

Barriga v Celona

2008 NY Slip Op 32244(U)

July 1, 2008

Supreme Court, Nassau County

Docket Number: 3480-06/

Judge: William R. LaMarca

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SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
NASSAU COUNTY - PART 17**

**Present: HON. WILLIAM R. LAMARCA
Justice**

**CARLOS A. BARRIGA, JR.,
Plaintiff,**

**Motion Sequence # 001
Submitted April 4, 2008
XXX**

-against-

INDEX NO: 13480/06

**EDWARD H. CELONA,
Defendant.**

The following papers were read on this motion:

Notice of Motion.....	1
Affirmation in Opposition.....	2
Reply Affirmation.....	3

Defendant, EDWARD H. CELONA, moves for an order, pursuant to CPLR §3212 and Insurance Law §5102 and §5104, granting summary judgment dismissing the action on the ground that plaintiff, CARLOS A. BARRIGA, JR., has not sustained a "serious injury" as defined by Insurance Law §5102(d). Counsel for plaintiff opposes the motion, which is determined as follows:

Plaintiff commenced this action for injuries allegedly sustained in an automobile collision that occurred on May 5, 2006, at approximately 5:15 A.M., on Lawson Boulevard, 250' south of its intersection with Concord Avenue, Oceanside, New York. Counsel for moving defendant states that the record reflects that plaintiff declined medical assistance

at the scene and was a walk in patient at Winthrop Memorial Hospital in the evening of the same day, where he was treated and released after a CAT scan of his cervical spine, as well as an x-ray of his cervical spine, thoracic spine and left knee were performed, which were all negative. Counsel states that the discharge diagnosis was: cervical and thoracic spine strain/knee contusion/MVA.

Plaintiff commenced the action on or about August 15, 2006 with the filing of a summons and complaint, and alleged that he sustained serious and severe personal injuries and nervous shock as a result of the collision, and has been incapacitated from attending to his usual occupation and has suffered pecuniary losses. After joinder of issue, plaintiff served a bill of particulars in which he alleged that defendant was negligent in the operation of his vehicle, and that plaintiff sustained the following serious and permanent personal injuries: focal bulge at C5-6 creating impingement on the thecal sac confirmed by MRI; focal central herniation at LR-5 creating impingement on the thecal sac confirmed by MRI; cervical radiculitis; cervical whiplash; lumbar radiculitis; lumbar derangement; neck pain, left knee derangement; lower back pain; headaches, pain, tenderness and limitation of motion of the cervical spine; and pain tenderness and limitation of motion of the lumbar sacral spine. He claims that he suffered a severe hyperflexion/hyperextension injury which involves joint movements to the extremes of normal range of motion with concomitant tearing and stretching of the ligamentous structures of the spine as well as development of an inflammatory reaction in the soft tissue of the spine resulting in pain, swelling, loss of function and decreased spinal range of motion.

In support of the motion to dismiss, defendant submits the affirmed report of Jerrold M. Gorski, M.D., an orthopedist, dated July 5, 2007 (Exhibit "G"), who examined plaintiff

on said date and reviewed his medical records. Dr. Gorski found no demonstrated sign of a permanent disability or impairment. Dr. Gorski saw no further need for orthopedic treatment, and he stated the plaintiff could perform all activities of daily living as well as pursue gainful employment without restriction.

Defendant also submits the reports of Sandra J. Pfeffer, M.D., a radiologist, both dated July 27, 2007 (Exhibit "H"), who reviewed the films of plaintiff's lumbar and cervical MRI's. In her report on plaintiff's lumbar spine, Dr. Pfeffer indicated that the MRI taken June 6, 2006 showed minor annular bulging and subtle disc desiccation (some loss of fluid) due to a degenerative disc disease unrelated to trauma (i.e., an automobile collision). As to the cervical spine, the MRI that was reviewed by Dr. Pfeffer was taken on June 19, 2006. Dr. Pfeffer found the cervical spine MRI to be "unremarkable."

