Fuller v Mangiaracina
2010 NY Slip Op 31167(U)
April 30, 2010
Sup Ct, Nassau County
Docket Number: 3870-08
Judge: Arthur M. Diamond
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SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

---x

JOHNNIE D. FULLER,

Plaintiff,

-against-

M. MANGIARACINA AND ROSALBA LOBUE,

Defendants.

---x

TRIAL PART: 16

NASSAU COUNTY

INDEX NO: 3870-08

MOTION SEQ. NO: 2

SUBMIT DATE: 04/6/10

The following papers having been read on this motion:

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

Motion by defendants, M. Mangiaracina and Rosalba Lobue, for an Order of this Court, awarding them summary judgment dismissing plaintiff's complaint on the grounds that her injuries do not satisfy the "serious injury" threshold requirement of Insurance Law §5102(d) is denied.

This personal injury action arises out of a motor vehicle accident that occurred on October 29, 2005 when the plaintiff, a pedestrian, was struck by a vehicle owned by M. Mangiaracina and being operated by Rosalba Lobue, at the intersection of Franklin Avenue and Franklin Gate in the Town of Hempstead, New York. Specifically, plaintiff was legally crossing the intersection at its cross walk when the defendant, Rosalba Lobue, who was making a left turn onto Franklin Avenue struck the 60 year old plaintiff.

As a result of the accident, plaintiff was taken by ambulance to the Emergency Room at Franklin Medical Hospital Center in Valley Stream, New York where he presented with complaints of pain to her neck, back, right leg, chest pain and difficulty breathing. The plaintiff was seen by a physician at the Emergency Room and discharged the same day with instructions to follow up with her primary care doctor.

At the time of the accident, the 60 year old plaintiff was employed as a Nursing Assistant at

[* 2]

the VA Administration located in St. Albans, New York.

In her bill of particulars, plaintiff claims that as a result of this accident, she was "confined to her bed and home for approximately three days as a result of the injuries sustained in this accident" (*Motion*, Ex. D [Bill of Particulars] ¶11). Plaintiff claims that as a result of the subject accident, she sustained, *inter alia*, subligamentous posterior disc herniating from C2 through C6 abutting the anterior aspect of the spinal cord; traumatic arthropathy left shoulder joint; traumatic arthropathy knee joint; lumbar radiculopathy; cervical radiculopathy; internal derangement of hip joint; low back derangement; bilateral knee derangement; and limited range of motion (*Id.* at ¶9).

Plaintiff alleges that her injuries fall within the following three categories of the serious injury statute: to wit, 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 (*Id.* at ¶17).

Whether plaintiff can demonstrate the existence of a compensable serious injury depends upon the quality, quantity and credibility of admissible evidence (*Manrique v. Warshaw Woolen Associates, Inc.*, 297 AD2d 519 [1st Dept. 2002]).

In moving for summary judgment, the defendant must make a prima facie case showing that the plaintiff did not sustain a "serious injury" within the meaning of the statute. Once this is established, the burden shifts to the plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating a triable issue of fact that a "serious injury" was sustained (*see Pommels v. Perez,* 4 NY3d 566 [2005]; *see also Grossman v. Wright,* 268 AD2d 79, 84 [2nd Dept. 2000]).

Defendant is not required to disprove any category of serious injury which has not been properly pled by the plaintiff (*Melino v. Lauster*, 82 NY2d 828 [1993]). Moreover, even pled categories of serious injury may be disproved by means other than the submission of medical evidence by a defendant, including plaintiff's own testimony and her submitted exhibits (*Michaelides v. Martone*, 186 AD2d 544 [2nd Dept. 1992]; *Covington v. Cinnirella*, 146 AD2d 565,

566 [2nd Dept. 1989]).

In support of a claim that the plaintiff has 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 plaintiff's examining physician (*see Pagano v. Kingsbury*, 182 AD2d 268 [2nd Dept 1992]). However, unlike the 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 [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, stated that plaintiff's proof of injury must be supported by objective medical evidence, such as MRI and CT scan tests (*Toure v. Avis Rent A Car Sys.*, supra at 353). However, the MRI and CT scan tests and reports must be paired with the doctor's observations during his physical examination of the plaintiff (*see Toure v. Avis Rent A Car Systems,* supra). In addition, unsworn MRI reports are not competent evidence unless both sides rely on those reports (*see Gonzalez v. Vasquez*, 301 AD2d 438 [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, in *Pommels v. Perez*, 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*, 4 NY3d 566).

"Permanent consequential limitation of use of a body organ or member" and "significant limitation of use of a body function or system"

To meet the threshold significant limitation of use of a body function or system or permanent consequential limitation, 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 [1992]; *Licari v. Elliot*, 57 NY2d 230 [1982]; *Scheer v. Koubeck*, 70 NY2d 678 [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*, 268 AD2d 79, 83 [2nd Dept. 2000]).

When 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.*, 98 NY2d 345). 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" (*see id*).

90/180 days

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", a plaintiff must again provide competent, objective medical proof causing the alleged limitations on plaintiff's daily activities (*Monk v. Dupuis*, 287 AD2d 187, 191 [3rd Dept. 2001]). Furthermore, plaintiff must demonstrate that he has been "curtailed from performing his usual activities to a great extent rather than some slight curtailment" (*Licari v. Elliott*, supra at 236; *see also Sands v. Stark*, 299 AD2d 642 [2nd Dept. 2002]).

