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SHORT FORM ORDER

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

Present: HON. WILLIAM R. LaMARCA
Justice

PATRICIA CIONE, as Administratrix of the ESTATE OF JOSEPH CIONE and PATRICIA CIONE, Individually,
Plaintiffs,
-against-
THEODOR O. FROBIN,
Defendants.

Motion Sequence #5
Submitted November 19, 2008
XXX

INDEX NO: 17858/06
Action #1

THEODOR FROBIN,
Plaintiff,
-against-
PATRICIA CIONE, as Administratrix of the ESTATE OF JOSEPH CIONE,
Defendant.

INDEX NO: 965/07
Action #2

ENCOMPASS INDEMNITY COMPANY a/s/o PATRICIA CIONE, as Administratrix of the ESTATE OF JOSEPH CIONE,
Plaintiff,
-against-
THEODOR O. FROBIN,
Defendant.

INDEX NO: 18839/07
Action #3
SETTLED

The following papers were read on this motion:

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

Defendant, THEODORE O. FROBIN, moves for an order, pursuant to CPLR §3212 and Article 51 of the Insurance Law, awarding him summary judgment and dismissing the complaint on the grounds that neither plaintiff, JOSEPH CIONE nor PATRICIA CIONE, has satisfied the "serious injury" threshold requirement of Insurance Law §5102(d). The Court notes that during litigation, plaintiff, JOSEPH CIONE, died and his wife, PATRICIA, was appointed Administrator of the Estate, which has been substituted as a plaintiff herein.[1] Counsel for plaintiffs opposes the motion, which is determined as follows:

This action arises out of an automobile accident that occurred on June 6, 2005, at the intersection of Marcus Avenue and the entrance to 3000 Marcus Avenue, in Lake Success, New York. The 64 year old plaintiff, JOSEPH CIONE, now deceased, was operating his vehicle with his 58 year old wife, PATRICIA CIONE, as a passenger, when it was struck in the rear by a vehicle owned and operated by defendant, THEODOR O. FROBIN. As a result of the impact, several hours later, JOSEPH drove himself and his wife to the Emergency Room at North Shore University Hospital (NSUH). Both plaintiffs were discharged the same day.

Plaintiff, ESTATE OF JOSEPH CIONE, claims that, as a result of the subject accident, Mr. CIONE sustained the following injuries: a tear of the posterior horn of the medial meniscus, left knee; medial collateral ligament sprain of the left knee; left knee synovitis; traumatic effusion of the left knee; chondromalacia left knee; and multiple abrasions to the left lower extremity. Plaintiff, PATRICIA CIONE, claims that, as a result

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[1] Joseph Cione is now deceased due to a cause unrelated to the subject accident.

of the subject accident, she sustained capsulitis/bursitis of the right ankle requiring steroid injections (*Bill of Particulars, annexed to moving papers as Exhibit "E"*, ¶6).

It is noted at the outset that a defendant is not required to disprove any category of serious injury which has not been pled by the plaintiff (*cf., Melino v Lauster*, 82 NY2d 828, 605 NYS2d 625 NE2d 589 [C.A.1993]). In this case, plaintiffs have failed to identify the specific categories of the serious injury statute into which their injuries fall. Nevertheless, whether they can demonstrate the existence of a compensable serious injury depends on the quality, quantity and credibility of admissible evidence (*Manrique v Warshaw Woolen Associates, Inc.*, 297 AD2d 519, 747 NYS2d 451 [1st Dept. 2002]).

Defendant moves for summary judgment dismissal of the complaint on the grounds that neither plaintiff has satisfied the serious injury threshold of Insurance Law. In moving for summary judgment, defendant must make a *prima facie* showing that plaintiffs did not sustain a "serious injury" within the meaning of the statute. Once this is established, the burden shifts to the plaintiffs to come forward with evidence to overcome defendant's submissions by demonstrating a triable issue of fact that a "serious injury" was sustained (*Pommels v Perez*, 4 NY3d 566, 797 NYS2d 380, 830 NE2d 278 [C.A.2005]; *see also Grossman v Wright*, 268 AD2d 79, 707 NYS2d 233 [2nd Dept. 2000]).