In further support of the motion to dismiss, defendant also submits the deposition testimony of plaintiff (Exhibit "F"), which reflects the following: that plaintiff missed two (2) weeks work as a waiter (p. 11); that after two (2) weeks, plaintiff was back at work full time but he had assistance with plates and dishes for two (2) months following the accident; that plaintiff did not request an ambulance at the collision site (p. 35); that plaintiff went to Dr. Shawn A. Sosnik, a chiropractor, three (3) times a week for four months (pgs. 45, 48-49); that his last treatment was in 2006 (p. 48, 49); that Dr. Sosnik directed plaintiff to do no heavy lifting (pgs. 53, 58 & 59); that plaintiff stopped going to Dr. Sosnik because his office was too far from plaintiff's job (p. 61); that, as of May 15, 2007 (the deposition date), plaintiff was working full time as a bank teller (p. 9).

It is well settled that a motion for summary judgment is a drastic remedy that should not be granted where there is any doubt as the existence of a triable issue of fact (*Sillman*

v Twentieth Century Fox, 3 NY2d 395, 165 NYS2d 498, 144 NE2d 387 [C.A. 1957]; *Bhatti v Roche*, 140 AD2d 660, 528 NYS2d 1020 [2nd Dept 1998]). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof in admissible form sufficient to warrant the Court, as a matter of law, to direct judgment in the movant's favor. Such evidence may include deposition transcripts as well as other proof annexed to an attorney's affirmation (CPLR §3212 [b]; *Olan v Farrell Lines*, 64 NY2d 1092, 489 NYS2d 884, 479 NE2d 229 [C.A.1985]).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. It is incumbent upon the non-moving party to lay bare all of the facts which bear on the issues raised in the motion (*Mgriditchian v Donato*, 141 AD2d 513, 529 NYS2d 134 [2d Dept 1998]). Conclusory allegations are insufficient and to defeat the application the opposing party must provide more than a mere reiteration of those facts contained in the pleadings (*Doran v Mutual Benefit Life Insurance Co.*, 106 AD2d 540, 483 NYS2d 66 [2nd Dept. 1984]; *Bethlehem Steel Corp. v Solow*, 70 AD2d 850, 418 NYS2d 40 [1st Dept. 1979]). When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist (*Barr v County of Albany*, 50 NY2d 247, 428 NYS2d 665, 406 NE2d 481 [C.A. 1980]; *Daliendo v Johnson*, 147 AD2d 312, 543 NYS2d 987 [2nd Dept. 1989]).

Within the particular context of a threshold motion which seeks dismissal of a personal injury complaint, the movant bears a specific burden of establishing that the plaintiff did not sustain a "serious injury" as enumerated in Article 51 of the Insurance Law §5102(d) (*Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990, 591 NE2d 1176 [C.A.1992]). Upon such a showing, it becomes incumbent upon the nonmoving party to come forth with sufficient evidence in admissible form to raise an issue of fact as to the existence of a "serious injury" (*Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570, 441 NE2d 1088 [C.A.1982]).

Within the scope of the defendant's burden, a defendant's medical expert must specify the objective tests upon which the stated medical opinions are based and when rendering an opinion with respect to the plaintiff's range of motion, must compare any findings to those ranges of motion considered normal for the particular body part (*Qu v Doshna*, 12 AD3d 578, 785 NYS2d 112 [2d Dept 2004]; *Browdame v Candura*, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]; *Mondi v Keahan*, 32 AD3d 506, 820 NYS2d 625 [2d Dept 2006]).

Applying the aforesaid criteria particularly to the reports of Dr. Gorski and Dr. Pfeffer, the Court finds that the defendant has established a *prima facie* case that the plaintiff failed to sustain a serious injury (*Gaddy v Eyler, supra; see also, Kearse v New York City Transit Authority*, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]). As set forth above, Dr. Gorski found only mild mid to lower back complaints with no demonstrated signs of permanency, disability or impairment. Dr. Pfeffer found only minor posterior annular bulging and subtle disc desiccation at L5-Si, which she attributed to degenerative disc disease, unrelated to trauma. Dr. Gorski stated the specific tests upon which his medical

conclusions were based and compared the plaintiff's ranges of motion to those ranges of motion considered normal. (*Qu v Doshna, supra; Browdame v Candura, supra*). Moreover, plaintiff's deposition testimony does not support a finding that plaintiff sustained a medically determined injury that prevented him from performing substantially all of his regular daily activities for a period of 90 of the first 180 days following the accident. Thus, the burden now shifts to the plaintiff to demonstrate a triable issue of fact with respect to the existence of a "serious injury" (*Licari v Elliott, supra*).

