

**Jean-Baptiste v Tobias**

2010 NY Slip Op 31316(U)

May 18, 2010

Supreme Court, Nassau County

Docket Number: 11792/08

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

GAMALIEL JEAN-BAPTISTE and MARIEANGE MOISE,

Plaintiff(s),

MOTION DATE: 3/19/10

INDEX NO.: 11792/08

-against-

SEQ. NOS. 1 & 2

JOSHUA TOBIAS and STANLEY TOBIAS,

Defendant(s)

The defendants and counterclaim defendants' respective motions, pursuant to CPLR 3212, for summary judgment dismissing the plaintiffs' complaint and the defendants' counterclaim due, inter alia, to the plaintiffs' failure to incur a serious injury within the meaning of Insurance Law §5102(d) on May 29, 2008 are determined as hereinafter provided.

This personal injury action arises out of a May 29, 2008 motor vehicle accident which occurred at approximately 12:30 p.m. at the intersection of Washington Avenue and Cooper Street in Hempstead. The defendants were traveling on Cooper Street which is controlled by a stop sign while the plaintiffs were headed northbound on Washington Avenue which does not have a traffic control device at that location. During an August 29, 2009 deposition, the defendant Joshua Tobias, who was permissively operating the co-defendant Stanley Tobias' vehicle at the time of the accident, testified, inter alia, that he made only a "brief stop at the stop sign" (p.43,L10). He therefore acknowledged that he "didn't stop long enough to see [the plaintiff's vehicle] coming" (p.43,L11).

During his April 9, 2009 (and August 24, 2009) deposition (see defendants' Exhibits G & H), the plaintiff Gamaliel Jean-Baptiste testified, inter alia, that at the time of the accident his sister-in-law, the plaintiff Marieange Moise, was driving him to work at the Mineola Post Office (Exhibit H, p.8,L20). (Curiously, in his March 2, 2010 affirmation in opposition [see plaintiffs' Exhibit C]

Mr. Jean-Baptiste avers that he was operating the plaintiffs' vehicle. Ms. Moise asserts, inter alia, that she was the passenger, however, her purported affidavit is undated and unsworn [see plaintiffs' Exhibit D]).

In any event, they were each removed by ambulance to the Mercy Hospital emergency room where they were treated and released. Mr. Jean-Baptiste complained of pain to his left knee and back. X-rays were normal (p.65,L11). Ms. Moise complained of neck, knee and back pain (see defendants' Exhibit L, p.80,L2-6). Her x-rays were likewise normal.

They each testified that approximately a week later they began receiving treatment at "Nara Physical Therapy" in Queens. Conversely, the undated affirmations of their treating physician, David Mun, M.D. (see plaintiffs' Exhibits A & B) assert that he began treating the plaintiffs on the day of the accident i.e., May 29, 2008. They each received assorted treatment (e.g., Ms. Moise testified to receiving range of motion, ultra sound, electrical stimulation, thermal therapy, acupuncture and chiropractic treatment [p.91,L9 and p.102,L16]) until their respective no-fault benefits expired. Mr. Jean-Baptiste testified that treatment ceased in late January or early February of 2009 (see defendants' Exhibit H, p.40,L7) whereas Dr. Mun asserts that his treatment ended on March 30, 2009 (see plaintiff's Exhibit A, para.4). Similarly, while Ms. Moise testified that her treatment ceased in December, 2008 (see defendants' Exhibit L, p.86,L19), Dr. Mun asserts that it continued until June 25, 2009 (see plaintiffs' Exhibit B, para.4).

At the time of their August 24, 2009 depositions, neither plaintiff had any further treatment scheduled (see defendants' Exhibit H, p.39,L22 and p.40,L2; Exhibit L, p.93,L16). Dr. Mun did, however refer them for multiple MRI examinations and Ms. Moise visited an unidentified orthopedist on a single occasion (p.94,L24). Significantly, Mr. Jean-Baptiste was involved in two prior motor vehicle accidents (i.e., in 1992 or 1993 and 2003) in which he injured his back (see defendants' Exhibit G, p.74,L2;p.74,L10;p.78,L25 and Exhibit H, p.44,L10). Likewise, Ms. Moise previously injured her neck in a motor vehicle accident approximately ten (10) years earlier (see defendants' Exhibit L,

p.22,L11).

The plaintiffs commenced this action on June 26, 2008. Issue was joined on or about August 22, 2008 with the service of the defendants' verified answer and counterclaim. The plaintiffs' reply was interposed on or about September 23, 2008. Ultimately, upon the completion of disclosure, the case was certified for trial on September 10, 2009 and on October 8, 2009 a note of issue was filed. The December 23, 2009 motion and December 28, 2009 cross motion are therefore timely.

The defendants' cross motion is premised upon the aforementioned testimony, plaintiffs' medical records and the October 9, 2009 (plaintiff Gamliel Jean-Baptiste) and June 26, 2009 (plaintiff Marieange Moise) affirmations of an orthopedist, Michael J. Katz, M.D. (see defendants' Exhibits I & M). His contemporaneous examinations, utilizing objectively measured criteria, conclude that Mr. Jean-Baptiste incurred only cervical and thoracolumbosacral strains as well as bilateral knee contusions which have resolved. In addition, he opines that Ms. Moise sustained only resolved cervical and lumbosacral strains and bilateral knee and chest contusions. The defendants have thereby established a prima facie entitlement to judgment as a matter of law as to each plaintiff by demonstrating that they did not sustain a serious injury within the meaning of Insurance Law §5102(d) on May 29, 2008 (see Pommells v Perez, 4 NY3d 566; Toure v Avis Rent A Car Sys., 98 NY2d 345; Albano v Onolfo, 36 AD3d 728).

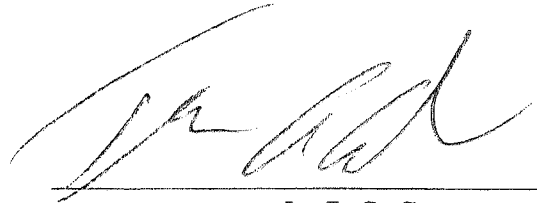
In opposition, the plaintiffs have failed to create a triable issue of fact. Dr. Mun's reports are based on January 22, 2010 rebuttal examinations prompted by the defendants' December 28, 2009 cross motion. Although he finds specific restrictions in each plaintiff's range of motion and concludes that they are both permanently injured, no explanation is proffered for the significant gap in treatment which exists (see Pommells supra at 574; Ciancio v Nolan, 65 AD3d 1273,1274). He also impermissibly incorporates the MRI findings of other physicians ( see Puerto v Blum, 39 AD3d 614; Umanzor v Pineda, 39 AD3d 539). While those radiologists have supplied affirmations adopting their earlier findings (see plaintiffs' Exhibits E-I), none of them express an opinion as to causation (see Albano supra; Munoz v Koyfman, 44 AD3d

914; Collins v Stone, 8 AD3d 321). Finally, Dr. Mun fails to adequately account for the plaintiffs' prior neck and back injuries (see Franchini v Palmieri, 1 NY3d 536,537; Munoz supra at 915; Houston v Gajdos, 11 AD3d 514,515).

Mr. Jean-Baptiste conclusory and self serving affidavit (see plaintiffs' Exhibit C) is also inadequate to create a triable issue of fact as to whether he was unable to perform substantially all of his daily activities for not less than 90 out of the first 180 days as a result of the accident (see Doyaga v Teleeba, Inc., 35 AD3d 798; Felix v New York City Trans. Auth., 32 AD3d 527). As previously noted, Ms. Moise's purported affidavit (see plaintiffs' Exhibit D) is not in admissible form .

Accordingly, the defendants' cross motion, pursuant to CPLR 3212, to dismiss the plaintiffs' complaint due to their respective failure to sustain a serious injury within the meaning of Insurance Law §5102(d) on May 29, 2008 is granted. Moreover, in view of the plaintiff Joshua Tobias' admission, the counterclaim defendants' motion, pursuant to CPLR 3212, for summary judgment dismissing the defendants' counterclaim is also granted (see VTL §§1142[a] & 1172[a]).

Dated: 5/18/10



A.J.S.C.

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**ENTERED**

MAY 20 2010

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**