In support of a claim that plaintiffs have not sustained a serious injury, defendant may rely either on the sworn statements of the defendant's examining physician or the unsworn reports of the plaintiffs' examining physician (*see, Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692 [2nd Dept. 1992]). However, unlike movant's proof, unsworn

reports of plaintiff's examining doctor or chiropractor are not sufficient to defeat a motion for summary judgment (*Grasso v Angerami*, 79 NY2d 813, 580 NYS2d 178, 588 NE2d 76 [C.A.1991]).

Essentially, in order to satisfy the statutory serious injury threshold, the legislature requires objective proof of a plaintiff's injury. The Court of Appeals, in *Toure v Avis Rent A Car Systems*, 98 NY2d 345, 746 NYS2d 865, 774 NE2d 1197 (C.A. 2002), stated that plaintiff's proof of injury must be supported by objective medical evidence, such as sworn MRI and CT scan tests. However, the sworn MRI and CT scan tests and reports also must also be paired with the doctor's observations during his physical examination of the plaintiff (*see Toure v Avis Rent A Car Systems, supra*). Unsworn MRI reports can also constitute competent evidence but only if both sides rely on those reports (*see, Gonzalez v Vasquez*, 301 AD2d 438, 754 NYS2d 7 [1st Dept. 2003]).

On the other hand, even where there is ample objective proof of plaintiff's injury, the Court of Appeals held in *Pommels v Perez, supra*, that certain factors may nonetheless override a plaintiff's objective medical proof of limitations and permit dismissal of plaintiff's complaint. Specifically, the Court of Appeals held that additional contributing factors, such as a gap in treatment, an intervening medical problem, or a preexisting condition, would interrupt the chain of causation between the accident and the claimed injury (*Pommels v Perez,supra)*.

Based upon the papers submitted for this Court's consideration, it is readily apparent that neither plaintiff's injuries fall within the first five (5) categories of Insurance

Law §5102(d) for: (1) death; (2) dismemberment; (3) significant disfigurement; (4) fracture; or (5) loss of fetus. Further, as neither plaintiff claims that he or she lost permanent and total use of any of the body parts alleged in their bill of particulars, then it is also established that plaintiffs' injuries do not qualify under the sixth category of the serious injury statute, namely, permanent loss of use of a body organ, member, function or system (*Oberly v Bangs Ambulance, Inc.*, 96 NY2d 295, 727 NYS2d 378, 751 NE2d 457 [C.A.2001]).

To meet the threshold significant limitation of use of a body function or system or permanent consequential limitation of a body function or system, the law requires that the limitation be more than minor, mild, or slight and that the claim be supported by medical proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition (*Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990, 591 NE2d 117 6 [C.A.1992]; *Licari v Elliot*, 57 NY2d 230, 455 NYS2d 570, 441 NE2d 1088 [C.A.1982]; *Scheer v Koubeck*, 70 NY2d 678, 518 NYS2d 788, 512 NE2d 309 [C.A.1987]). A minor, mild or slight limitation shall be deemed "insignificant within the meaning of the statute (*Licari v Elliot*, *supra*; *see also Grossman v Wright*, *supra).*

When, as in this case, a claim is raised under the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, then, in order to prove the extent or degree of the physical limitation, an expert's designation of a numeric percentage of plaintiff's loss of range of motion is acceptable (*see, Toure v Avis Rent A Car Systems, Inc., supra).* In addition, an expert's qualitative assessment of a plaintiff's condition is also probative,

provided that: (1) the evaluation has an objective basis, and, (2) the evaluation compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system" (*Toure v Avis Rent A Car Systems, Inc., supra).*

To prevail under the "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" category, a plaintiff must demonstrate through competent, objective proof, a "medically determined injury or impairment of a non permanent nature" (Insurance Law §5102[d]) "which would have caused the alleged limitations on the plaintiff's daily activities (*Monk v Dupuis*, 287 AD2d 187, 734 NYS2d 684 [3rd Dept. 2001]), and, furthermore, a curtailment of the plaintiff's usual activities "to a great extent rather than some slight curtailment" (*Licari v Elliott*, *supra*; *see also Sands v Stark*, 299 AD2d 642, 749 NYS2d 334 [3rd Dept. 2002]).