A physician's report, submitted by a plaintiff in opposing a summary judgment motion on the issue of serious injury, is speculative when it does not address the findings contained in the report of the defendant's radiologist that the disc bulges in the plaintiff's spine were the result of a pre-existing degenerative process and not a result of the subject collision (*Phillips v Bilinsky, 39 AD3d 728, 834 NYS2d 299 [2nd Dept. 2007]*). Here, the plaintiff's physicians made no effort to refute or rebut Dr. Pfeffer's diagnosis that the MRI films demonstrate disc bulges/herniations that are degenerative in nature and not causally related to the trauma of the accident. (See *Pommells v Perez, 4 NY3d 566, 797 NYS2d 380, 830 NE2d 278 [C.A. 2005]*).

Plaintiff relies on the unsworn MRI reports of Mark Shapiro, M. D., a radiologist, who performed an MRI of the plaintiff's lumbar spine and cervical spines in June 2006 (Exhibit "B", annexed to plaintiff's affirmation in opposition). The reports do not address plaintiff's alleged degenerative spine disease and do not relate the findings to the accident of May 5, 2006 (*Basmajian v Wong, 12 AD3d 471, 785 NYS2d 468 [2nd Dept. 2004]*). The Court finds that the unsworn reports are of no probative value. (*Bravo v Rehman, 28 AD3d*

694, 814 NYS2d 223 [2nd Dept. 2006]).

Additionally, plaintiff relies on the sworn affidavit of Shawn A. Sosnik, D.C., a chiropractor, dated February 16, 2008, who treated plaintiff from May 9, 2006, four (4) days after the accident, until September 12, 2006, when he was discharged from care allegedly because continued treatment would be of no benefit to plaintiff. Dr. Sosnik noted that plaintiff's no-fault benefits had been denied at that point (¶ 10).

Although Dr. Sosnik report, dated November 22, 2006, discusses "further management recommendations and prognosis" and opines that the plaintiff ". . . will probably have a long-term need for pain medication and chiropractic care. . ." said comments are in conflict with his affidavit of February 16, 2008, in which he asserts that plaintiff was discharged from care because continued treatment would be of no benefit to plaintiff. Nor is there any post-summary judgment affidavit from plaintiff commenting on the gap in treatment from September 2006 until February 2008. Other than his testimony at his deposition that he stopped treatments because of the "inconvenience", no explanation is given for discontinuing his treatment.

In *Pommells v Perez, supra*, the Court of Appeals held that a gap in treatment would interrupt the chain of causation between the collision and the alleged injury. While cessation of treatment is not totally dispositive since it is not required that the plaintiff continue needless treatment in order to survive a summary judgment motion, the Court of Appeals has recently stated that a plaintiff who terminates therapeutic measures following the accident while claiming serious injury must offer some reasonable explanation for having done so (*Pommells v Perez, supra; see also Mohamed v Siffrain, 19 AD3d 561, 797 NYS2d 532 [2nd Dept. 2005]*).

Courts that have applied *Pommells v Perez, supra*, have consistently held that to be reasonable, the explanation must be concrete and substantiated by the record. The same exacting scrutiny should be applied to the plaintiff's explanation that the gap or cessation of treatment occurred when the no-fault benefits stopped.

The plaintiff has not met his burden. It appears to the Court that Dr. Sosnik's affidavit, dated February 16, 2008, is tailored to avoid the consequences of the "gap" of treatment as set forth in *Pommells v Perez, supra*. As such, Dr. Sosnik's affidavit does not raise a triable issue of fact (see *Cornelius v Cintas Corp.*, 50 AD3d 1085, 857 NYS2d 637 [2nd Dept. 2008]).

Based on the foregoing, the Court concludes that plaintiff has failed to raise a triable issue of fact that requires a trial. Accordingly, it is hereby

ORDERED, that defendant's motion for summary judgment dismissing the complaint is granted and the action is dismissed.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: July 1, 2008


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