

Lucey v Carman

2010 NY Slip Op 31169(U)

May 3, 2010

Sup Ct, Nassau County

Docket Number: 018747/08

Judge: Randy Sue Marber

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

JUSTICE

TRIAL/IAS PART 20

X

JOHN T. LUCEY and WILLIAM J. CAREY,

Plaintiffs,

-against

**Index No.: 018747/08
Motion Sequence...02, 03, 04
Motion Date...02/23/10**

JAMES R. CARMAN,

Defendant.

X

Papers Submitted:

- Notice of Motion.....X
- Notice of Cross-motion.....X
- Notice of Motion.....X
- Affirmation in Opposition.....X
- Affirmation in Opposition.....X
- Affirmation in Support.....X
- Reply Affirmation.....X

The Defendant, James R. Carman, (hereafter Carman) seeks an Order of this Court dismissing the Plaintiff, William J. Carey's (hereafter Carey) complaint pursuant to CPLR § 3212 on the ground that the Plaintiff, Carey has not sustained a serious injury as defined by § 5102 (d) of the New York Insurance Law. The Plaintiff, Carey opposes the motion. The Plaintiff, John C. Lucey, (hereafter Lucey) seeks an Order, pursuant to CPLR § 3212, granting him summary judgment and dismissing the Plaintiff, Carey's complaint on the basis that the Plaintiff, Carey has not sustained a serious injury. In addition, the Plaintiff,

Lucey seeks an Order, pursuant to CPLR § 3212 granting him summary judgment against the Defendant on the issue of liability. The Defendant opposes that motion.

This action arises from a motor vehicle accident that occurred on May 4, 2008 on Waukena Avenue where it intersects with Oceanside Road in Oceanside, Nassau County, New York. The vehicle driven by the Plaintiff, Lucey, in which the Plaintiff, Carey and the Plaintiff, Lucey's daughter were passengers and the vehicle driven by the Defendant were traveling in opposite directions on Waukena Avenue. The two vehicles collided when the Defendant's vehicle made a left turn in front of the Plaintiff, Lucey's vehicle. All of the occupants of the Plaintiff, Lucey's car were taken by ambulance to the hospital.

The Plaintiff, Carey claims that as a result of this accident he sustained, inter alia, posterior bulges at C2-3 and C6-7; cervical disc syndrome; post concussion disc syndrome secondary to trauma with traumatic headaches; cervical myofascial pain syndrome; cervical vertebral derangement with sprain and chest wall contusion.

This action was commenced on or about October 14, 2008 by service of a summons and verified complaint. Issue was joined on or about October 17, 2008 with the service of the Defendant's answer. Included in the answer is a counterclaim against the Plaintiff, Lucey, alleging that the Plaintiff, Carey's injuries were caused by the Plaintiff, Lucey's negligence. The Plaintiff, Lucey was deposed on July 27, 2009 and the Defendant was deposed on September 24, 2009.

It is noted at the outset that a defendant is not required to disprove any category

of serious injury which has not been pleaded by the plaintiff. (*Melino v. Lauster*, 82 N.Y.2d 828 [1993]). In the instant matter, the Plaintiff, Carey's alleged injuries potentially fall within the following three categories of serious injury: permanent consequential limitation of the use of a body or organ; significant limitation of use of a body function or system and "a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material act 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". Whether the Plaintiff, Carey can demonstrate the existence of a compensable serious injury depends upon the quality, quantity and credibility of the admissible evidence. *Manrique v. Warshaw Woolen Associates, Inc.*, 297 A.D.2d 519 [1st Dept, 2002].

On a motion for summary judgment, the movant must establish his or her cause of action or defense sufficient to warrant a court directing judgment in its favor as a matter of law (*Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966 [1988]; *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 [1986], *Rebecchi v. Whitmore*, 172 A.D.2d 600 [2nd Dept. 1991]). "The party opposing the motion, on the other hand, must produce evidentiary proof in admissible form sufficient to require a trial of material issues of fact" (*Frank Corp. v. Federal Ins. Co.*, *supra*, at 967; *GTF Mktg. v. Colonial Aluminum Sales*, 66 N.Y.2d 965 [1985]; *Rebecchi v. Whitmore*, *supra* at 601). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (*see, Frank Corp. v. Federal Ins. Co.*, *supra*).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist (*Barr v. County of Albany*, 50 N.Y.2d 247 [1980]; *Daliendo v. Johnson*, 147 A.D.2d 312, 317 [2nd Dept. 1987]). It is the existence of an issue, not its relative strength that is the critical and controlling consideration. (*Barrett v. Jacobs*, 255 N.Y. 520 [1931]; *Cross v. Cross*, 112 A.D.2d 62 [1st Dept. 1985]). The evidence should be construed in a light most favorable to the party moved against. (*Weiss v. Garfield*, 21 A.D.2d 156 [3rd Dept. 1964]). Summary judgment is rarely granted in negligence cases. (*Connell v. Buitekant*, 17 A.D.2d 944 [1st Dept. 1962]).

In a personal injury action, a summary judgment motion seeking to dismiss the complaint requires that a defendant establish a prima facie case that the plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102 (d) (*Gaddy v. Eyler*, 79 N.Y.2d 955 [1992]). Upon such a showing, it becomes incumbent on the plaintiff to come forward with sufficient evidence in admissible form to demonstrate the existence of a question of fact on the issue (*Gaddy v. Eyler, supra*). The court must then decide whether the plaintiff has established a prima facie case of sustaining serious injury (*Licari v. Elliot*, 57 N.Y.2d 230 [1983]).

In support of a claim that the plaintiff has not sustained a serious injury, the defendant may rely either on the sworn statements of the defendant's examining physicians

or the unsworn reports of the plaintiff's examining physicians (*see Pagano v. Kingsbury*, 182 A.D.2d 268 [(2nd Dept. 1992)]). However, unlike the movant's proof, unsworn reports of the plaintiff's examining doctors or chiropractors are not sufficient to defeat a motion for summary judgment (*Grasso v. Angerami*, 79 N.Y.2d 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 N.Y.2d 345 (2002), stated that a plaintiff's proof of injury must be supported by objective medical evidence, such as sworn MRI and CT scan tests. However, these sworn tests must be paired with the doctor's observations during the physical examination of the plaintiff. Unsworn MRI reports can also constitute competent evidence if both sides rely on those reports. *See Gonzalez v. Vasquez*, 301 A.D.2d 438 [1st Dept. 2003]).

Conversely, even where there is ample proof of a plaintiff's injury, certain factors may nonetheless override a plaintiff's objective medical proof of limitations and permit dismissal of a plaintiff's complaint. Specifically, additional contributing factors such as a gap in treatment, an intervening medical problem or a pre-existing condition would interrupt the chain of causation between the accident and the claimed injury (*Pommels v. Perez*, 4 N.Y.3d 566 [2005]).

Insurance Law §5102 (d) defines serious injury to mean a personal injury which results in: (1) death; (2) dismemberment; (3) significant disfigurement; (4) a fracture;

(5) loss of a fetus; (6) 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”.

To meet the threshold regarding 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. Eyley*, 79 N.Y.2d 955 [1992]; *Licari v. Elliot*, 67 N.Y.2d 230 [1982]). A minor, mild or slight limitation will be deemed insignificant within the meaning of the statute (*Licari v. Elliot, supra*). A claim 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, can be made by an expert's designation of a numeric percentage of a plaintiff's loss of motion, in order to prove the extent or degree of the physical limitation (*See Toure v. Avis, supra*). In addition, an expert's qualitative assessment of a plaintiff's condition is also probative, provided: (1) the evaluation has an objective basis and (2) the evaluation compares the plaintiff's limitation to the normal

function, purpose and use of the affected body organ, member, function or system (*see id.*).

Finally, 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 A.D.2d 187, 191 [3rd Dept. 2001]). A curtailment of the plaintiff’s usual activities must be “to a great extent rather than some slight curtailment” (*Licari v. Elliott, supra* at 236). Under this category specifically, a gap or cessation in treatment is irrelevant in determining whether the plaintiff qualifies (*Gomez v. Ford Motor Credit Co.*, 10 Misc.3d 900 [Sup. Ct., NY Cty., 2005]).

With these guidelines in mind, the Court will turn to the merits of the Defendant’s motion.

In support of his motion, the Plaintiff, Carey submits the pleadings, the verified bill of particulars, the affirmation of Alan J. Zimmerman, M.D., an orthopaedic surgeon who examined the Plaintiff, Carey on August 26, 2009, the affirmation of Chandra M. Sharma, M.D., a psychiatrist and neurologist who examined the Plaintiff, Carey on August 21, 2009 and the affirmation of Audrey Eisenstadt, M.D., a radiologist who reviewed the Plaintiff,

Carey's cervical spine MRI.

Based upon this evidence, the Court finds that the Defendant has established a prima facie case that the Plaintiff, Carey did not sustain a serious injury within the meaning of Insurance Law § 5102 (d). This holds true notwithstanding the fact that neither Drs. Zimmerman nor Sharma noted how the range of motion tests were measured. Additionally, the fact that both doctors noted some variances from the normal range is not controlling. Dr. Sharma notes that the Plaintiff, Carey's inability to perform a tandem maneuver is due to his age, 74 at the time of the exam and that the limitations of movement of the cervical spine are also age related. Otherwise, the results of both the orthopaedic and neurological examinations were normal. Dr. Eisenstadt's report of the Plaintiff, Carey's May 21, 2008 cervical spine MRI notes the presence of degeneration at the C6-7 level, desiccation at the C2-3, C7-T1 and T2-3 levels, as well as bulging of disc material at the C2-3, C6-7 and C7-T1 intervertebral disc levels. However, she concludes that these are the result of "long-standing degenerative change". She continues, "There is osteophyte formation seen at the C2-3, C6-7 and C7-T1 levels. These bony productive changes are greater than six months in origin, and could not have occurred in the short time interval between examination and injury. Disc degeneration is seen at the C6-7 level. Degeneration is a drying out and loss of disc substance, another process greater than six months in origin, which could not have occurred in the short time interval examination and injury (sic). Desiccation is seen at the C2-3, C7-T1 levels. Desiccation is a drying out of disc material, greater than three months in origin,

