

Patterson v Fives

2010 NY Slip Op 31232(U)

May 3, 2010

Supreme Court, Nassau County

Docket Number: 6069/08

Judge: Ute W. Lally

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SHORT FORM ORDER

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**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 4**

**Present: HON. UTE WOLFF LALLY
Justice**

**CHARLES PATTERSON,
Plaintiffs**

**Motion Sequence #2
Submitted March 9, 2010
XXX**

-against-

INDEX NO: 6069/08

**KELLY M. FIVES, JOHN M. FIVES, BRITTANY L.
FLECKER and JEAN M. FLECKER,**

Defendants.

The following papers were read on this motion for summary judgment:

**Notice of Motion and Affs.....1-3
Affs in Opposition.....4-9
Affs in Reply.....10&11**

Upon the foregoing papers, it is ordered this motion by defendants, Kelly M. Fives and John M. Fives, for an Order pursuant to CPLR 3212 granting summary judgment in their favor, dismissing plaintiff's complaint as against movant on the grounds that his injuries do not satisfy the "serious injury" threshold requirement of Insurance Law §5102(d) is granted. The plaintiff's complaint is dismissed in its entirety.

This is an action to recover money damages for serious personal injuries allegedly sustained in a motor vehicle accident that occurred on December 23, 2007 at approximately 4:15 p.m. at the intersection of Merchants Concourse and Pravado Road, Westbury, County of Nassau, New York. Plaintiff was a passenger in a vehicle being

operated by his girlfriend, non-party, Monica Rewiako. Defendant, Kelly M. Fives was operating a vehicle owned by the defendant John M. Fives. Defendant, Brittany Flecker was operating a vehicle owned by defendant Jean M. Flecker. Apparently, the Flecker vehicle rear ended the Fives vehicle which in turn impacted the vehicle in which plaintiff was traveling. Plaintiff claims that his vehicle was stopped in traffic when the impact occurred. Plaintiff explained that the vehicle in which he was traveling was not towed away from the scene; rather his girlfriend drove them away to her house, as was their plan prior to the accident.

Plaintiff testified that he did not have any physical complaints at the time of the accident. Rather, he first felt physical pain around two weeks later. He stated that he felt a "sharp pain" in his lower back which he described as "a pain going into my lower back". Plaintiff first sought medical help approximately three weeks after the accident when he had terrible pain at work going up his back and down his right leg.

At the time of the accident, plaintiff was employed as a part time clerk at the Department of Motor Vehicles in Bethpage, New York working approximately 20 hours a week.

Plaintiff also testified that he previously injured his back in 2002 while lifting a box at his job which at the time was with Hudson Valley Pavement doing "miscellaneous" work. As a result of this 2002 accident, plaintiff explained that he had a sharp general pain in his lower back and that upon visiting a 24 hour clinic for treatment, his symptoms had resolved within a week. He did not report any prior or subsequent injuries.

At his deposition, plaintiff did not complain of any activities that he is unable to engage in as a result of the accident. His restrictions, he stated, are limited to being able to do everything but with pain.

In his bill of particulars, plaintiff claims that as a result of this accident, he was “confined to his bed and home for approximately eight months to date and continuing”. The plaintiff alleges that as a result of the subject accident, he sustained, *inter alia*, straightening of the normal lordosis; L5-S1 disc bulge with central herniation; L2-L3 through L4-L5 minimal bulge; neck pain radiating into both shoulders; low back pain radiating into both legs and both feet with his toes being numb since the accident; lumbar radiculopathy; and lumbago.

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).

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; see also *Grossman v Wright*, 268 AD2d 79, 84).

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). 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 his

submitted exhibits (*Michaelides v Martone*, 186 AD2d 544; *Covington v Cinnirella*, 146 AD2d 565, 566).

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). 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).

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, Id.*). 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, Id.*). In addition, unsworn MRI reports are not competent evidence unless both sides rely on those reports (see *Gonzalez v Vasquez*, 301 AD2d 438).

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, Id.*, 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, Id.*).

In support of his instant motion, defendant submits, *inter alia*, the unsworn, unaffirmed report of Dr. Bradley J. Cohen, D.O., of the Ross Orthopaedic Group, P.C. with whom the plaintiff had sought treatment from as early as May 30, 2007 (seven months prior to the date of accident); and the sworn, affirmed MRI report dated January 30, 2009, of Dr. Audrey Eisenstadt, M.D..

It is noted at the outset that the affirmation of Dr. Eisenstadt, dated January 30, 2009, does not constitute competent medical evidence herein as the physician merely "reviewed" the MRI examination of the plaintiff performed at Metropolitan Diagnostic Imaging on February 11, 2008; there is no evidence that Dr. Eisenstadt paired her observations with a physical examination of the plaintiff (*Toure v Avis Rent-a-Car Systems, supra*).

Insofar as Dr. Cohen's medical records are unsworn and unaffirmed, said report nevertheless constitutes admissible evidence in support of defendants' motion, because Dr. Cohen is admittedly the plaintiff's physician and not the defendants' examining doctor (*Pagano v Kingsbury, supra*).

Dr. Cohen's report, dated May 30, 2007, i.e., more than seven months prior to the date of plaintiff's subject motor vehicle accident, states, in pertinent part, as follows:

Charles Patterson is a 27 year old gentleman who presents, describing low back pain since 2001. He states that at the time of his pain, he was involved in a roller hockey accident. He reports having x-rays, which revealed a bulging disc, though never had an MRI. Mr. Patterson comes in with daily low back pain radiating down to his right leg, which he feels is now radiating down his left leg for the past 4 days. He is here now for a neurologic consultation.

* * *

IMPRESSION:

At this time, the neurologic impression is that of a 27 year old gentleman coming in with signs and symptoms consistent with a lumbar disc herniation, with the possibility of a lumbar radiculopathy.

RECOMMENDATION:

At the request of Mr. Patterson, the bilateral lumbar paraspinal musculature has been injected with Depo Medrol and Lidocaine today, under sterile procedure. The patient tolerated this procedure well. The patient is advised to apply ice for pain alleviation...Mr. Patterson does not have any insurance at the present time, so even though an MRI of the lumbar spine is recommended, he will hold off on this, until he gets insurance...I want to see the patient back in my office within the month for hopeful neurologic improvement.

6/15/07 - NEUROLOGIC FOLLOW UP

...He states that he still has episodic low back pain, which is worse in the morning...I have told him that, if and when he does get insurance, he can get an MRI at the point to determine the etiology for his chronic back pain.

7/13/07 - NEUROLOGIC FOLLOW UP

...Mr. Patterson presents, today, still uninsured, so he cannot do an MRI yet. He states that his back pain has still be episodic radiating down to his right leg, which is worse after exertion. Mr. Patterson is not working at present...Since Mr. Patterson does have inflammation that has been becoming more persistent, I am going to add on Celebrex 200 mg. 1x a day to the Lorcet...

8/10/07 - NEUROLOGIC FOLLOW UP

...Mr. Patterson presents, today, not doing to [sic] well. He states that for the past 1 ½ weeks, he has had increasing low back pain with the humidity as well as the rain...His exam, today, reveals right lumbar tenderness associated with spasm as well as right piriformis tenderness associated with spasm. At the request of the [sic] Mr. Patterson, these areas have been injected with Depo Medrol and Lidocaine today, under sterile procedure...

9/12/07 - NEUROLOGIC FOLLOW UP

...Mr. Patterson presents, today, not doing to [sic] well. He states that he has continued low back pain, which is radiating up to his midback area. He also reports that his condition has worsened over the course of the past month, since his Lorcet prescription was stolen out of his car...Mr. Patterson is working part-time. His exam reveals bilateral thoracic as well as bilateral lumbar tenderness associated with spasm. At his request, these areas have been injected with Depo Medrol and Lidocaine today, under sterile procedure...Mr. Patterson also reports that as of January of 2008, he will be getting insurance, so at that point, we will

obtain an MRI of the lumbar spine to finally evaluate his status causing his persistent symptomatology.

10/11/07 - NEUROLOGIC FOLLOW UP

...Mr. Patterson presents, today, not doing to [sic] well...He states that his back pain has worsened to the point where he gets numbness in both legs, more on the right than the left hand side, which is worse after any exertional activity...I have told Mr. Patterson that once he starts working full-time and gets insurance benefits, we have to obtain an MRI of the lumbar spine to determine the etiology behind his persistent daily low back pain.

11/8/07 - NEUROLOGIC FOLLOW UP

...Mr. Patterson presents, today, not doing to [sic] well. He states that as the weather has turned colder, he has had increasing low back pain, more on the right than the left hand side, which is causing him to be unable to sleep...Mr. Patterson does have right lumbar tenderness associated with spasm. At the request of the patient, these areas have been injected with Depo Medrol and Lidocaine today, under sterile procedure...I want to see the patient back in my office next month for hopeful neurologic improvement. Mr. Patterson also reports that he is able to obtain insurance benefits as of January of 2008. At that time, I will recommend an MRI of the lumbar spine, to finally determine the etiology behind his frequent complaints.

12/4/07 - NEUROLOGIC FOLLOW UP

...Mr. Patterson presents, today, not doing to [sic] well. He states that has the weather has turned colder, his back pain has worsened radiating down to his right leg, which has been exacerbated over the course of the past week...Mr. Patterson continues to have bilateral lumbar tenderness associated with spasm...

12/27/07 - NEUROLOGIC FOLLOW UP

...Mr. Patterson presents, today, doing better...Mr. Patterson also reports that he has injured his back, last week, after being involved in an MVA...His exam, today, reveals right lumbar tenderness associated with spasm, with right piriformis tenderness associated with spasm. At the patient's request, these areas have been injected with Depo Medrol and Lidocaine today, under sterile procedure...I want to see the patient back in my office next month for hopeful neurologic improvement.

1/25/08 - NEUROLOGIC FOLLOW UP

...Mr. Patterson presents, today, not doing well. He states that for the past 24 hours, he has had increasing back pain on the right-hand side, which has been getting worse over the day...He continues to have bilateral lumbar tenderness associated with spasm, as well as bilateral piriformis tenderness associated with spasm...I have told Mr. Patterson, once again, that he should get an MRI of the lumbar spine, ruling out a focal disc herniation. He states that he will most likely

have insurance next month, so at the next visit, I will arrange for an MRI of the lumbar spine, if he remains symptomatic.

Based upon the report of plaintiff's own neurologist, Dr. Cohen, this Court finds that defendants, Fives, have submitted sufficient proof in admissible form that plaintiff, Charles Patterson, did not sustain a serious injury within the meaning of the statute as a result of the subject accident. The evidence submitted by the defendant, including plaintiff's medical records, establishes that the plaintiff had a pre-existing injury to his lower back, the same area which he claims was injured as a result of this accident (*Passaretti v Yung*, 39 AD3d 517). Further, Dr. Cohen's report states that such pre-existing condition was in fact symptomatic before the accident (*Umanzor v Pineda*, 39 AD3d 539). In light of the foregoing, the burdens shifts to the plaintiff to raise a triable issue of fact with respect to his claimed serious injuries.

In opposition to defendants' motion, plaintiff submits, *inter alia*, the sworn, affirmation of Dr. Alan Ng, M.D., Diplomate of American Board of Physical Medicine and Rehabilitation dated November 5, 2009, more than 21 months after the date of plaintiff's accident; the sworn narrative report of Dr. Bradley Cohen, D.O., dated November 5, 2009; and, the plaintiff's own sworn affidavit.

Initially, it is noted that Dr. Cohen's narrative report, which forms the large part of defendants' support of their motion, falls short of raising a triable issue of fact when submitted in opposition to the defendants' motion. Dr. Cohen, states, in his narrative report, in pertinent part, as follows:

This is a narrative report regarding Charles Patterson, who was involved in a motor vehicle accident, on December 23, 2007. The patient presented to my office in neurologic consultation for this case, on February 1, 2008. At that point,

he was a 27-year-old gentleman who claimed that he was involved in a motor vehicle accident, which occurred on December 23, 2007...He came in at that initial visit with a chief complaint of neck pain radiating down to both shoulders as well as low back pain radiating down to both legs. He stated that his toes have been numb since the trauma. The patient also reported that he had been having a very unsteady in-balanced gait since the accident as well. The patient denied being involved with any physical therapy or chiropractic care. He presented here for neurologic consultation for the above-described complaints.

