

Jimenez v Jeg Limo Inc.
2009 NY Slip Op 30937(U)
April 21, 2009
Supreme Court, New York County
Docket Number: 116605/06
Judge: Paul Wooten
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN
Justice

PART 22

JOSE JIMENEZ,
Plaintiff,
- v -

JEG LIMO INC and TEOFILO A. LIRIANO,
Defendant.

INDEX NO. 116605/06
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. 65

The following papers, numbered to , were read on this motion by defendant for summary judgment on the threshold "serious injury" issue and cross-motion by plaintiff to amend her bill of particulars.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits (Memo) _____
Replying Affidavits (Reply Memo) _____

Cross-Motion: Yes No

PERS NUMBERED
FILED
APR 23 2009
COUNTY CLERK'S OFFICE
NEW YORK

On September 13, 2005, plaintiff was involved in a collision with a vehicle owned by defendant Jeg Limo Inc. and operated by defendant Teofilo Liriano. The accident occurred on Nagle Avenue near its intersection Ellwood Street in New York County, New York. On or about November 29, 2006, plaintiff commenced this action, to recover damages for alleged personal injuries suffered as a result of the of the subject motor vehicle accident. The parties completed discovery and a Note of Issue was filed. Defendants now move for an order pursuant to CPLR § 3212, granting summary judgment dismissing the complaint, on the threshold issue of "serious injury", pursuant to Insurance Law § 5102 (d).

SERIOUS INJURY THRESHOLD

Pursuant to the Comprehensive Motor Vehicle Insurance Reparation Act of 1974 (now 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 sustained at

least one of the categories of "serious injury" as set forth in Insurance Law § 5102 (d) (*Marquez v New York City Tr. Auth.*, 686 NYS2d 18 [1 Dept 1999]; *DiLeo v Blumberg*, 672 NYS2d 319 [1 Dept 1998]).

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.

It is indisputable that five of the nine categories of serious physical injuries discussed by Insurance Law 5102 (d) are not applicable herein as there is no allegation of death, dismemberment, significant disfigurement, fracture or a loss of a fetus. Therefore, the court must determine if the plaintiff's injuries constitute either: (1) permanent loss of use of a body organ, member, function or system; (2) a permanent consequential limitation of use of a body function or system; (3) a significant limitation of use of a body function or system; and (4) 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 90 days during the 180 days immediately following the occurrence of the injury or impairment; (See defendants' motion, plaintiff's bill of particulars, exhibit c, paragraph 20)

Serious injury is a threshold issue, and thus, a necessary element of plaintiff's prima facie case (*Licari v Elliott*, 57 NY2d 230 [1982]; *Toure v Harrison*, 775 NYS2d 282 [1 Dept 2004]; Insurance Law § 5104 [a]). This is in accord with the purpose of the "No-Fault" law, which was to "weed out frivolous claims and limit recovery to significant injuries" (*Toure v Avis*

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Rent A Car Systems, Inc., 98 NY2d 345 [2002], quoting *Dufel v Green*, 84 NY2d 795, 798 [1995]; *Licari v Elliott*, 57 NY2d 234 [1982]; *Rubenscastro v Alfaro*, 815 NYS2d 514 [1 Dept 2006]).

In order to satisfy the statutory threshold, the plaintiff must submit competent objective medical evidence of his or her injuries, based on the performance of objective tests (*Grossman v Wright*, 707 NYS2d 233 [2 Dept 2000]; *Lopez v Senatore*, 65 NY2d 1017, 1019 [1985]). Subjective complaints alone are insufficient to establish a prima facie case of a serious injury (*Gaddy v Eyer*, 79 NY2d 955, 957 [1992]; *Scheer v Koubek*, 70 NY2d 678, 679 [1987]).

It is well settled that positive MRI results may constitute a serious injury within the meaning of Insurance Law §5102(d) (see *Pommels v Perez*, 797 NYS2d 380 [2005]; *Nagbe v Mimigreen Hacking Group, Inc.*, 802 NYS2d 416 [1 Dept. 2005]). Furthermore, a CT scan or MRI may constitute objective evidence to support subjective complaints (see *Arjona v Calcano*, 776 NYS2d 49 [1 Dept 2004]; *Lesser v Smart Cab Corp.*, 724 NYS2d 49 [1 Dept 2001]). The plaintiff's medical submissions must show when the tests were performed, the objective nature of the tests, what the normal range of motion should be and whether the plaintiff's limitations were significant (see *Milazzo v Gesner*, 822 NYS2d 49 [1 Dept 2006]; *Vasquez v Reluzco*, 814 NYS2d [1 Dept 2006]).

With respect to the categories of significant limitation of use of a body function or system and permanent consequential limitation of use, "[w]hether a limitation of use or function is "significant" or "consequential" (i.e., important . . .) relates to medical significance and 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.*, *supra* quoting *Dufel v Green*, *supra*).

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DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The issue of whether a claimed injury falls within the statutory definition of "serious injury" is a question of law for the courts which may decide the issue on a motion for summary judgment (*Perez v Rodriguez*, 809 NYS2d 15 [1 Dept 2006]). On a motion for summary judgment based upon a failure to sustain a serious injury, the defendants bear the initial burden of establishing the absence of a serious injury by tendering evidentiary proof in admissible form eliminating any material issues of fact from the case (*Toure v Avis Rent A Car Sys.*, *supra*; see also *Gaddy v Eyler*, *supra*; *Pirrelli v Long Is. R.R.*, 641 NYS2d 240 [1 Dept 1996]).

A defendant may rely either on the sworn or affirmed statements of their examining physician, plaintiff's deposition testimony and plaintiff's unsworn physician's records (*Fragale v Geiger*, 733 NYS2d 901 [2 Dept 2001]; *Pagano v Kingsbury*, 587 NYS2d 692 [2 Dept 1992]). An affirmed physician's report demonstrating that plaintiff was not suffering from any disability or consequential injury resulting from the accident is sufficient to satisfy a defendant's burden of proof (see *Gaddy v Eyler*, *supra*). In addition, the Courts have unanimously held that a party may not use an unsworn medical report prepared by the parties' own physician on a motion for summary judgment (see *Grasso v Angerami*, 79 NY2d 813 [1991]; *Offman v Singh*, 813 NY2d 56 [1 Dept 2006]). Moreover, CPLR § 2106 requires a physician's statement be affirmed (or sworn) to be true under the penalties of perjury.

Once a defendant has made such a showing, the burden shifts to the plaintiff to come forward with prima facie evidence, in admissible form, to rebut the presumption that there is no issue of fact as to the threshold question (see *Pommells v Perez*, *supra*; *Gaddy v Eyler*, *supra*; *Perez v Rodriguez*, *supra*). A medical affirmation or affidavit based on a physician's own examination, tests, and review of the record, can support the existence and extent of a plaintiff's serious injury (*O'Sullivan v Atrium Bus Co.*, 668 NYS2d 167 [1 Dept 1998]). However, "where a defendant fails to meet his initial burden of establishing a *prima facie* case that the

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plaintiff did not sustain a serious injury, it is not necessary to consider whether the plaintiff's papers in opposition were sufficient to raise a triable issue of fact" (see *Offman v Singh, supra*; *Winegrad v New York Univ. Med Ctr., supra*).

DISCUSSION

In support of the motion for summary judgment, defendants proffer, *inter alia*, the plaintiff's deposition testimony and the affirmed medical reports of Dr. Edward Weiland, a neurologist and Dr. Salvatore Corso, a orthopedist. Both doctors concluded, after medical examinations on October 18, 2007 and without reviewing plaintiff's medical records, that plaintiff was able to "perform normal activities of daily living without restrictions" and exhibited no signs of "permanency or residual" injuries as a result of the subject accident. (See defendants' motion, Dr. Weiland's report, exhibit d, p 4, para. 2 and Dr. Corso's report, exhibit e, p 3, bottom.) The defendant's proffer they meet their burden of proof on the plaintiff's 90/180 claim, because the plaintiff's bill of particulars statements (see plaintiff's motion, bill of particulars, exhibit c, paragraph 13), supported by his deposition testimony, indicates that plaintiff that was confined to bed for three days and home for one week. Defendants' also proffer that in the absence of contrary information they need no other information, including defendant's medical evidence that plaintiff was not injured per the 90/180 period to meet their burden of proof.

Based on the foregoing, defendants have submitted evidence in legally admissible form to meet their *prima facie* burden, entitling them to summary judgment and a finding that plaintiff has not sustained a "serious injury" within the meaning of Insurance Law § 5102 [d] (see, *Gaddy v Eyler, supra*; *Lowe v Bennett*, 511 NYS2d 603 [1 Dept 1986], *Affd*, 69 NY2d 700 [1 Dept 1986]). Thus, the burden shifts to plaintiff to produce evidentiary proof in admissible form in order to establish the existence of a serious injury (see *Taynisha Baez v Imamally Rahamatali*, 817 NYS2d 204 [2006]; *Franchini v Palmieri*, 775 NYS2d 232 [2003]; *Gaddy v*

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Eyler, supra; Shinn v Catanzaro, 767 NYS2d 88 [1 Dept 2003]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Forrest v Jewish Guild for the Blind*, 765 NYS2d 326 [1 Dept 2003]).

In opposition, plaintiff submits, *inter alia*, the affirmation of Dr. Larry M. Neuman, plaintiff's treating physician, whose office is at Heights Medical Care P.C. Dr. Neumann conducted range of motion tests of the plaintiff's cervical and lumbar spine at his initial examination on September 14, 2005 and his recent examination on June 4, 2008. Both examinations indicated significant limitations in plaintiff's range of motion. Plaintiff was treated with chiropractic adjustments and exercises at Heights Medical Care P.C. from September 14, 2005 until April 2006. According to Dr. Neumann's affirmation plaintiff ended treatment because his "no-fault benefits ran out " and " he was advised that he had reached maximum medical improvement" but, plaintiff "from December 2007 until April 2008, the patient [plaintiff] continued receiving further chiropractic treatment at Capitol Chiropractic, P.C." Plaintiff does not submit any medical records to support his medical treatments or claims.

Dr. Neumann also states in his affirmation that plaintiff underwent a CT scan of the cervical spine, on November 7, 2005, an EMG/NCV test on February 23, 2006 and X-rays of the cervical and lumbar spine on September 24, 2005. Dr. Neumann opines that such tests revealed injuries to plaintiff's cervical and lumbar spine. However, plaintiff does not submit any medical records of the CT scan, EMG/NCV test or the X rays, and Dr. Neumann fails to demonstrate that his opinion was based upon his own review of such test results or reports regarding plaintiff's injuries.

Moreover, Dr. Neumann in his affirmation states that plaintiff's injuries were causally related to the motor vehicle accident of September 13, 2005. But this conclusion is contradicted by his own initial medical report from plaintiff's examination on September 14, 2005, which is omitted from plaintiff's proof. The defendants' annexed Dr. Neumann's initial medical examination report to their reply. The report states that plaintiff "was involved in a

previous motor vehicle accident on 9/17/ 05 and 5/17/03, with injuries to the neck and back” (see defendants’ reply, Dr. Neumann medical report, exhibit a, p 1, para. 5) and that “ with a degree of reasonable medical certainty, I conclude that the accidents of 9/7/05 and 9/13/05, are a competent producing *cause* of the patients injuries.” (Id. p 3, para. “Causal Relationship;”) First, plaintiff’s medical proof is rendered suspect and insufficient by the omission of Dr. Neumann’s own initial medical report which contradicts his final conclusion that the subject accident is the sole cause of plaintiff’s injuries. Second, plaintiff’s proof of causation is insufficient because Dr. Neumann’s affirmation also alleging defendants’ are the cause of plaintiff’s injuries by the subject accident, fails to address or even mention, plaintiff’s pre-existing condition back and neck injuries from two previous motor vehicle accidents.

The Court of Appeal in *Pommells v. Perez*, 797 NYS2d 380 (2005), has held the even where there is objective medical proof, when additional contributory factors interrupt the chain of causation between the accident and the claimed injury, such as gap in treatment, an intervening medical problem or pre-existing condition, summary dismissal of the complaint may be appropriate. *Brewster v. FTM Servo Corp.*, 844 NYS2d 5, [1 Dept. 2007]; *Yvonne Style v Christopher K. Joseph*, 820 NYS2d 26; [1 Dept 2006]; *Franchini*, 1 N.Y.3d at 537; *Licari v Elliot*, 57 NY2d 230, 237, 455 NYS2d 570 [1982]). Moreover, plaintiff did not seek to challenge or modify their position (at oral argument or otherwise) after defendants reply submission challenged plaintiff’s medical proof through inconsistent statements.

In addition, plaintiff’s 90/180-day claim proof is insufficient. Plaintiff in his deposition testified, that he only missed “two or three” days of work, as a result of his injuries and Dr. Neumann’s affirmation does not demonstrate that plaintiff suffered an injury which limited “substantially all” his daily activities for 90 of the 180 days immediately after the accident. (See *Morris v Ilay Cab Corp.*, --- N.Y.S.2d ----, [1 Dept. 2009], 2009 N.Y. Slip Op. 02668, 2009 WL 910847 and Insurance Law § 5102 [d] [5]). When construing the statutory definition of a

90/180-day claim, the words 'substantially all' should be construed to mean that the person has been prevented from performing his usual activities to a great extent, rather than some slight curtailment." *Thompson v Abbasi*, 15 AD3d 95, 100-101 [1st Dept 2005].

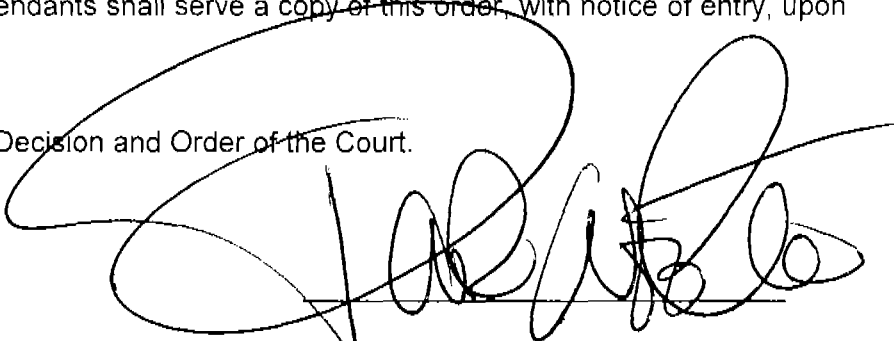
Thus, plaintiff has not met his burden to raise a triable issue of material fact as to whether or not he sustained a "serious injury", pursuant to Insurance Law § 5102 (d).

For these reasons and upon the foregoing papers, it is,

ORDERED that the defendants motion for summary judgment is granted and the case is dismissed; and it is further,

ORDERED that defendants shall serve a copy of this order, with notice of entry, upon plaintiff.

This constitutes the Decision and Order of the Court.



Dated: 4-21-09

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Paul Wooten J.S.C.
Paul Wooten J.S.C.

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