and also indicative of pre-existing degenerative disease. Multiple bulging discs are noted. Disc bulging is not a traumatic process. It is degeneratively induced, related to ligamentous laxity. This patient has degenerative changes involving the osseous and intervertebral disc structures as well as ligamentous structures. What is not seen is an acute traumatic injury involving the osseous, ligamentous, or intervertebral disc structures”.

Since the Defendant has established a prima facie case that the Plaintiff, Carey has not sustained a serious physical injury, it then becomes the Plaintiff, Carey’s burden to submit sufficient evidence to raise a triable question of fact. This he has failed to do. In support of his opposition to the motion, the Plaintiff, Carey has submitted copies of photographs depicting the damage to the Plaintiff, Lucey’s vehicle, the Plaintiff, Carey’s affidavit, the October 7, 2009 affirmation of Harold Augenstein, M.D., a radiologist, together with reports interpreting MRI films of the Plaintiff, Carey’s brain and cervical spine, the February 8, 2010 affirmation of Proceso Villarica, M.D. and South Nassau Community Hospital records from the day of the accident.

Neither the photographs nor the hospital records are sworn to and as a result, cannot be considered by the Court. Dr. Augenstein’s report of the Plaintiff, Carey’s cervical spine MRI notes his findings but does not correlate them to any specific injury caused by the instant motor vehicle accident. Dr. Villarica notes the existence of disc bulges at C2-3 and C6-7 and concludes that they were a direct result of the May 4, 2008 vehicular accident. He documents considerable restriction of motion based upon computerized range of motion tests

performed on the Plaintiff, Carey on July 28, 2009 and predicts that future exacerbations will occur as a result of the bulging discs. Neither doctor, however, address the Defendant's doctors findings that the Plaintiff, Carey's cervical spine injuries were the result of pre-existing degeneration and not the result of the auto accident. Dr. Villarica's conclusion that the Plaintiff, Carey's injuries were caused by the accident is rendered speculative in light of this omission. (*Ferebee v. Sheika*, 58 A.D.3d 675 [2nd Dept, 2009]).

In addition, the Plaintiff, Carey and his doctors have failed to adequately explain the gaps in treatment. The Plaintiff, Carey's assertion that he was only able to continue treatment in his native Ireland a dozen times is unavailing, given the nationalized system of medical care in that country. Moreover, no proof has been submitted as to that treatment. Furthermore, the Plaintiff, Carey has failed to provide competent medical proof that he has sustained a medically determined injury of a non-permanent nature which prevented him from performing his usual and customary activities for 90 of the 180 days following the accident. (*Roman v. Fast Lane Car Service*, 46 A.D.2d 535 [2nd Dept, 2007]). The only evidence presented are the Plaintiff, Carey's own claims that he is no longer able to referee soccer games or coach his grandchildren in soccer. These assertions, without more, are insufficient to establish this category of serious injury.

The Court will next consider whether summary judgment should be granted to John Lucey, the Plaintiff on the counterclaim, on the issue of liability. Based upon the applicable law and the deposition testimony submitted, the Court finds that issues of fact

exist as to the cause or causes of the collision between the vehicle driven by the Plaintiff, Lucey and the vehicle driven by the Plaintiff, Carey. Consequently, summary judgment on the issue of liability is **DENIED**.

Accordingly, it is hereby

ORDERED, that the motion by the Defendant made pursuant to CPLR § 3212, which seeks dismissal of the Plaintiff, William J. Carey's complaint is hereby **GRANTED**, and it is further

ORDERED, that the motion by the Plaintiff, John Lucey made pursuant to CPLR § 3212, which seeks dismissal of the Plaintiff, William J. Carey's complaint is hereby **GRANTED**, and it is further

ORDERED, that the Cross-motion interposed by Plaintiff on the counterclaim, John Lucey, which seeks an order granting summary judgment dismissing all claims and cross-claims asserted against him is hereby **DENIED**.

This decision constitutes the decision and order of the court.

DATED: Mineola, New York
May 3, 2010



Hon. Randy Sue Marber, J.S.C.

ENTERED
MAY 05 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE