

**Connizzo v Barbera**

2010 NY Slip Op 30547(U)

March 8, 2010

Supreme Court, Nassau County

Docket Number: 21156/07

Judge: Thomas A. Adams

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SHORT FORM ORDER  
SUPREME COURT - STATE OF NEW YORK

Present: HON. THOMAS A. ADAMS,  
Acting Supreme Court Justice

TRIAL/IAS, PART 33  
NASSAU COUNTY

ALFRED CONNIZZO and WINNIE CONNIZZO,

Plaintiff(s),

MOTION DATE: 1/08/10

INDEX NO.: 21156/07

-against-

SEQ. NO. 2

ANTHONY BARBERA and B. REITMAN BLACKTOP,

Defendant(s)

The defendants' motion, pursuant to CPLR 3212, for summary judgment due to the plaintiffs' alleged failure to sustain a serious injury within the meaning of Insurance Law §5102(d) on May 25, 2007 is determined as hereinafter provided.

This personal injury action arises out of a May 25, 2007 motor vehicle accident that occurred on Jericho Turnpike in Mineola at or near the intersection of Jericho Turnpike and Mineola Boulevard. The case was certified for trial on June 9, 2009 and on August 19, 2009 a note of issue was filed. The defendants' motion is therefore timely (see CPLR 3212[a]).

During an October 7, 2008 deposition (see plaintiffs' Exhibit A) the plaintiff Alfred Connizzo testified, inter alia, that after the accident he and his wife, the plaintiff Winnie Connizzo, declined the responding police officer's offer of an ambulance and drove home (p.41,L3). They first sought medical attention three days later (May 28, 2007) (p.41,L16) when they visited the Long Island Jewish Hospital's emergency room in Lake Success (p.42,L3). They were each treated and released and directed to follow-up with their personal physician (p.46,L10).

On May 30, 2007 they visited Joseph Gregorace, D.O., of Island South Medicine & Rehabilitation, P.C., in Bellmore (p.46,L19). The plaintiffs were aware of Dr. Gregorace because he had previously treated Mr. Connizzo following a prior August 12,

2002 motor vehicle accident (p.47,L12; see plaintiffs' Exhibit C). On this occasion, he complained of "chronic headaches and pain in my shoulder" (p.50,L2).

He subsequently began treatment with Dr. Gregorace which consisted of "massage therapy and ... heat" (p.53,L7). He was also referred to a neurologist, James Liguori, M.D., as well as an orthopedist, Jonathan B. Ticker, M.D. (p.54,L14-20). Dr. Ticker administered trigger point injections to his neck twice (p.58,L21) and, in addition, at Dr. Gregorace's recommendation, Mr. Connizzo underwent cervical, left shoulder and brain MRI examinations (p.60,L15). Finally, he received treatment from a chiropractor, Alan Alterman, D.C. (p.65,L13) "occasionally" (p.66,L2), as well as another orthopedist, Dorothy Scarpinato, M.D., and a neurologist whom Dr. Scarpinato recommended, Vandana Soni, M.D.. Dr. Scarpinato diagnosed a partial tear of Mr. Connizzo's left rotator cuff and performed surgery on February 3, 2009 ( see plaintiffs' Exhibit D, Mr. Connizzo's April 14, 2009 further deposition , p.7,L8). Afterwards, he participated in physical therapy twice a week with Dr. Gregorace (p.5,L23) and received two shots from Dr. Scarpinato. (p.19,L2-9).

Dr. Gregorace likewise referred the plaintiff Winnie Connizzo for cervical and lumbar MRI examinations (see plaintiffs' Exhibit B, p.31,L21) and she also saw a neurologist (Dr. Soni) (p.32,L8) and a chiropractor, Alan Alterman (p.33,L23). At the time of her October 7, 2008 deposition, she had no scheduled medical appointments (p.35,L24).

The defendants' motion is premised upon the aforementioned deposition testimony, the plaintiffs' respective medical histories and, inter alia, the January 14, 2009 affirmations of an orthopedist Vartkes Khachadurian, M.D.. With respect to Ms. Connizzo, Dr. Khachadurian averred, based upon a contemporaneous medical examination utilizing objective medical criteria, that she sustained only cervical and lumbar sprains which have resolved (see defendants' Exhibit F).

