

Reyes v Abode

2010 NY Slip Op 31560(U)

June 15, 2010

Sup Ct, Nassau County

Docket Number: 19003/08

Judge: Daniel R. Palmieri

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SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

**HON. DANIEL PALMIERI
Acting Justice Supreme Court**

-----x
WILMER A. REYES,

Plaintiffs,

-against-

GEORGE V. ABODE and CHRISTIANA ABODE,

Defendants.
-----x

TRIAL TERM PART: 45

INDEX NO.: 19003/08

MOTION DATE: 4-30-10

SUBMIT DATE: 6-3-10

SEQ. NUMBER - 001

The following papers have been read on this motion:

- Notice of Motion, dated 3-31-10.....1**
- Affirmation in Opposition, dated 5-20-10.....2**
- Reply Affirmation, dated 6-2-10.....3**

This motion by the defendants pursuant to CPLR 3212 and Insurance Law § 5104 for summary judgment dismissing the complaint on the ground that the plaintiff has not suffered a “serious injury” as that term is defined by the Insurance Law is granted and the complaint is dismissed.

In this automobile accident case, the plaintiff was involved in a collision with defendants’ vehicle on July 8, 2008. Discovery has concluded, and the defendants now move for summary judgment, contending that the suit may not proceed because the plaintiff has not

suffered a "serious injury."

"Serious injury" is defined by § 5102(d) of the New York Insurance Law as follows:

"a personal injury which results in death; dismemberment; significant disfigurement, a fracture; loss of a fetus; 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 one hundred and eighty days immediately following the occurrence of the injury or impairment."

In his bill of particulars, the plaintiff alleges that he sustained the following injuries: lumbar sprain/strain, lumbar derangement, lumbar myofascitis with radiculopathy and nerve root compression, and disc herniation at L5-S1; cervical myofascitis with nerve root compression and straightening of the cervical curvature; post-concussion syndrome with post-traumatic headaches; and anxiety, depression and insomnia.

As a result of these injuries, the plaintiff contends that he suffers from a permanent consequential limitation of use of a body organ or member, significant limitation of use of a body function or system, and also had a non-permanent injury that satisfies the "90/180" category.

By way of submission of the transcript of plaintiff's examination before trial, defendants address the "90/180" category. The proof indicates that there was no injury preventing plaintiff from resuming his usual and customary activities for 90 of the first 180 days following the collision. Plaintiff testified that he was confined to home for only

two or three days after the accident and missed no other time from work at Lexus of Rockville Centre. He also testified that he cannot play with his child as he once did, but still engages in that activity, and no longer can engage in drawing, but admitted that he has not attempted to do so after the accident.

With regard to the other categories claimed, plaintiff was examined by Michael Katz, M.D., an orthopedist, on November 20, 2009. Dr. Katz's affirmed report of that same date is annexed to the moving papers. The plaintiff's sole complaint to the examiner was pain in his lower back while bending. Dr. Katz reviewed medical records, and then examined the plaintiff. Using a goniometer, Dr. Katz performed range of motion testing on the cervical and thoracolumbar spine, comparing his findings against stated normal values, and found no variations. All other stated tests were negative. Dr. Katz's diagnosis was cervical strain, resolved, and lumbosacral strain with radiculitis, resolved. He concludes by stating, *inter alia*, that the claimant "shows no signs or symptoms of permanence relative to musculoskeletal system and relative to 07/08/08. He is currently not disabled. He is capable of gainful employment...[and] his activities of daily living."

Defendants also submit two affirmed reports by Melissa Sapan Cohn, M.D., a radiologist, who reviewed the plaintiff's cervical and lumbar MRI films on November 15, 2009 and found nothing indicating a trauma-induced abnormality. She found a straightening of the normal cervical lordosis, stating that this might reflect muscular spasm, or positioning of the neck during the MRI. Dr. Cohn also found a central disc

herniation at L5-S1, but attributed it to underlying disc dessication, which indicated the commencement of degenerative disc disease, and was chronic in nature. She therefore concludes that there was no evidence of a trauma-related injury.

The Court finds that this evidence constitutes *prima facie* proof that no “serious injury” as claimed in the bill of particulars was suffered as a result of the accident, and is sufficient to shift the burden to the plaintiff to demonstrate that such an injury exists. *See, Toure v Avis Rent-A-Car Sys.*, 98 NY2d 345 (2002); *Taylor v Zhao*, 279 AD2d 518 (2d Dept. 2001); *Nisnewitz v Renna*, 273 AD2d 210 (2d Dept. 2000), *lv den* 96 NY2d 705 (2001); *Grossman v Wright*, 268 AD2d 79 (2d Dept. 2000).

The Court notes that the presence of the herniated disc, described by Dr. Cohn, does not bar the finding of such a *prima facie* showing because “the existence of a herniated or bulging disc is not evidence of serious injury in the absence of objective medical evidence of the extent of the alleged physical limitations resulting from the disc injury and its duration.” *Albano v Onolfo*, 36 AD3d 728 (2d Dept. 2007); *Yakubov v CG Trans Corp.*, 30 AD3d 509 (2d Dept. 2006); *Kearse v New York City Tr. Auth.*, 16 AD3d 45 (2d Dept. 2005). This is especially true where the reviewing medical expert for the defendant avers, as here, that the condition was preexisting and unrelated to the accident. *See, Pommells v Perez*, 4 NY3d 566, 579-580 (2005); *Lopez v American United Transp., Inc.*, 66 AD3d 407 (1st Dept. 2009); *Mullings v Huntwork*, 26 AD3d 214, 216 (1st Dept. 2006).

In response, the plaintiff submits the affirmation of his attorney, his own affidavit,

and the affirmation and affirmed reports of George L. Colvin, D.O., who rendered chiropractic treatment to the plaintiff until December 2, 2008. He reexamined the plaintiff on April 8, 2010.

Initially, the Court finds that no medical evidence is presented of a non-permanent injury that prevented the plaintiff from participating in his normal and customary activities for 90 of the first 180 days following the accident. *See Uddin v Cooper*, 32 AD3d 270 (2006); *Liao v Festa*, 18 AD3d 448 (2005). Accordingly, there can be no continuation of this suit based upon this contention. As to the other categories claimed, the plaintiff also has failed to establish that an issue of fact exists regarding a serious injury caused by the accident.

First, Dr. Colvin explains the cessation of treatment in December 2008 as having been caused by termination of insurance benefits, and that he believed that the plaintiff had reached maximum medical improvement. This explanation is sufficient to eliminate this factor as being fatal to the plaintiff's case. *Pommells v Perez*, 4 NY3d 566, *supra*, at 577.

However, Dr. Colvin's conclusion that the accident was a cause of the herniated disc does not address defendants' proof of disc dessication and degenerative disease. Further, Dr. Colvin does not assert that he reviewed the MRI films himself, but instead relied of the report of Dr. Lefkowitz, a radiologist – whose report is silent on causation in any event. Accordingly, there is nothing presented by the plaintiff demonstrating that the disc herniation was caused by the accident. *See, Nickolson v Albishara*, 61 AD3d 542 (1st Dept. 2009); *Shaw v. Looking Glass Associates, LP*, 8 AD3d 100 (1st Dept. 2004).

This leaves only certain “soft tissue” injuries as the only ones that might serve to satisfy the categories of injury described in the bill of particulars. Two affirmed reports are presented; one dated July 24, 2008, about two weeks after the accident, and another dated April 8, 2010. In the 2008 report Dr. Colvin reports certain positive test findings (Jackson’s compressoin, Soto-Hall, Becterew) and restrictions on range of motion. However, the reduction in range of motion was slight: 58/60 in extension of cervical spine, with pain on the right, rotation in both directions 78/80 with pain. Lateral flexion of the cervical spine was normal. Flexion of the lumbar spine was 80/90, with pain on the right. Lateral flexion was normal, but with pain going to the left and right side.

In the 2010 examination there were no more complaints from the plaintiff of restrictions or pain in the cervical spine. Plaintiff complained of pain in the lumbar spine only. On examination, Dr. Colvin found flexion to be 70/90 with pain; extension 15/25 with pain; left lateral flexion 22/25 with pain; right lateral flexion normal, but with pain; left rotation was 25/30 with pain; right rotation was normal, with pain. Dr. Colvin also reported positive Kemp’s test bilaterally, positive Becterew’s bilaterally, positive straight leg raising bilaterally, positive prone leg raising bilaterally, and positive prove hyperextension extremities. He concludes that the plaintiff has suffered a 20% impairment of the lumbar spine.

However, no objective testing was described in support of his conclusion that the plaintiff was suffering from the degree of restrictions claimed. *Spence v Mikelberg*, 66 AD3d 765 (2d Dept. 2009); *Budhram v Ogunmoyin*, 53 AD3d 640 (2d Dept. 2008).

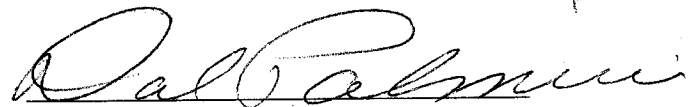
Further, given the failure to address the degenerative disc disease found by defendants' radiologist in the same area of the body of which the plaintiff complained in 2010 (lumbar spine), the plaintiff's expert's conclusion that the restrictions were the result of the accident was speculative and insufficient to defeat this motion. *Larkin v Goldstar Limo Corp.*, 46 AD3d 631 (2d Dept. 2007); *Phillips v Zilinsky*, 39 AD3d 728 (2d Dept. 2007).

Accordingly, the motion is granted.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: June 15, 2010


HON. DANIEL PALMIERI
Acting Supreme Court Justice

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ENTERED
JUN 17 2010

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