SHORT FORM ORDER mg SCAN

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

Present: HON. UTE WOLFF LALLY
Justice

DINOPAOLO D. MANATO,

Plaintiff,

-against-

ROBERT ANTHONY FINEO and MARIA L. MAZZA-LORIA,

Defendants.

Motion Sequence #1
Submitted May 24, 2010
XXX

INDEX NO: 21656/08

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

Notice of Motion and Affs.....1-5
Affs in Opposition.....6-14
Affs in Reply.....15&16

Upon the foregoing papers, it is ordered that this motion by defendants Robert Anthony Fineo and Maria L. Mazza-Loria for an order pursuant to CPLR 3212 granting summary judgment in their favor finding that plaintiff Dinopaolo Manato's injuries do not satisfy the "serious injury" threshold requirement of Insurance Law § 5104(a) is granted.

This is an action to recover money damages for personal injuries allegedly sustained as the result of an automobile accident that occurred on October 1, 2007 between 4:30PM and 5:00PM at the intersection of Ardsley Road and Nassau Boulevard in Garden City South, New York. It is alleged that upon impact, plaintiff was

thrust forward against his seat belt and then thrown back against the driver seat and headrest. Plaintiff sustained no visible physical injuries and maintained consciousness; however, from this impact plaintiff claims to have suffered a disc bulge at C5/6, a disc bulge at L4/5, right L5/S1 radiculopathy, left lower C7-T1 radiculopathy and sciatica. Plaintiff sought treatment the next day in the emergency room of South Nassau Communities Hospital where he worked as a physical therapist, and missed four days of work before taking a pre-planned three week vacation to visit family in the Phillipines. Thereafter, he did not miss any days of work due to his alleged injuries, but he now has an aide to assist him while working at all times, which he did not have before. In addition, plaintiff has altered his exercise regimen due to his alleged injuries.

Defendants herein move for summary judgment on the grounds that the alleged injuries of plaintiff do not qualify as "serious injur[ies]" under any of the nine categories described in Insurance Law § 5102(d). Specifically, defendants argue (1) that there is no causal relationship between plaintiff's alleged injuries and the subject automobile accident, (2) that there is no objective medical evidence of range of motion limitations contemporaneous with the time of the accident, (3) that plaintiff's alleged injuries are insufficient under the case law interpreting § 5102(d), and (4) that plaintiff was not prevented from completing substantially all of his usual daily activities for the required statutory period.

In opposition, plaintiff argues that there was a clear causal relationship between plaintiff's alleged injuries and the subject accident, and that plaintiff has suffered significant and permanent range of motion limitations within the scope of the seventh or

eighth categories of "serious injury" as defined by Insurance Law § 5102(d). Furthermore, plaintiff argues that these injuries and the limitations arising therefrom have caused, and continue to cause, significant qualitative restrictions on his day-to-day activities within the scope of the ninth category of "serious injury" as defined by Insurance Law § 5102(d).

Insurance Law § 5102(d) provides nine categories of serious injury sufficient to meet the threshold requirement of § 5104(a). The pertinent categories herein are: (7) permanent consequential limitation of use of a body function or system; (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 at least ninety days of the one hundred eighty days immediately following the occurrence of the injury or impairment.

A moving defendant's burden is to establish *prima facie* that the plaintiff did not sustain a serious injury from the subject accident. To do so movant must produce objective medical evidence in appropriate form. The affirmation or affidavit of the healthcare professional must include the opinion's underlying rationale, including a description of the methods and instrumentalities used to evaluate plaintiff and the normals against which plaintiff's results were compared. (*Iles v Jonat*, 35 AD3d 537; *Kearse v NYC Transit Authority*, 16 AD3d 45). Unsworn medical records have no probative value; however, defendant's reviewing healthcare professional may validly

refer to such unsworn records and rely upon them in rendering his opinion, but in doing so allows plaintiff to likewise rely upon the same unsworn records in his opposition papers though plaintiff would not otherwise be able to do so. (*Ayzen v Melendez*, 299 AD2d 581).

In support of their motion, defendants offer the affirmation of Dr. Michael J. Katz, a board certified orthopedic surgeon who is also board certified in forensic medicine, detailing his examination of plaintiff on September 11, 2009 and plaintiff's unsworn medical records. Dr. Katz, using a goniometer, performed range of motion tests on plaintiff's cervical and lumbar spine and found no limitation of motion versus normal values. Furthermore, he opined that based on his review of plaintiff's medical records since the subject accident and subjective pain complaints plaintiff did sustain a cervical strain with radiculitis and a lumbrosacral strain with radiculitis and that such injuries are consistent with what would be expected from the subject accident. However, he further stated that these conditions are now completely resolved, plaintiff having regained full range of motion and ability to perform all of his customary daily activities.

Additionally, defendants proffer the affirmed reports of radiologist Dr. Melissa Sapan-Cohn, a board certified neuroradiologist, who reviewed the MRIs of plaintiff's cervical and lumbosacral spine taken on January 4, 2008, three months after the subject accident. She opined that with respect to plaintiff's lumbosacral spine there was no evidence of disc pathology or acute trauma related injury. With respect to plaintiff's cervical spine, she stated that there was a straightening of the normal cervical lordosis and a disc bulge at C5/6. She further stated that these changes are unrelated to trauma

and are within the spectrum of a mild degenerative disc disease. Thus, in her medical opinion, the changes are due wholly to degenerative disc disease.

Finally, defendants offer the EBT of plaintiff Dinopaolo Manato. At his EBT plaintiff testified that he missed only four days of work due to his alleged injuries. Furthermore, he has continued in his pre-accident work, albeit with an aide to assist him. However, he testified at his EBT that this aide was assigned to him due to a tougher caseload, and had no relation to his alleged injuries.

Thus, defendants have established their *prima facie* entitlement to summary judgment, having carried their burden of demonstrating that plaintiff has not sustained a "serious injury" within the meaning of the pertinent categories of § 5102(d).

The burden now shifts to the non-moving plaintiff to defeat a summary judgment motion by refuting defendants assertions and raising a triable issue of fact. Failure to refute defendants entire *prima facie* case will result in defendants' motion being granted. (*Pommells v Perez*, 4 NY3d 566). Plaintiff must establish the existence of a "serious injury" within the meaning of the statute arising out of the subject accident and produce evidence establishing the qualitative or quantitative effects of the condition. Such effects must be significant. (*Toure v Avis Rent-A-Car* Sys, 98 NY2d 345; *McCrary v Street*, 34 AD3d 768; *Kearse v NYC Transit Authority*, *supra*). Furthermore, plaintiff must establish the serious injury existed contemporaneously at both the time of the accident and the time of the CPLR 3212 motion. (*Monnette v Keller*, 281 AD2d 523).

In opposition, plaintiff offers the affirmations of the numerous healthcare professionals who treated or examined him between the date of the subject accident

and present and attendant medical records. Though largely unsworn to at the time of their creation, plaintiff may rely upon these documents as defendants' expert Dr. Katz referenced them in his affirmation. (*Ayzen v Melendez*, *supra*).

To prove the existence of a "serious injury" contemporaneous with the subject accident, plaintiff first provides the emergency room records from October 2, 2007. These records, however, establish only that plaintiff had a neck and back sprain. However, Dr. Magda Fahmy, board certified in physical medicine, rehabilitation and spinal cord medicine, conducted on November 9th and 28th, 2007 needle EMG examinations of plaintiff, which revealed evidence of both right L5-S1 lumbar radiculopathy and left lower C7-T1 cervical radiculopathy. Likewise, Dr. Mark Soffer, a New York State licensed chiropractor, conducted a V-sNCT test upon plaintiff on December 3, 2007, which revealed further evidence of lumbar radiculopathy. Furthermore, Dr. Mark Shapiro, a board certified radiologist, who conducted MRIs on plaintiff on January 4, 2008 found a cervical disc bulge at C5/6 and a lumbar disc bulge at L4/5.

