciculations. Ventura did not exhibit problems with his gait, his stance, or with walking on his toes or heels, his tandem walking was normal, his reflexes were present and equal in his upper and lower limbs, a Babinski reflex sign was absent, as were tremor and rigidity. Ventura's straight leg raising was negative to 80° bilaterally (normal range is 75° to 90°), Bowstring sign was absent, no trouble sitting unaided, percussion and palpation of the vertebral column were unremarkable, there was no spasm of the paraspinal musculature, and the range of motion of his lumbar spine was normal, that being 75° flexion, 30° extension, 30° left and right lateral bending, and 30° right and left thoracolumbar rotation. His ranges of motion of his upper limbs were found to be normal, that being (as measured by an orthopedic caliper), 180° extension at the shoulder and full reach behind the back, without limitation in pronation, supination, elbow flexion at 130° and wrist flexion at 90°, and there was no Tinel sign, and there was no indication of carpal tunnel syndrome.

Dr. April's medical impression was that "there are no objective neurologic findings and nothing in this entire review that would suggest a significant injury to the nervous system or any other system. He is not disabled and does not need a further neurological intervention."

The IME reports confirm that the chief complaints for which Ventura sought and received minimal treatment consisted of cervical muscle spasm and sprains to his lumbar spine and left shoulder, and that these ailments, which are now resolved, had minimal impact on this daily life. Accordingly, movants have made a prima facie showing that Ventura's claimed injuries do not satisfy the serious injury threshold requirement, thereby shifting the burden to Ventura to raise a triable issue of fact as to the seriousness of his injuries.

In response, Ventura offers his sworn affidavit; his deposition transcript; and copies of medical records and narrative reports from 2004, as well as an undated physical therapy intake evaluation form, and an assortment of insurance/benefit forms. However, the medical reports, impressions, studies, and results are not in admissible form, as they are neither sworn to nor affirmed. See Zuckerman v City of New York, *supra*. Ventura does not offer an explanation for submitting these documents in this manner, and accordingly, Ventura's medical submissions cannot be considered in opposition to the motions before the court. See Grasso v Angerami, 79 NY2d at 814 - 815. Moreover, as stated above with regard to Sanson, even if these documents were admissible, upon a review of their content, it is evident that they do not support a claim of serious physical injury, precluding this plaintiff from maintaining this tort action.

Ventura submits a report from Dr. Howell, dated January 12, 2004, in which he states that, due to the presence of muscle spasm, limitations of movement, and expressions of pain, he was recommending a course of physical therapy, analgesics, and muscle relaxants, and was referring Ventura to diagnostic specialists. In his second and final narrative report, dated June 21, 2004, Dr. Howell stated that, upon physical examination, Ventura "appears to be well-developed, [with] no apparent distress from the stated injuries." Dr. Howell reported that he exhibited a full range of motion on orthopedic examination, but that he also exhibited limitations, pain, and spasm on his lumbosacral spine and cervical spine. Dr. Howell opined that Ventura's condition, which consisted of severe trauma to the spine with misaligned vertebrae, stretched muscles, irritated nerves and inflamed soft tissues, was directly related to the accident, and he recommended that Ventura "continue physical therapy [] to alleviate pain and to prevent any further progression of this disability."

The radiology report, dated January 12, 2004, notes proper alignment of Ventura's cervical spine and left shoulder, without evidence of fracture, dislocation, bony or joint abnormalities, or abnormal soft tissue calcification. The January 14, 2004 cervical spine magnetic resonance imaging [MRI] report notes a "loss of the normal anterior cervical lordosis indicating muscle spasm," and the February 4, 2004 lumbar spine MRI report found no evidence of abnormalities. A physiatrist's report, dated February 3, 2004, noted limitations on Ventura's cervical and lumbar movement with the presence of muscle spasm and tenderness, and concluded that Ventura was suffering from both a cervical and lumbar sprain and strain. The EMG/NCV results conclusively ruled out radiculopathy, with all motor nerve conduction and sensory nerve conduction studies producing normal findings. Suggested treatment consisted of continued physical therapy for one to two months, and recommended that Ventura avoid heavy lifting, bending, pulling, and pushing.

The psychological evaluation, like the other reports, was prepared in or about late January/early February 2004, and concludes that Ventura exhibits symptoms of posttraumatic stress as a result of the accident, and has a need of short-term individual psychotherapy to ventilate his emotions and to reduce anxiety and stress levels.

Ventura's affidavit and deposition testimony contain subjective complaints of pain and limitations which are inadequate to rebut the movants' prima facie evidence. See Toure v Avis Rent A Car Systems, *supra*; Gaddy v Eyler, *supra*; Munoz v Hollingsworth, 18 AD3d 278 (1st Dept 2005). His assertions that he is in pain if he sits or stands for a long period of time, that he is no longer able to dance or play baseball are insufficient to raise a triable issue of fact (*id.*), and his statement that his doctor told him that further treatment would not be helpful due to lack of

improvement constitutes inadmissible hearsay.

The medical reports, which are submitted in inadmissible form, are more than three and a half years old, and they are consistent in their diagnosis of soft-tissue injuries of spasm, strains, sprains and bulging discs, and they are consistent with their recommended courses of treatment consisting of physical therapy, analgesics, and muscle relaxants as well as short term psychotherapy. Even setting aside the issue of admissibility, Ventura offers no objective evidence to support his subjective complaints of continued pain and lack of mobility, nor does he submit evidence of either ongoing, or more recent, diagnostic testing or treatment which would lend support to Ventura's claim that he sustained serious physical injuries in the January 2004 accident which continue to impact his daily life in a meaningful way. See Lopez v Senatore, 65 NY2d 1017, 1019 (1985). The presence of soft tissue injury, "even if persistent or protracted, will not quality as a serious injury in the absence of competent medical evidence establishing a meaningful impairment or limitation as a result of the pain." Rath v Shafer, 267 AD2d 565, 566 (3rd Dept 1999).

Since neither plaintiff has met his burden of submitting admissible, objective medical proof of a serious injury sustained as a result of the subject accident, the defendants' motion is granted in its entirety and plaintiff Sanson's cross-motion is granted to the extent it seeks summary judgment dismissing the cross-claims against him. That branch of plaintiff Sanson's motion which seeks dismissal of the counterclaim sounding in contribution and indemnification is rendered moot by the dismissal of the complaint and cross-claims.

Accordingly, it is

ORDERED that the motion and cross motion for summary judgment is granted and the

complaint is dismissed in its entirety with costs and disbursements to defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the branch of the cross motion which seeks dismissal of the counterclaim is denied as moot; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: February 14, 2008

ENTER:



J.S.C.

DEBORAH A. KAPLAN
J.S.C.

FILED
MAR 03 2008
NEW YORK
COUNTY CLERK'S OFFICE