With these guidelines in mind, the Court turns to the merits of defendant's motion at hand.

As to JOSEPH CIONE, in support of his motion, defendant submits, *inter alia*, the NSUH Emergency Room Report; the unsworn, unaffirmed radiology report of plaintiff's physician, Dr. Edward Perkes, MD of Nassau Radiologic Group, P.C.; the sworn affirmed report of Dr. Melissa Sapan Cohen, M.D., a radiologist, who performed an independent radiological review of plaintiff's left knee, and the unsworn unaffirmed

"Office Note" of Dr. George L. Hines, M.D. of Winthrop Cardiovascular & Thoracic Surgery, P.C.

As to PATRICIA CIONE, in support of his motion, defendant submits, *inter alia*, the NSUH Emergency Room Report; the sworn affirmed report of Dr. Michael J. Katz, MD, an Orthopedic Surgeon who performed an independent orthopedic examination of the plaintiff on June 6, 2008; and, the sworn affirmed report of Dr. Melissa Sapan Cohen, M.D., a radiologist who performed an independent radiological review of plaintiff's ankle.

Based upon this evidence, and based upon plaintiffs' deposition testimonies, this Court finds that the defendant has submitted ample proof in admissible form that neither plaintiff sustained a serious injury within the meaning of the statute as a result of the subject accident.

Specifically, the physician at the Emergency Room at NSUH that examined JOSEPH CIONE reported that he had sustained "no head trauma" and "no loss of consciousness." The attending physician reported that, although plaintiff had sustained a "left leg abrasion", he nonetheless had "no leg pain," "no problems," and "no other complaints." Further, the radiologist at Nassau Radiologic Group, P.C., Dr. Perkes, reported, on February 2, 2006, that x-rays of plaintiff's left lower leg failed "to reveal any significant bony abnormality" and did not demonstrate "any destructive lesion of bone or fracture." Although Dr. Perkes reported that x-rays of plaintiff's left ankle demonstrated "mild soft tissue swelling," he also reported that the x-rays "fail to reveal any significant osseous abnormality" and that "[t]here is no evidence of any arthritis, destructive lesion

of bone or fracture." Furthermore, the affirmed findings and opinions of Dr. Cohn, based upon her review of plaintiff's MRIs of his left knee taken on May 10, 2006 concluded that plaintiff has "tearing of the posterior horns of the menisci bilaterally which is of indeterminate age based exclusively upon MRI criteria."

Furthermore, JOSEPH CIONE's admissions at his deposition establish that he did not sustain "a medically determined injury or impairment of a non-permanent nature" which prevented him "from performing substantially all of the material acts which constitute [his] usual and customary daily activities for not less than 90 days during the 180 days immediately following [the Accident]." Specifically, at his deposition, plaintiff testified that he was retired at the time of the Accident and that he was not confined to his bed or home as a result of the Accident. In addition, he testified that the only difficulty he experienced following the Accident was that of climbing a ladder, which he does once a year, and that otherwise he has no other problems or activities he is limited in performing.

Based upon this proof, this Court finds that defendant has made a *prima facie* showing that plaintiff, JOSEPH CIONE, did not sustain a "serious injury" to his left lower leg and left knee as defined in the Insurance Law.

Similarly, defendant has demonstrated that the injuries claimed by PATRICIA CIONE do not qualify as a "serious injury" within the meaning of the Insurance Law.

The clinical findings and diagnosis reported by the Emergency Room (ER) physician at NSUH establish that upon presentation to the ER on the date of the accident, she was oriented x 3, that cranial nerves II -XII were intact, that her reflexes,

sensation and coordination were normal, and that her right lower extremity was normal. In addition, the affirmed findings and opinions of Dr. Katz, a board certified orthopedic surgeon, based on his physical examination of the plaintiff and review of her medical records, dated June 6, 2008, reported the following findings:

> Examination of the Cervical Spine: There is no tenderness about the cervical spine and there is no paravertebral muscle spasm. Flexion is present to 50 degrees (normal 50 degrees) and extension is present to 60 degrees (normal 60 degrees). Lateral flexion is present with right sided lateral flexion to 45 degrees (normal 45 degrees) and left sided lateral flexion to 45 degrees (normal 45 degrees). Right sided rotation is present to 80 degrees (normal 80 degrees) and lefts [sic]-sided rotation is present to 80 degrees (normal 80 degrees). Motor strength is present in the C5-T1 innervated segments. Sensation is intact in the C5-T1 innervated dermatomes. Reflex testing reveals the biceps, triceps and brachioradialis reflexes to be 2+ and symmetric. Adson's test is negative.
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> Examination of the Lumbosacral Spine: The gait was normal without antalgic or Trendelenburg component. No paravertebral muscle spasm was present. Active range of motion revealed forward flexion to 90 degrees (normal 90 degrees), full extension to 30 degrees (normal 30 degrees), and full lateral and side bending to 30 degrees (normal 30 degrees).
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> Straight leg raising test was negative. Sensory examination revealed full sensation to light touch in the L3-S1 dermatomes. Reflexes of the quadriceps, tibialis posterior, and Achilles tendon were 2+ and symmetric bilateral. Babinski was negative and there was no demonstrable clonus. Patrick was negative.
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> Examination of the Right Ankle and Foot: Ankle dorsiflexion is present to 30 degrees (normal 30 degrees) and plantar flexion is present to 45 degrees (normal 45 degrees). Inversion is present to 20 degrees (normal 20 degrees). Eversion is present to 20 degrees (normal 20 degrees). There is no joint line tenderness, erythema, or induration. There is no crepitation present. The anterior and posterior signs are negative.
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> The dorsalis pedis and posterior tibial pulses are 2+ and symmetric. The tibialis anterior is 5/5 in strength. The tibialis posterior is 5/5 in strength. The peroneal muscles are 5/5 in strength. There is no tenderness or contracture at the plantar fascia. There are no callosities, bunions or hammertoes.
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> Range of motion was determined using a goniometer.

Dr. Katz diagnosed PATRICIA CIONE with a resolved "cervical strain," resolved "lumbosacral strain," resolved "bilateral shoulder contusion," and a resolved "right ankle contusion." Dr. Katz concluded that plaintiff "shows no signs or symptoms of permanence relative to the musculoskeletal system and relative to [the Accident]." He concluded that plaintiff "is currently not disabled," "is capable of gainful employment," and "is capable of her activities of daily living."

Furthermore, the affirmed findings and opinions of Dr. Cohn, based upon her review of plaintiff's x-ray of her ankle taken at the office of Dr. Joseph on February 6, 2006 concluded that there appeared to be "[n]o acute fracture or dislocation" and that the "ankle mortise appears intact." Dr. Cohn concluded that the x-ray examination was of "poor quality" and there "[t]here is no definite evidence for abnormality or acute trauma-related injury on the submitted study."

Furthermore, PATRICIA CIONE's admissions at her deposition establish that she did not sustain "a medically determined injury or impairment of a non-permanent nature" which prevented her "from performing substantially all of the material acts which constitute [her] usual and customary daily activities for not less than 90 days during the 180 days immediately following [the Accident]." Specifically, at her deposition, plaintiff testified that at the time of the Accident she was employed by Joseph Cione haircutters as a bookkeeper and that she missed two weeks of work immediately following the Accident.

Based upon this proof, this Court finds that defendant has made a *prima facie* showing that plaintiff, PATRICIA CIONE, did not sustain a "serious injury" to her right ankle as defined in the Insurance Law.

In opposing defendant's motion, plaintiffs' sole medical submission is the sworn affirmation and report of Dr. Bruce Ross, M.D. Notably, plaintiff PATRICIA CIONE does not come forward with any evidence to raise an issue of fact as to whether she sustained a "serious injury." Accordingly, defendant's motion for summary judgment is granted as it pertains to PATRICIA CIONE.