Additionally, at the November 2007 examinations Dr. Fahmy quantified significant range of motion limitations versus normals, but Dr. Fahmy failed to set forth those objective tests she employed to measure plaintiff's range of motion. Likewise, Dr. Appasaheb Naik, a New York State licensed physician, also quantified significant range of motion limitations after examining plaintiff on November 30, 2007, but failed to set forth those objective tests he employed to determine plaintiff's range of motion. Both findings, therefore, are rendered speculative. (*Sapienza v Ruggiero*, 57 AD3d 643).

Furthermore, insofar as the report of Dr. Martin Plutno, a New York State licensed chiropractor, dated March 3, 2008 noted his office's range of motion findings from October 3, 2007 without noting what testing means were used, Dr. Putno's affidavit is likewise defective.

However, these same doctors do note that plaintiff's injuries had qualitative impacts upon his daily activities. Specifically, Dr. Fahmy in her November 9, 2007 report stated that plaintiff had difficulty with "some ADL [activities of daily living], bending, lifting, sitting, standing and walking for a long period of time." Furthermore, plaintiff at his EBT and in his affidavit explained how he can no longer sit for longer than thirty minutes without pain and has had to alter his exercise regimen significantly, including no longer participating in marathons.

However, plaintiff's EBT and affidavit are contradictory as to the effect his injuries have had upon his work as a physical therapist. In his affidavit plaintiff claims that due to his injuries he can no longer perform his work duties alone and therefore requires an aide to assist him at all times. By contrast, at his EBT plaintiff stated that the assignment of the aide was due entirely to a tougher caseload. Therefore, as plaintiff's papers contradict themselves, the specific testimony therein is not credited.

Thus, plaintiff has failed to establish by objective medical evidence that he sustained a "serious injury" contemporaneously with the subject accident, and therefore has failed to raise a triable issue of fact so as to preclude summary judgment dismissing his claims under the seventh and eighth categories of "serious injury" of § 5102(d).

Plaintiff likewise failed to raise a triable issue of fact as to whether he sustained a "serious injury" under the ninth category. Plaintiff missed only four days of work due to his injuries before his three week vacation. Furthermore, plaintiff's other complaints of restrictions upon his exercise regimen do not suffice to meet the statute's requirement that plaintiff be prevented from performing "substantially all of his daily activities" by his injuries. (Insurance Law § 5102(d); *Ku v Baldwin-Bell*, 61 AD3d 938 [holding two days of missed work to be insufficient despite claims of other limitations of daily activities]; *LaMarre v Michelle Taxi, Inc.*, 60 AD3d 911 [holding sixty days of missed work insufficient]).

Finally, plaintiff failed to discredit defendant's expert Michael J. Katz's opinion and defeat defendant's *prima facie* case. Though true that the article which Dr. Katz referenced in his affirmation speaks only of males aged thirty to forty years old, plaintiff failed to note that at the time of Dr. Katz's examination plaintiff was a mere week from his thirtieth birthday. Furthermore, the range of motion normals Dr. Katz used were the same as those used by plaintiff's medical experts. Plaintiff's objection therefore is of questionable validity.

Therefore, defendants' motion for summary judgment is granted and plaintiff Dinopaolo Manato's complaint as against defendants Robert Anthony Fineo and Maria L. Mazza-Loria is dismissed in its entirety.

Dated: August 5, 2010

UTE WOLFF LALLY, J.S.C.

TO: Lutfy & Lutfy, PC
Attorneys for Plaintiff
595 Stewart Avenue, Suite 520
Garden City, NY 11530

Richard T. Lau & Associates
Attorneys for Defendants
PO Box 9040
Jericho, NY 11753

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