Dr. Khachadurian's January 14, 2009 affirmation concerning Mr. Connizzo concluded, based upon a contemporaneous examination utilizing objective medical criteria, that he incurred cervical and

lumbar sprains as well as a left shoulder contusion (see defendants' Exhibit J). After Mr. Connizzo's February 3, 2009 surgery, Dr. Khachadurian re-examined his shoulder and executed a June 11, 2009 affirmation (see defendants' Exhibit I) wherein he opines, inter alia, that Mr. Connizzo had "no clinical evidence of internal derangement and no clinical evidence of rotator cuff tear or impingement syndrome".

In addition, as to Mr. Connizzo, the defendants rely upon the December 16, 2008 affirmation of a neurologist, Erik J. Entin, M.D., who, following a contemporaneous examination utilizing objective medical criteria, avers, inter alia, that Mr. Connizzo's post-traumatic migraine headaches would resolve if appropriately treated by a headache specialist (see defendants' Exhibit K). Finally, a radiologist, Melissa Sapan Cohn, M.D., reviewed Mr. Connizzo's August 20, 2002 and September 7, 2007 cervical MRI films and observed only degenerative changes (see defendants' Exhibit L). Moreover, after reviewing Mr. Connizzo's July 3, 2007 left shoulder MRI, Dr. Cohn asserted, in sum, that "[t]here is no evidence of rotator cuff tear". Instead, she observed degenerative changes and, more specifically, "evidence of tendinosis" (see defendants' Exhibit M).

In opposition, the plaintiffs rely entirely upon Dr. Gregorace's affirmed treatment reports (see plaintiffs' Exhibits C & E). In particular, as to Mr. Connizzo, reports from May 30, 2007, June 27, 2007, July 25, 2007, September 15, 2007, October 3, 2007 November 21, 2007, January 9, 2008 and - following service of the defendants' October 12, 2009 motion - November 20, 2009 have been submitted. Similarly, with respect to Ms. Connizzo, Dr. Gregorace's affirmed treatment reports from May 30, 2007, June 15, 2007, June 29, 2007, July 18, 2007, July 25, 2007, September 21, 2007, November 30, 2007, December 21, 2007, February 15, 2008 - and after the defendants' October 12, 2009 motion - November 20, 2009 have been proffered.


Almost uniformly, Dr. Gregorace characterizes Mr. Connizzo's cervical spine injury as a "strain/sprain" and, as his October 20, 2009 report recites, Mr. Connizzo incurred cervical herniations in the prior August 12, 2002 motor vehicle accident. That report also includes a diagnosis of left shoulder rotator cuff tear. However,

Dr. Gregorace's reports impermissibly incorporate the unsworn reports of other physicians i.e., the July 3, 2007 left shoulder MRI report of John Himelfarb, M.D. and the September 7, 2007 cervical MRI report of Mark Shapiro, M.D. (see Umanzor v Pineda, 39 AD3d 539; Porto v Blum, 39 AD3d 614). Significantly, there is no indication that he reviewed the actual MRI films (see Umanzor supra at 540).

Conversely, Dr. Himelfarb's unsworn July 3, 2007 MRI report, which diagnosed a "[p]artial tear and/or tendinitis" of Mr. Connizzo's left shoulder (see plaintiffs' Exhibit C), expresses no opinion as to causation (see Collins v Stone, 8 AD3d 321,322). Moreover, Dr. Gregorace proffers no explanation for the substantial gap in treatment of each plaintiff (see Pommells supra). Yet, none of the defendants' experts address the plaintiffs' claims, clearly set forth in their bill of particulars, that they each sustained a medically-determined injury or impairment of a non-permanent nature which prevented them from performing substantially all of the material acts which constituted their usual and customary activities for not less than 90 days during the 180 days immediately following the May 25, 2007 accident. The defendants therefore failed to meet their prima facie burden of showing that the plaintiffs did not sustain a serious injury within the meaning of Insurance Law §5102(d) as a result of the accident (see Menezes v Khan, 67 AD3d 654,655; Takaroff v A.M. USA, Inc., 63 AD3d 1142,1143; Coburn v Samuel, 44 AD3d 698,699).

Accordingly, the defendants' motion, pursuant to CPLR 3212, for summary judgment due to their failure to incur a "serious injury" as defined by Insurance Law §5102(d) is denied.

Dated: MAR 08 2010

  
A.J.S.C.

**ENTERED**  
MAR 10 2010  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE