Rodriguez v Freight Masters Inc.
2009 NY Slip Op 33286(U)
July 21, 2009
Supreme Court, New York County
Docket Number: 117827/05
Judge: Paul Wooten
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SCANNED ON 7/24/2009
[* 1]

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

PRESENT: HON. PAUL WOOTEN, Justice — PART 22

SANTIAGO RODRIGUEZ,
Plaintiff,

- v -

FREIGHT MASTERS INC., STEVEN S. JANUARY and PATRICIA A. RYDAK,
Defendants.

INDEX NO. 117827/05
MOTION DATE
MOTION SEQ. NO. 004
MOTION CAL. NO. 103

FILED
JUL 24 2009
COUNTY CLERK'S OFFICE
NEW YORK

The following papers, numbered to , were read on this motion by defendants for summary judgment on the threshold "serious injury" issue.

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

Cross-Motion: Yes ☑ No

On January 30, 2003, plaintiff was an inmate at the Eastern Correction Facility. While being transported to the Albany Medical Center for treatment for Cataracts to his left eye, in a New York State Correction van driven by defendant Patricia Rydak, he was involved in a collision with a vehicle owned by defendant Freight Masters Inc., and operated by defendant Steven January. The accident occurred on the northbound side of Interstate 87, near Albany, New York. Plaintiff was taken to Albany Medical as scheduled, after complaining of pain to the head, right leg and lower back.

Plaintiff commenced this action, on December 27, 2005, to recover damages for alleged personal injuries suffered as a result of the of the subject motor vehicle accident. The parties have completed discovery and Note of Issue has been filed. Defendants Freight Masters Inc., and Steven January ("summary judgment defendants") now move for an order pursuant to CPLR § 3212, granting summary judgment, dismissing the complaint on the basis that plaintiff has not suffered a 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 on-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 that ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

On July 17, 2006, plaintiff served a verified bill of particulars on the Summary judgment defendants. The verified bill of particulars alleged that plaintiff sustained injuries to the neck, left eye, right knee, upper chest, shoulders, and upper and lower back, as well as a disc herniation requiring laminectomy/diskectomy surgery on November 29, 2004, at the Westchester Medical Center. Plaintiff alleged that he sustained "personal injuries in excess of the basic economic losses as defined in New York Insurance Law Section 5102, including fracture and deformity with significant limitation and impairment and injury and impairment which prevents plaintiff from engaging in his usual and customary activities for not less than 90 days during the immediate 180 days following the accident." (See Notice of Motion, Exhibit e.) The summary judgment defendants objected to the verified bill of particulars in that it was

vague and over broad.

On August 16, 2007, plaintiff served a supplemental verified bill of particulars alleging an L1-S1 disc herniation requiring laminectomy/diskectomy surgery, as well as back pain radiating down his right leg. Plaintiff alleged that he was diagnosed with postlaminectomy syndrome of the lumbar spine and lumbar radiculopathy. Plaintiff then quoted New York Insurance Law § 5102 (d).[1] The summary judgment defendants again objected this supplemental verified bill of particulars, because it merely quoted Section 5102 (d), and did not specifically identify the serious injury or injuries that plaintiff allegedly suffer as defined in Section 5102 (d).

On December 26, 2007, plaintiff served a second supplemental verified bill of particulars, which claimed serious injury resulting in (1) permanent loss of use of a body organ, member, function or system and (2) permanent consequential limitation of use of a body organ, member, function or system, as defined in Section 5102 (d). Plaintiff made no other claims of injury under Section 5102 (d). There was no objection to this second supplemental verified bill of particulars.

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 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]; *Rubensccastro 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*

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[1] Plaintiff incorrectly cited the statute as Section 5101 (d).

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 Eyler*, 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*).

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 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 their motion, defendants proffer plaintiff's deposition testimony and the

independent medical examinations and affirmed medical reports of Dr. Jerome Block, and Dr. Adam Bender, and various unaffirmed and uncertified (and at times unreadable) medical reports of the New York State Department of Corrections, Westchester Medical Center and New York State Neuro and Rehab Center of plaintiff's and medical treatment, including various MRI reports.