With respect to JOSEPH CIONE, in his report dated May 9, 2006, Dr. Ross states as follows:

Exam:	On physical exam, there is pain over the anterior tibial tendon in the distal tibia with a healed laceration, and a 2+ knee effusion. There is patellofemoral crepitus and apprehension with no joint line pain. No instability is encountered. There is 0° to 90° of motion with pain.
X-rays:	X-rays of the tibia are negative for fracture or dislocation. X-rays of the knee show calcific menisci bilaterally as well as osteoarthritic changes seen. No fractures are noted.
Impression:	The impression is that of a traumatic effusion in the left knee, possibly a meniscal tear, with chondromalacia.
Plan:	I have discussed the risks, alternatives and benefits of all forms of treatment with the patient. I have aspirated the knee and injected it with Depo Medrol and Lidocaine, today, under sterile procedure. The patient tolerated this procedure well. The patient is advised to apply ice for pain alleviation. The patient is to call this office immediately, if fever or rash occurs. The patient is referred for MRI of the left knee as well as to physical therapy.

If this history is correct, a causal relationship with the Accident does exist. Notably, Dr. Ross's examination of the plaintiff, JOSEPH CIONE is not based on a recent examination, but based on examinations conducted two (2) years ago. It is unclear from the papers submitted herein as to the date of JOSEPH CIONE's death; however, for the purposes of this motion, this Court can determine that he died sometime after March 26, 2008, which was the date of his deposition. The plaintiffs have failed to tender an affirmation from a medical doctor or an affidavit from a chiropractor based on a more recent medical examination of the plaintiff - e.g., dated 2008 (*Elgendy v Nieradko*, 307 AD2d 251, 762 NYS2d 275 [2nd Dept. 2003]).

Moreover, in his report and accompanying affirmation, Dr. Ross reports degenerative findings and does not causally relate his findings to the accident. Dr. Ross also fails to address the degenerative findings reported by defendant's radiologist, Dr. Sapan Cohn (*Francis v Christopher*, 302 AD2d 425, 754 NYS2d 578 [2nd Dept. 2003]; *Napoli v Cunningham*, 273 AD2d 366, 710 NYS22d 919 [2nd Dept. 2000]). He also fails to quantify any loss of range of motion of the plaintiff's left knee contemporaneous with the accident (*Yeung v Rojas*, 18 AD3d 863, 796 NYS2d 661 [2nd Dept. 2005]; *Nemchyonok v Ying*, 2 AD3d 421, 767 NYS2d 810 [2nd Dept. 2003]).

In addition, Dr. Ross's records seem to reflect that the plaintiff stopped treatment with him for his injuries in September 2006. Yet, at his deposition, JOSEPH testified that he treated with another provider for two (2) months until his no-fault benefits were cut off. Plaintiff also admitted that he had his own health insurance at the time of the accident. Thus, the plaintiff ceased treatment two (2) years ago and Dr. Ross fails to

address this cessation of treatment. Here there is no evidence contemporaneous with the cessation of treatment that the plaintiff had reached maximum medical improvement (*Pommells v Perez, supra; Francis v Christopher*, 302 AD2d 425, 754 NYS2d 578 [2nd Dept. 2003]). In addition, Dr. Ross's first examination of the plaintiff was not until more than three (3) months after the accident and he does not comment whether plaintiff was prevented from performing "substantially all" of his daily activities for 90 out of the first 180 days after the accident. Plaintiff does not submit any affirmation from any physician who treated him in the days, weeks and months immediately following the Accident stating during their treatment that he was medically disabled from performing substantially all of his customary daily activities for at least 90 days out of the 180 days immediately following the Accident.

Based on the foregoing, it is therefore

ORDERED, that defendant's motion for an order granting summary judgment dismissing plaintiffs' complaint is granted; and it is further

ORDERED, that Action #2, FROBIN v. CIONE, is severed and continued.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: February 5, 2009

WILLIAM R. LaMARCA, J.S.C.

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