

**Kushinsky v Ambra**

2010 NY Slip Op 31768(U)

July 8, 2010

Supreme Court, Nassau County

Docket Number: 19646/08

Judge: F. Dana Winslow

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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. F. DANA WINSLOW,**

**Justice**

**TRIAL/IAS, PART 5  
NASSAU COUNTY**

**JOSH KUSHINSKY,**

**Plaintiff,**

**-against-**

**INDEX NO.: 19646/08  
MOTION SEQ. NOS.: 001**

**YAMIC AMBRA and SOTERO CANALES,**

**MOTION DATE: 3/5/10**

**Defendants.**

**The following papers read on this motion (numbered 1-3):**

- Notice of Motion.....1**
- Affirmation in Opposition.....2**
- Reply Affirmation.....3**

The motion by defendants YAMIC AMBRA and SOTERO CANALES for summary judgment pursuant to **CPLR §3212** is determined as follows.

Plaintiff JOSH KUSHINSKY, age 53, alleges that on June 15, 2006, at approximately 9:16 a.m., he was the operator of a motor vehicle which came into contact with a vehicle owned by defendant YAMIC AMBRA and operated by defendant SOTERO CANALES. The accident occurred on the Meadowbrook Parkway at or about the exit to the Southern State Parkway. Defendants YAMIC AMBRA and SOTERO CANALES now move for an order dismissing plaintiff's complaint pursuant to **CPLR §3212**, on grounds that plaintiff failed to sustain a "serious injury" within the meaning of **Insurance Law §5102(d)**.

**Insurance Law §5102(d)** provides that a "serious injury means 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; (7) permanent consequential limitation of use of a body organ or member; (8) significant limitation of use of a body function or system; or (9) 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” (numbered by the Court). The Court’s consideration in this action is confined to whether plaintiff’s injuries constitute a permanent consequential limitation of use of a body organ or member (7), a significant limitation of use of a body function or system (8), or a medically determined injury which prevented plaintiff from performing all of the material acts constituting his usual and customary daily activities for ninety days of the first one hundred eighty days following the accident (9).

In support of their motion for summary judgment, defendants submit an affirmed report of examination, dated May 15, 2009, of neurologist Chandra M. Sharma, MD, covering an examination of that date; affirmed report of radiologist Jacques Romano, MD, dated October 19, 2007, covering a review of an MRI of plaintiff’s cervical spine conducted on July 20, 2006; and affirmed report of Dr. Romano, dated July 20, 2009, covering a review of an MRI of plaintiff’s lumbosacral spine conducted on September 15, 2008.

Dr. Sharma reported that physical examination of plaintiff’s cervical and lumbar spines revealed normal range of motion results, comparing the results to norms. Dr. Sharma’s other reported findings include no motor or sensory deficits, normal deep tendon reflexes, normal gait, normal rapid alternating movement and finger-to-nose testing and normal movements of plaintiff’s neck without pain. Dr. Sharma also found that standing upright, plaintiff could bend forward and touch his toes, and was able to place each foot on the opposite knee. The Court notes that Dr. Sharma found leg elevation of eighty degrees on both sides in the supine position but failed to provide a comparison to a normal range. Dr. Sharma diagnosed “cervical and lumbar sprain/strain, resolved” and concluded that plaintiff “had a normal neurological examination” and that “there are no neurological manifestations of disc bulges or disc herniations.” Dr. Sharma noted that plaintiff is a mortgage broker and returned to work one month after the accident.

Dr. Romano performed a review of an MRI of plaintiff’s cervical spine performed on July 20, 2006 and noted *inter alia* “diffuse changes of cervical spondylosis from C3 through C7 with discal bulges and bordering endplate osteophytes” and spinal stenosis from C4 through C7. Dr. Romano opined that “there are generalized degenerative changes,” “no discal extrusion” and that the “findings are not suggestive of the sequela of acute trauma.” Dr. Romano also performed a review of an MRI of plaintiff’s lumbosacral spine performed on September 15, 2008. Dr. Romano found disc bulges at L3/4 and L4/5 and spinal stenosis. Dr. Romano concluded that plaintiff has “long-standing degenerative change with spinal and bilateral foraminal stenosis at L3/4 and L4/5.” The Court cannot consider Dr. Romano’s statement regarding his comparison of this MRI report with his purported report, dated October 19, 2007, covering a lumbosacral MRI conducted on July 24, 2006, since this report is not in the record.

In reply, defendants submit the deposition testimony of plaintiff conducted on March 6, 2009. Plaintiff testified at his deposition that he was taken by ambulance to Nassau County Medical Center where he was given x-rays and released after one hour with tylenol and motrin (Deposition testimony, pp. 12-16). After being released, plaintiff went to a pain management physician, Sunil Butani, MD whom he found by calling information (Deposition testimony, pp. 17-19). Dr. Butani prescribed Vicodin, ordered MRIs and EMGs, and administered shots in plaintiff's neck and back (Deposition testimony, pp. 27-29, 34). Plaintiff testified that he also received physical therapy treatment at Dr. Butani's office (Deposition testimony, p. 27). The Court notes that plaintiff's testimony regarding the possibility of surgery is vague and contradictory (Deposition testimony, pp. 30-32).

Plaintiff testified that when Allstate (presumably his no-fault insurance carrier) stopped paying, his personal medical insurance paid the bills (Deposition testimony, p. 40), but that he last treated with Dr. Butani, in January 2009 because his COBRA coverage terminated (Deposition testimony, pp. 25-28). Plaintiff stated that he also can no longer afford Vicodin (Deposition testimony, p. 28). In addition, plaintiff testified that in 1999 he was treated by neurosurgeon Dr. Mitchell Levine two times for neck pain, had an MRI and was told that he had a herniated disc, presumably in his cervical spine (Deposition testimony, pp. 21-23, 35).

The Court finds that defendants' motion papers have adequately addressed plaintiff's claim asserted in his bill of particulars that he suffered a medically determined injury or impairment of a non-permanent nature which prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the June 15, 2006 accident. In making a determination with respect to this category of serious injury, the Court notes that the Second Department has considered a defendant's motion papers, including sworn deposition testimony and statements made by a plaintiff to a defendant's examining physician. *See generally* **Breedy v. Jenkins**, 70 AD3d 718; **Encarnacion v. Smith**, 70 AD3d 628; **Pinder v. Salvatore**, 69 AD3d 823; **Belafrikh v. Tarzan Cab Corp.**, 69 AD3d 777; **Saetia v. VIP Renovations Corp.**, 68 AD3d 1092; **Layne v. Drouillard**, 65 AD3d 1197; **Alvarez v. Dematas**, 65 AD3d 598; **Richards v. Tyson**, 64 AD3d 760; **Hossain v. Singh**, 63 AD3d 790; **Berson v. Rosada Cab Corp.**, 62 AD3d 636; **Rahman v. Sarpaz**, 62 AD3d 979; **Raleigh v. Ram**, 60 AD3d 747.

In the case at bar, the Court finds that defendants have made a *prima facie* showing that plaintiff did not satisfy the 90/180 category of serious injury. With respect to his current activities, plaintiff testified he cannot run, pick up anything, work out at a gym or throw a ball (Deposition testimony, p. 40) and that his pain is as great today as it was at the time of the accident (Deposition testimony, p. 30). Plaintiff testified that he missed approximately

one month of work (Deposition testimony, p. 7), and in Dr. Sharma's report of examination, covering an examination conducted on May 15, 2009, Dr. Sharma states that plaintiff "is a mortgage broker and returned to work a month later." The Court also notes plaintiff's contradictory claim in his bill of particulars that he was incapacitated from employment for approximately ten days as a result of the injuries sustained in the accident. In addition, plaintiff's deposition testimony that he cannot run, pick up anything, work out at a gym or throw a ball is self serving and is insufficient by itself to satisfy this category of serious injury. See **Frischia v. Mak Auto, Inc.**, 59 AD3d 492; **Duke v Saurelis**, 41 AD3d 770.

The Court finds that the reports of defendants' examining physicians, taken together, are sufficiently detailed in the recitation of the various clinical tests performed and measurements taken during the examinations to satisfy the Court that an "objective basis" exists for their opinions. Accordingly, the Court finds that defendants have made a *prima facie* showing, that plaintiff JOSH KUSHINSKY did not sustain a serious injury within the meaning of **Insurance Law §5102(d)**. With that said, the burden shifts to plaintiff to come forward with some evidence of a "serious injury" sufficient to raise a triable issue of fact. **Gaddy v. Eyler**, 79 NY2d 955, 957.

In opposition, plaintiff submits (1) an affirmation of Dr. Butani, dated January 19, 2010, incorporating and affirming various attached reports of examination and EMG reports; (2) an affirmation of radiologist David L. Kasow, MD, dated January 14, 2010, covering his review, dated January 8, 2010, of an MRI of plaintiff's cervical spine, conducted on July 20, 2006, which revealed multilevel disc herniations; (3) an affirmation of Dr. Kasow, dated January 14, 2010, covering his review, dated January 8, 2010, of an MRI of plaintiff's lumbar spine conducted on July 24, 2006, which revealed disc herniations and a disc bulge; (4) an affirmation of Dr. Kasow, dated January 14, 2010, covering his review, dated January 11, 2010, of an MRI of plaintiff's lumbar spine conducted on September 15, 2008, which revealed the same findings as the prior lumbar spine MRI; (5) a report covering a needle EMG of plaintiff's upper extremities and cervical paraspinals, conducted on August 1, 2006, which revealed a "right C5-C6 radiculopathy"; (6) a report covering a needle EMG of plaintiff's lower extremities and lumbar paraspinals, conducted on August 4, 2006, which revealed a "severe bilateral L5-S1 radiculopathy"; and (7) a range of motion report attached to a report of examination of Dr Butani, dated December 7, 2009, which revealed decreased range of motion in plaintiff's cervical and lumbar spines, comparing the results to norms.

Plaintiff's submissions also include unaffirmed hospital records and surgical reports which the Court cannot consider since a report of a physician which is not affirmed, or subscribed before a notary or other authorized official, is not competent evidence. **CPLR 2106; Grasso v. Angerami**, 79 NY2d 814; **Varveris v. Franco**, 71 AD3d 1128; **Haber v. Ullah**, 69 AD3d 796; **Yunatanov v. Stein**, 69 AD3d 708; **McMullin v. Walker**, 68 AD3d

943; **Vickers v. Francis**, 63 AD3d 1150; **Ponciano v. Schaefer**, 59 AD3d 605; **Pompey v. Carney**, 59 AD3d 416; **Sapienza v. Ruggiero**, 57 AD3d 643; **Marrache v. Akron Taxi Corp.**, 50 AD3d 973; **Patterson v. NY Alarm Response Corp.**, 45 AD3d 656. *See also* **Pagano v. Kingsbury**, 182 AD2d 268

The Court finds that the positive EMG and MRI findings, together with the report of decreased range of motion results of plaintiff's cervical and lumbar spines at an examination conducted on December 7, 2009, satisfy the Court that plaintiff has raised an issue of fact as to whether or not plaintiff's alleged injuries to his cervical and lumbar spines constitute a permanent consequential limitation of use of a body organ or member (7) or significant limitation of use of a body function or system (8). The Court makes this finding notwithstanding the fact that the affirming language in Dr. Butani's affirmation is not in strict compliance with **CPLR §2106**. The Court finds, however, that plaintiff has demonstrated a *prima facie* failure to prove a medically determined injury which prevented him from performing all of the material acts constituting his usual and customary daily activities for ninety days of the first one hundred eighty days following the accident (9).

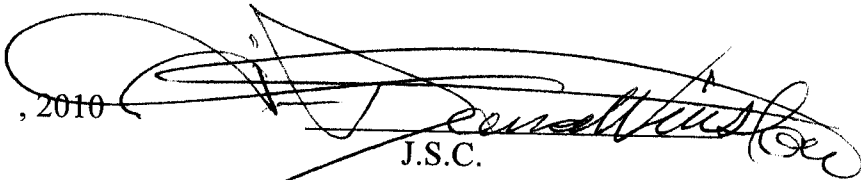
The Court has examined the parties' remaining contentions and finds them to be without merit.

Based on the foregoing, it is

ORDERED, that the motion by defendants YAMIC AMBRA and SOTERO CANALES for summary judgment dismissing the complaint of plaintiff JOSH KUSHINSKY pursuant to **CPLR §3212**, on the grounds that plaintiff failed to sustain a "serious injury" within the meaning of **Insurance Law §5102(d)** is **denied**.

This constitutes the Order of the Court.

Dated: June 2

, 2010  J.S.C.

**ENTERED**  
JUL 12 2010  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE