

Sproul v Azim

2008 NY Slip Op 31559(U)

June 2, 2008

Supreme Court, New York County

Docket Number: 0113522/2006

Judge: Deborah A. Kaplan

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PRESENT: Hon Deborah Kaplan **DEBORAH A. KAPLAN** PART 22
Justice

Index Number : 113522/2006
SPROUL, PERRY A.
VS.
AZIM, NURUL
SEQUENCE NUMBER : # 001
SUMMARY JUDGMENT
Cal # 90

J.S.C. 113522-06
INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. #001
MOTION CAL. NO. _____

read on this motion to for dismissal

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...
Answering Affidavits - Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion by the defendants for summary judgment is granted and the complaint is dismissed, as in accordance with the attached opinion.

like consistent to Decision and Order of the Court.

FILED
JUN 06 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: June 2, 2008

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

Check one: FINAL DISPOSITION
Check if appropriate: DO NOT POST

NON-FINAL DISPOSITION
 REFERENCE

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

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

-----X

PERRY A. SPROUL,

Plaintiff,

Index No. 113522/06

- against -

NURUL AZIM and YOUSRY E. ABOUZIED,

Defendants.

-----X

KAPLAN, J.:

Defendants move for summary judgment dismissing the complaint on the ground that plaintiff did not suffer a serious injury as defined by Insurance Law § 5102 (d).

Plaintiff, a self-employed accountant, brought this action to recover for injuries sustained after defendants' car struck his on September 22, 2004. He alleges that the accident permanently injured his back and right knee, confining him to home and bed for 14 days. The defendant's expert witnesses, Michael Rafiy, M.D., an orthopedist, examined plaintiff as part of this litigation indicates that plaintiff told him that two days after the accident, he went to a hospital emergency room complaining of pain in his lower back, shoulders, and right knee. He was examined, x-rayed, and released on the same day. Two days after the hospital visit, a Dr. Kaffay began to treat plaintiff with a course of physical therapy, chiropractic adjustments, acupuncture, massage, and heat. All treatments stopped in December 2004.

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Post-accident MRIs were taken of plaintiff's cervical spine, lumbar spine, and right knee. Plaintiff claims that the accident caused "permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; [and] 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]). Specifically, the bill of particulars alleges cervical sprain, bulging disc at C4-C5, post-traumatic cervical radiculopathy, bulging disc at L5-S1, straightened lumbar lordosis related to muscle spasm, right knee joint effusion, meniscal capsular separation in the region of the medial meniscus of the right knee, and right knee contusion with internal derangement.

The question of whether the accident caused plaintiff to suffer a "serious injury," in the first instance, must be decided by the court (*see Licari v Elliott*, 57 NY2d 230, 237 [1982]). In order to be granted summary judgment, defendants must establish a prima facie case that plaintiff did not sustain a "serious injury" as contemplated by Insurance Law § 5102 (d) (*Gaddy v Eyster*, 79 NY2d 955, 956 [1992]). If defendants succeed, the burden shifts to plaintiff to come forward with sufficient competent evidence demonstrating that he sustained a serious injury within the meaning of the statute (*id.*).

At defendants' request, plaintiff was examined by three physicians. Each made a sworn report. Rafiy, the orthopedist, examined plaintiff on August 23, 2007. He reports that plaintiff complained of right knee pain. Rafiy examined plaintiff's cervical spine and found a normal degree of flexion and extension, bending to the right and left, and rotation to the right and left, and no muscle spasm or tenderness. Examination of the lumbar spine revealed the same, and normal straight leg raising and reflexes. Examination of the right knee revealed no

swelling or increased warmth or tenderness, and a normal range of flexion, extension, and rotation. The report concludes that plaintiff is not disabled from an orthopedic point of view, suffers from no restriction or limitations, and needs no orthopedic treatment.

Neurologist Norman Sobol, M.D. examined plaintiff on August 23, 2007. Examinations of the cervical spine, thoracic spine, and lumbar spine revealed normal functioning, the same as in the orthopedist's report. Examinations of the cranial nerve, motor functions, reflexes, sensory functions, gait, and station revealed normal functioning. The report concludes that plaintiff is not disabled from a neurological point of view and needs no treatment.

Radiologist Audrey Eisenstadt, M.D. did not examine plaintiff in person. Her report, dated June 25, 2007, relates that she reviewed an MRI of plaintiff's lumbar spine, taken on December 8, 2004. She reports that the MRI shows desiccation and bulging at the L5-S1 intervertebral disc level. She states that the desiccation is a drying out of disc material, a degenerative process, that could not have occurred in less than three months' time and perforce predates the September 22, 2004 accident. Her report describes the bulging as degeneratively induced, related to ligamentous laxity, and not a traumatic abnormality. She found no condition related to the accident and identified no post-traumatic abnormalities.

On the same date, the radiologist made another report based on her review of the MRI of plaintiff's right knee. The radiologist concluded that the MRI, taken October 18, 2004, showed no joint effusion or bone contusion, no changes to the meniscal structures, and was in all respects normal.

Whether a limitation of use or function is significant or consequential " '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' " (*Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d 345, 353 [2002], quoting *Dufel v Green*, 84 NY2d 795, 798 [1995]). To prove the extent of physical limitation, an expert may

designate a numeric percentage of the plaintiff's loss of motion or may make a qualitative assessment of the plaintiff's condition (*Shinn v Catanzaro*, 1 AD3d 195, 198 [1st Dept 2003]). In this case, the orthopedist and neurologist subjected plaintiff to quantitative range-of-motion assessments, based on numeric percentages. They found plaintiff's range of motion to be normal. Their findings were objective, that is, not based on plaintiff's claims of pain or tenderness (*see Chen v Marc*, 10 AD3d 295, 296 [1st Dept 2004]). The radiologist's conclusion that plaintiff's lumbar problem was degeneratively induced was likewise based on objective evidence, the film of the MRI (*see Ortega v Maldonado*, 38 AD3d 388, 388 [1st Dept 2007]; *Chen*, 10 AD3d at 296).

Defendants' experts concluded that there was no objective evidence of a disability, no need for further medical treatment and/or testing, and no ongoing impairment resulting from the accident (*see Rossi v Alhassan*, 48 AD3d 270, 271 [1st Dept 2008]; *Uddin v Cooper*, 32 AD3d 270, 271 [1st Dept 2006]). Although the radiologist did not review the MRI of plaintiff's cervical spine, the other experts examined the cervical spine and found that it was not disabled. Defendants successfully demonstrate that plaintiff did not sustain a permanent or significant loss or limitation of any bodily function. They also disprove the claim that the accident rendered plaintiff unable to perform his usual and customary activities for not less than 90 days during the 180 days immediately following the accident. The MRI taken on December 8, 2004, about three months after the accident, showed a lumbar condition that existed before the accident.

Further evidence that plaintiff has not meet the standard for the 90/180 period is found in his bill of particulars, which states that he was out of work for merely 14 days after the accident. On a motion for summary judgment, defendants may use plaintiff's pleadings and evidence to show their entitlement to summary judgment (*see Prestol v McKissock*, __ AD3d __, __, 2008 NY Slip Op 03979, *1 [1st Dept 2008]; *Lloyd v Green*, 45 AD3d 373, 374 [1st Dept 2007]; *Norona v*

Manhattan and Bronx Surface Tr. Operating Auth., 40 AD3d 480, 480 [1st Dept 2007]; *Alexander v Garcia*, 40 AD3d 274, 274 [1st Dept 2007]). This evidence shows that plaintiff's customary activities were restricted for less than 90 days following the collision.

To oppose the motion, plaintiff must demonstrate that he suffers from a permanent or significant limitation or that he suffered from a non-permanent limitation for 90 days after the accident. Plaintiff submits a report by a non-treating physician, Howard Baum, M.D. (no specialization noted). The report states that Baum examined plaintiff on October 30, 2007 and that he reviewed three MRI reports. Two of those MRI reports correlate to the two MRI films examined by defendant's radiologist.

The December 8, 2004 MRI report of the lumbar spine states that plaintiff has a mild degree of bulging at the L5-S1 level, and straightened lumbar lordosis most likely related to muscular spasm. The November 10, 2004 MRI report of the cervical spine states that there is a generalized bulge at the C4-C5 level and straightened cervical spine compatible with muscular spasm. The October 18, 2004 MRI report of the right knee states that there is small joint effusion and Grade I meniscal capsular separation. Baum states that he correlated the MRI reports to objective findings of range of motion and concludes that the lumbar spine has less than a normal range of motion. The deficits of range of motion are directly causally related to the bulging disc at L5-S1, which in turn is causally related to the trauma in the accident and no other cause. The cervical spine shows less than a normal range of motion, causally related to the bulging disc at C4-C5, which is casually related to the accident.

Baum's report further states that movement by plaintiff's right knee is restricted because of "medial femoral condyle and medial joint line tenderness" and pain. The report concludes that plaintiff has a permanent partial disability due to limitation of motion and loss of use and function of his right knee, his lumbar spine,

and his cervical spine, directly casually related to the accident.

Baum's report explains that there are two reasons for the gap in time between his examination of plaintiff and plaintiff's last treatment for his injuries. One, the cessation of no-fault benefits prevented plaintiff from receiving further therapy because he could not afford to pay for the treatment out of his own pocket. Two, the records show that plaintiff had achieved the maximum benefits from the course of physical therapy, that he had not achieved full recovery, and that further therapy would not reduce his symptoms and might even prove counterproductive. The date of plaintiff's last treatment is not included in the report.

At his deposition, plaintiff testified that, due to the accident, he suffers pain in his right knee about every two weeks. The pain lasts about 10 minutes. Before the accident, he used to jog regularly, two or three times a week, about two miles each time. He used to play soccer once or twice a week in the summer. Since the accident, he can't jog more than 50 meters because of pain. He has tried to play soccer about six times, but can play only about 20 minutes at a time. He cannot engage in social dancing any more. Because of the injuries sustained to his back, he cannot lift weights at the gym or furniture as he used to be able to do before the accident. Now when he wants to take merchandise out of his warehouse, he must hire people to do it. He has hired people for this about 50 times since the accident. Plaintiff further testified that he never belonged to a soccer league or a gym. His work requires a great deal of travel and, before the accident, he used to go to the hotel gym where he stayed.

Plaintiff's evidentiary submissions are deficient in several respects. A finding of bulging and herniated discs, by itself, does not establish a serious injury (*Style v Joseph*, 32 AD3d 212, 214 [1st Dept 2006]; *Toulson v Young Han Pae*, 13 AD3d 317, 319 [1st Dept 2004]). There must be objective non-conclusory evidence of a serious injury. Although Baum performed a quantitative range-of-motion

assessment on plaintiff, it must be noted that the examination came three years after the accident by a physician who examined him only on that one occasion (see *Batts v Medical Express Ambulance Corp.*, 49 AD3d 294 [1st Dept 2008]; *Atkinson v Oliver*, 36 AD3d 552, 552-553 [1st Dept 2007]). In addition, Baum relied on plaintiff's subjective complaints and the MRI reports, with no indication that he reviewed the actual MRI films (see *Vargas v Ahmed*, 41 AD3d 328, 329 [1st Dept 2007]). As stated above, the radiologist diagnosed a degenerative condition of plaintiff's lumbar spine that predated the accident. A diagnosis of a degenerative condition unrelated to trauma must be based on the actual MRIs or x-rays (*Mullings v Huntwork*, 26 AD3d 214, 215 [1st Dept 2006]; *Agard v Bryant*, 24 AD3d 182, 182 [1st Dept 2005]), and the radiologist properly based her report on the MRI film. As plaintiff's expert did not review the actual film, his finding that the accident caused the lumbar defects does not contravene the radiologist's finding that the lumbar condition predated the accident.

Once a defendant has presented evidence of a pre-existing injury, it is incumbent upon the plaintiff to present proof to meet the defendant's asserted lack of causation (*Pommells v Perez*, 4 NY3d 566, 574 [2005]; *Becerril v Sol Cab Corp.*, ___ AD3d __, __, 2008 NY Slip Op 02885, *2 [1st Dept 2008]; *Brewster v FTM Servo, Corp.*, 44 AD3d 351, 352 [1st Dept 2007]). Plaintiff ignores the radiologist's finding that he had a pre-existing degenerative condition of the lumbar spine.

Plaintiff does not provide any contemporaneous medical evidence of the extent of the physical limitations resulting from the disc and knee injuries (see *Prestol*, 2008 NY Slip Op 03979, *1; *Atkinson*, 36 AD3d at 552; *Toulson*, 13 AD3d at 319; compare *Silva v Vizcarrondo*, 31 AD3d 292, 292 [1st Dept 2006] [plaintiff met "minimal standard" to substantiate her serious injury claim where her expert, who began treatment for her injuries shortly after the accident, made the quantified assessment 17 months later]). Although the reports of MRIs made in

October, November, and December 2004 show disabilities, no record relates the MRIs to the accident injuries, except for Dr. Baum's report made three years after the accident. There are therefore no medical findings made around the time of the accident (*see Thompson v Abbasi*, 15 AD3d 95, 98 [1st Dept 2005]).

Plaintiff stopped treating his injuries in December 2004. A plaintiff who terminates therapeutic measures following an accident, while claiming serious injury, must offer some reasonable explanation for having done so (*Pommells*, 4 NY3d at 574). A failure to explain ceasing treatment for an injury claimed to be serious generally militates against a finding of serious injury (*id.*). A medical determination that a plaintiff has already achieved the maximum result is an acceptable reason to stop treatment (*id.* at 577). Impecuniousness also provides a reasonable excuse. Plaintiff's expert proffers both these reasons for plaintiff stopping treatment.

While a treating physician " 'may testify to the history obtained from the patient if it is germane to diagnosis and treatment' " (*Crisci v Sadler*, 253 AD2d 447, 449 [2d Dept 1998] [citation omitted]), a nontreating physician, retained as an expert, may not testify regarding the history of an accident as related by the plaintiff or concerning the plaintiff's medical complaints (*see Kerr v Vinokur*, 37 AD3d 418, 418 [2d Dept 2007]; *Easley v City of New York*, 189 AD2d 599, 600 [1st Dept 1993]; *Davison v Park Ave. Properties Assoc.*, 183 AD2d 681, 681 [1st Dept 1992]; *Nissen v Rubin*, 121 AD2d 320, 321 [1st Dept 1986]). Such testimony by an expert witness would constitute improper bolstering of plaintiff's claim and could prove unfairly injurious to the defendant (*Daliendo v Johnson*, 147 AD2d 312, 320 [2d Dept 1989]; *Nissen*, 121 AD2d at 322).

Baum's account of why plaintiff stopped treatment is not competent evidence. Baum does not claim any first-hand knowledge. He was not plaintiff's treating physician. Although the expert claims that his opinion of the futility of medical treatment is based on his review of records, these records are neither

produced, nor identified. Assuming that plaintiff does indeed suffer restrictions of movement and pain and that he stopped treatment for the reasons indicated, there is no evidence that his condition was caused by the accident. Baum's statements to that effect are wholly conclusory and thus cannot posit a triable issue of fact (*see Perez v Hilarion*, 36 AD3d 536, 537 [1st Dept 2007]; *Arjona v Calcano*, 7 AD3d 279, 280 [1st Dept 2004]). Baum fails to causally connect the injuries to the accident (*see Diaz v Kanuteh*, 38 AD3d 447, 447 [1st Dept 2007]). No explanation is given of how the accident hurt plaintiff's back or knee and how such an event would produce the symptoms noted by Dr. Baum (*see Navedo v Jaime*, 32 AD3d 788, 790 [1st Dept 2006]; *Mullings v Huntwork*, 26 AD3d at 215 [plaintiff's expert made no "attempt to demonstrate how herniation of intervertebral discs might have been caused by such a minor collision"]).

As for the injury under the 90/180 prong of the applicable Insurance Law provision, defendants sustained their initial burden and plaintiff failed to come forward with objective evidence of a medically determined injury or impairment of a nonpermanent nature (*see Berete v Ford Motor Credit Co.*, 29 AD3d 452, 453 [1st Dept 2006]; *Copeland v Kasalica*, 6 AD3d 253, 254 [1st Dept 2004]). Dr. Baum's report does not indicate that he was provided with any information showing that plaintiff was unable to perform his regular activity for not less than 90 days during the 180-day period immediately following the accident and, thus, he had no basis upon which to address this category of serious injury. Plaintiff does not assert that he was advised by a medical practitioner to curtail his work or other activities. Thus, the medical record is devoid of any objective medical evidence which substantiates plaintiff's 90/180-day claim (*see Toure*, 98 NY2d at 357).

Without any medical evidence linking his injuries to the accident, plaintiff's account of the effect of his injuries during the 90/180 period cannot raise a triable issue (*Becerril*, 2008 NY Slip Op 02885, *2 [plaintiff's "subjective statements that he was limited in his ability to exercise or perform personal maintenance were

insufficient to establish a serious injury under the 90/180 day prong"); *DeLeon v Ross*, 44 AD3d 545, 546 [1st Dept 2007] ["plaintiff's affidavit, stating that he is unable to teach kickboxing or play racquetball or handball, must be viewed as insufficient to establish a serious injury"]; *Guadalupe v Blondie Limo, Inc.*, 43 AD3d 669, 670 [1st Dept 2007]; *Copeland v Kasalica*, 6 AD3d at 254; *Thompson*, 15 AD3d at 101; *Nelson v Distant*, 308 AD2d 338, 340 [1st Dept 2003]).

For these reasons and upon the foregoing papers, it is

ORDERED that defendants' motion for summary judgment is granted and the complaint is dismissed 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 Clerk is directed to enter judgment accordingly.

Dated: June 2, 2008

JUN 02 2008

ENTER:

Deborah Kaplan

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

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