His past medical history at the initial consultation was unremarkable. He was not taking any medication...My initial neurologic working diagnosis was that of a 27-year-old gentleman who was involved in a motor vehicle accident, coming in with the clinical diagnosis of cervical and lumbar disc herniation with radiculopathy...

It is noted that Dr. Cohen's sworn narrative report submitted in opposition to the motion thoroughly fails to refute, or even address, the fact that the plaintiff's claimed injuries do not arise out of the subject motor vehicle accident. The evidence submitted herein by the defendants confirms that the plaintiff treated with Dr. Cohen for lower back pain over the course of approximately seven months prior to the accident, the last visit being nineteen days prior to the accident, at which point, plaintiff had lower back complaints and was prescribed numerous medications for the pain. In his narrative report submitted in opposition to defendants' motion, Dr. Cohen not only ignores the treatment he consistently rendered to the plaintiff prior to this accident, but his assertions herein are made to the contrary.

Specifically, the three page narrative report of Dr. Cohen dated November 5, 2009 ignores his own treatment of the plaintiff prior to the accident, stating that the plaintiff presented to his office for neurological consultation on February 1, 2008, with low back pain radiating down to both legs, as a result of this accident. This affirmation states that plaintiff's "past medical history" was "unremarkable," and that plaintiff was

“not taking any medication.” Obviously, in this case, Dr. Cohen’s opinion offered in support of the plaintiff’s argument that his injuries were the result of the subject motor vehicle accident, fails to adequately address plaintiff’s serious and debilitating pre-existing back condition, or how plaintiff’s current problems, in light of his past medical history, are causally related to the accident” (*Legendre v Bao*, 29 AD3d 645).

Plaintiff’s remaining proof is equally insufficient.

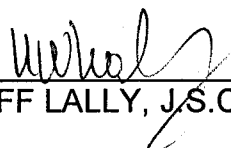
Dr. Ng’s affirmed to report dated November 5, 2009, fails in many regards to raise a triable issue of fact. First, like Dr. Cohen, Dr’ Ng’s report fails to document his awareness that the plaintiff had pre-existing lower back injuries; therefore any finding on his part that the plaintiff’s current injuries were causally related to the subject accident is nothing more than mere speculation (*Bennett v Genas*, 27 AD3d 601; *Bell v Ramean*, 29 AD3d 839). Second, Dr. Ng’s report confirms that he did not see the plaintiff herein until well after the date of the accident, approximately two years after the date of the accident. Plaintiff’s unexplained 22 month gap in treatment with Dr. Ng is fatal to his claim of serious injury (*Baez v Rahamatali*, 24 AD3d 256, *affd* 6 NY3d 876). This is especially true since Dr. Ng’s report was prepared after the defendants herein moved for summary judgment (*see e.g., Gonzalez v Beale*, 37 AD2d 278).

Plaintiff’s remaining proof, including his own affidavit, also falls short of raising a triable issue of fact herein. Contrary to his sworn deposition testimony and contrary to the medical evidence submitted herein, plaintiff, in his affidavit in opposition to defendants’ motion states that “at the time of the accident,” he “was not suffering from any lumbar pain...nor under the care of medical facility for...lumbar spine.” Plaintiff’s

affidavit, in direct contravention of the defendants' proof, states that "from 2002 until my accident of December 23, 2007, my lower back was pain and symptom free". The patent falsity of the assertions in the affirmation of Dr. Cohen and the affidavit of the plaintiff are striking. Taken together with the fact that none of plaintiff's submissions adequately address plaintiff's serious and debilitating preexisting back conditions or how plaintiff's current problems, in light of his past medical history are causally related to the accident, compels this court to grant summary judgment dismissal of plaintiff's complaint herein.

Therefore, defendant's motion for summary judgment dismissing plaintiff's complaint, in its entirety, is granted.

Dated: May 3, 2010



UTE WOLFF LALLY, J.S.C.

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