The Courts notes that unaffirmed or uncertified medical reports and records are inadmissible and cannot be considered on a motion for summary judgment (*Grasso v Angerami*, *supra*; *Offman v Singh*, *supra*; CPLR § § 2106, 4518), however, defendants' proffered plaintiff's medical records indicated above are admissible evidence. Defendants may rely either on the sworn or affirmed statements of their examining physician, plaintiff's deposition testimony and plaintiff's unsworn physician's records (*Newton v Drayton*, 305 AD2d 303 [1st Dept 2003]; *Fragale v Geiger*, 733 NYS2d 901 [2 Dept 2001]; *Pagano v Kingsbury*, 587 NYS2d 692 [2 Dept 1992][2]).

Dr. Bender IME examination found plaintiff's cervical and thoraco-lumbar ranges of motion to be normal, as detailed in the report attached to his affirmation. He also found the straight leg raising sign negative. Dr. Bender noted that plaintiff seemed to exaggerate his symptoms. Dr. Bender stated that he reviewed the November 8, 2007 report of Jerome M. Block M.D., a neurologist who conducted an IME of plaintiff on behalf of defendant Rydak, as well as plaintiff's medical records from New York Neuro and Rehab Center, the New York State Department of Correctional Services, and Westchester Medical Center, and the August 20, 2007 MRI of plaintiff's lumbar spine. Dr. Bender concluded, based on his review of the medical records and his examination of plaintiff, that plaintiff had no neurological problems causally

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[2] The Pagano Court wrote, "Clearly, consideration of a plaintiff's unsworn medical reports submitted in support of a defendant's motion for summary judgment, based on the plaintiff's failure to establish "serious injury", fosters the expeditious disposition of these cases, and is perfectly harmonious with the principle that the "serious injury" threshold "is a threshold imposed solely on plaintiff (*see, Licari v. Elliot,* 57 N.Y.2d 230 [455 N.Y.S.2d 570, 441 N.E.2d 1088])"

related to the January 30, 2007 accident, and did not sustain a serious injury as defined in Insurance Law § 5102 (d).

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 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*, plaintiff's affidavit, the affirmed medical report of plaintiff's physician Dr. Gabriel Dassa, a board certified orthopedic surgeon and the 4-page November 29, 2004 medical records from plaintiffs visit to Westchester Medical Center. Dr. Dassa conducted an examination of plaintiff and found abnormal ranges of motion of plaintiff's lumbosacral spine and a positive straight leg raising test on the right side.

To qualify as a serious injury within the meaning of the statute, "permanent loss of use" must be total. *Oberly v Bangs Ambulance Inc.*, 96 NY2d 295 (2001). Dr. Dassa's conclusions do not find that plaintiff sustained a total loss of use of the cervical and/or lumbar spine. Dr. Dassa's use of "permanent" in his evaluation is not enough to establish the permanency of an injury. *Robinson v Grecian Trans., Inc.*, 278 AD2d 90, 91 (1st Dept 2000). Therefore, plaintiff does not meet the threshold of a proving a permanent loss of use of a body organ, member, function, or system.

In regard to whether plaintiff suffered injury resulting in a permanent consequential limitation of use of a body function or system, Dr. Dassa's findings do show a limitation.

However, plaintiff must also establish that the injuries sustained are casually related to the accident claimed. *Pommells v Perez*, 4 NY3d 566 (2005).

Dr. Dassa discusses plaintiff's history, including the car accident of January 30, 2003, as well as a slip and fall on February 24, 2003 and a second fall on April 5, 2005. Dr. Dassa states that "the initial insult [January 30, 2003 accident] created susceptibility to further injury which was compounded by plaintiff's slip and fall." (See Affirmation in Opposition, Exhibit b). Dr. Dassa's failure to casually relate the alleged injuries to the January 30, 2003 accident is fatal. Stating that the January 30, 2003 accident created "susceptibility" to further injury and not the accident is speculative at best and insufficient to raise a triable issue of fact that plaintiff's alleged injury was caused by the subject accident. *Pommells v Perez, supra.*

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

ORDERED that the defendants' motion for summary judgment to dismiss is granted and the complaint is dismissed with costs and disbursements to these defendants as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the remainder of this action shall continue; and it is further

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

This constitutes the Decision and Order of the Court.

Dated: 7-21-09

JUL 21 2009

Paul Wooten, J.S.C.

Check one: ■ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST**

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