Unlike a claim of serious injury under "significant limitation of use of a body function or system" category, a gap or cessation in treatment is irrelevant as to whether plaintiff satisfied the 90/180 definition of serious injury (*Gomes v. Ford Motor Credit Co.*, 10 Misc. 3d 900, 904 [Sup. Ct. Bronx 2005]).

In support of their instant motion, defendants rely exclusively upon the sworn, affirmed report of Dr. Jerrold M. Gorski, M.D., who performed an independent medical examination of the plaintiff on September 21, 2009. Defendants' failure to submit any medical proof or their failure to rely upon the plaintiff's own testimony, to rebut the plaintiff's allegations that she was medically impaired in a non-permanent way such that she was prevented from performing substantially all of

[* 5]

the material acts which constituted her 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, precludes this Court from granting summary judgment with respect to the 90/180 category. Defendants have failed, with respect to the 90/180 category, to make a prima facie case showing that she did not sustain a "serious injury" (*see Pommels v. Perez,* supra; *see also Grossman v. Wright,* supra).

Dr. Gorski, in his sworn and affirmed narrative, dated September 21, 2009, states, in pertinent part as follows:

> <u>EXAMINATION</u>:
>
> ***
>
> **Range of motion is measured visually.**
>
> Her knee range of motion was accomplished bilaterally from 0 to 120 degrees (normal 120 degrees). There was no effusion, warmth or tenderness. Quadriceps mechanism was intact. She was able to get up onto the examining table and in that position her straight leg raising test was negative with a negative Lasegue's bilaterally.
>
> Back extension was 10 (normal 10 degrees). Left and right lateral bending and rotation were 60 (normal 60 degrees). Neurovascular examination of the lower extremities was normal.
>
> **Her neck range of motion was accompanied by pain at the extremes and there was global limitation of motion**. Flexion was 60 degrees (normal 70 degrees), extension 5 degrees (normal 15 degrees), left and right lateral bending 50 degrees (normal 70 degrees). She had a normal shoulder shrug.
>
> The forward elevation in the left shoulder was accompanied from 0 to 170 (normal 180 degrees). There was mild crepitus identified. Clinically her rotator cuff was intact. She was able to externally rotate to the ears (normal occiput) bilaterally and internally rotate to the L5 midline (normal L5 midline). Neurovascular examination was intact in the upper extremity.

[* 6]

She was able to walk on her heels and toes but she said this hurt her toes.

***

CONCLUSION:

In conclusion, I have examined Ms. Fuller for injuries claimed as a pedestrian struck by a car on 10/29/05. She was seen in the emergency room, treated and released. She went back to her regular job full time, full duty a few days later.

There is a significant history of prior injuries including motor vehicle accidents and work related issues as well as a subsequent injury. This woman has subjective complaints and no causally related objective findings today and in fact she has some signs of degenerative arthritis. In my opinion, there is no impairment or permanency consequent to this 10/29/05 incident. She requires not further diagnostic tests or treatment.

The claimant reports sustaining a sprain/strain of the back, left upper extremity and left lower extremity now resolved.

She has some evidence of age related degenerative disease which, in my opinion, is the cause of her decreased range of motion of the neck. She has no orthopedic disability. She may perform all activities of daily life including gainful employment.

(*Motion*, Ex. E [Emphasis Added])

While Dr. Gorski's affirmation appears, at first blush, to constitute sufficient proof in admissible form that plaintiff, Johnnie D. Fuller, did not sustain a serious injury within the meaning of the statute as a result of the subject accident, upon a closer reading of his narrative, this Court finds otherwise.

Specifically, in the absence of any objective medical testing by Dr. Gorski, his subjective impressions and opinions that the plaintiff did not sustain a serious injury within the meaning of the statute are irrelevant. Dr. Gorski fails to set forth the objective medical testing he performed to support his conclusion; rather, he relies upon his "eye" and "visual observations" to quantify the range of motion measurements of plaintiff's knee, back, neck and shoulder (*Vasquez v. Basso*, 27

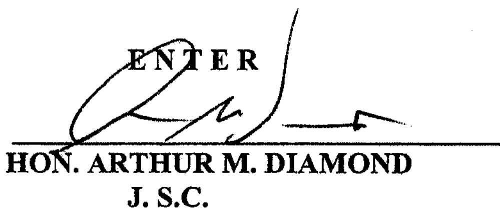
[* 7]

AD3d 728 [2nd Dept. 2006]; *Walters v. Papanastassiou*, 31 AD3d 439 [2nd Dept. 2006]). This is clearly insufficient (*Toure v. Avis Rent A Car Systems, Inc.*, supra).

Inasmuch as the defendants have failed to meet their prima facie burden of showing that the injured plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident, it is unnecessary to consider the sufficiency of the plaintiff's papers in opposition (*McFadden v. Barry*, 63 AD3d 1120 [2nd Dept. 2009]; *Delayhaye v. Caledonia Limo & Car Serv., Inc.*, 61 AD3d 814 [2nd Dept. 2009]).

This shall constitute the decision and order of this Court.

DATED: April 30, 2010



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