Garcia v Appelt
2010 NY Slip Op 32380(U)
August 24, 2010
Supreme Court, Nassau County
Docket Number: 9435/09
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

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TRIAL TERM PART: 45

FERDI REYES GARCIA,

INDEX NO.:9435/09

Plaintiff,

MOTION DATE:6-2-10
SUBMIT DATE:8-10-10
SEQ. NUMBER - 001

-against-

JOHN E. APPELT, 3RD and JOHN E. APPELT, JR.,

Defendants.

---x

The following papers have been read on this motion:

Notice of Motion, dated 4-30-10................................ 1
Affirmation in Opposition, dated 7-13-10.................2
Reply Affirmation, dated 8-9-10.................................3

This motion by the defendants for an order pursuant to CPLR 3212 for summary judgment dismissing the complaint is denied.

Initially, the Court notes that the plaintiff's name is incorrect in the caption, as his attorney states that his actual surname is "Garcia Reyes," not Reyes Garcia. Accordingly, the caption shall be deemed amended to reflect the correct name.

This is an action for personal injuries stemming from an accident that occurred on August 23, 2008. Defendants move for summary judgment on the ground that the plaintiff

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has not suffered a "serious injury" as defined by Insurance Law § 5102(d) , and thus has no claim against them pursuant to Insurance Law § 5104 (a).

"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 persons' 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."

Insurance. Law § 5102(d)).

In his bill of particulars the plaintiff alleges that he sustained 1) a "permanent loss of use" of a body, organ, member function or system, 2) a "permanent consequential limitation of use of a body organ or member", 3) a "significant limitation of use of a body function or system," and 4) a non-permanent injury that satisfies the "90/180" category.

This in turn is based on allegations in the bill of particulars that he suffered: disc bulges at C5-6 and C6-7, encroaching on the thecal sac; straightening of the cervical lordosis; epicondylitis and derangement of the right elbow; derangement of the left knee; and cervical and lumbar radiculopathy.

On this motion the defendants contend that the plaintiff did not sustain any injury that might satisfy any of the categories stated. As to the "90/180" claim, they rely on the plaintiff's statement in his bill of particulars that after the accident he was confined to bed for three days and to his home for one week, and missed only one week of work. With

regard to the other three categories of injury, defendants present the affirmed reports of their examining physicians, Frank M. Hudak, M.D., an orthopedist, and Edward M. Weiland, M.D., a neurologist. These examinations of the 28 year-old plaintiff were conducted on January 28, 2010 and January 27, 2010 respectively, approximately 15 months after the accident.

Dr. Hudak noted tenderness in the midline from C6-C7. Using a goniometer, he noted normal range of motion of the head and neck, without pain. All readings were compared to normal values. Examination of the upper extremities revealed normal abduction, flexion and extension of the shoulders. Examination of the right elbow revealed no redness, swelling, deformity or tenderness. There was full range of motion from 0-140 degrees, noting pain in the anterior aspect of the right elbow (normal is 0-135 degrees or greater). Range of motion of both wrists and hands were normal, without pain.

Examination of the dorsal and lumbosacral spine revealed tenderness in the midline of the dorsal spine from D6-D10. Forward flexion of the dorsal and lumbosacral spines was 75 degrees; normal is 90 degrees. Tilting left and right were within normal range. Examination of the left knee revealed no redness, swelling or deformity. Range of motion was within normal limits, with the plaintiff noting discomfort in the medial side of the left knee. However, there was no tenderness palpated about the left knee, and no pain noted on left patella compression. The right knee was normal. Based upon his examination and a review of records, Dr. Hudak concluded that the patient's status was post cervical strain, resolved, post right elbow epicondylitis, resolved, post strain of left knee. No disability or

permanency was found, that that he was capable of normal activities of daily living, including work activity, without restrictions.

Dr. Weiland noted on his examination that the plaintiff complained of mid thoracic, paravertebral pain and spasm, and episodic discomfort in the region of the left knee and right elbow. On examination, Dr. Weiland reported full range of motion of the neck, both shoulders and lower torso. Degrees of motion are provided, but no comparison is noted between his findings and normal values. The Court cannot know if the single figure given represents his findings, or are the normal values and that the plaintiff achieved that range of motion during testing.

Dr. Weiland noted no paravertebral spasm or tenderness in the thoracic spine, and no joint crepitus or effusions were found with range of motion activity in the left knee or right elbow. Full range of motion is noted for the left knee and right elbow; however, no specific numbers are provided. Other tests as stated in the report were all negative, and no sensory nerve loss was found. The diagnosis was cervical, thoracic, and lumbosacral strain/sprain, resolved, and that the neurological examination was normal. Dr. Weiland concluded that there was "no primary neurologic disability at the present time related to an injury reportedly occurring on August 23, 2008."

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 allegations in the bill of particulars, indicating a brief stay at home and then a return to work demonstrate that there was no injury that satisfies the "90/180" category. *See, Annan v Abdelaziz,* 68 AD3d 794 (2d Dept. 2009); *Linton v Nawaz,* 62 AD3d 434 (1st Dept. 2009). *See also, Onishi v N & B Taxe, Inc.,* 51 AD3d 594 (1st Dept. 2008) [absence from work for 11 days insufficient]; *Hamilton v Rouse,* 46 AD3d 514 (2d Dept. 2007) [absence for one month insufficient].

Although the deficiencies in Weiland affirmation noted above – regarding absence of comparative values in range of motion testing – prevents his proof from being sufficient regarding such testing (*Levin v Khan,* 73 AD3d 991 [2d Dept. 2010]), Dr. Hudak's report is sufficient to demonstrate the absence of restrictions. Further, the one range of motion test found by Dr. Hudak as falling below the normal range may fairly be characterized as slight. *See, Gaddy v Eyler,* 79 NY2d 955 (1992); *Licari v Elliot,* 57 NY2d 230 (1982); *Style v Joseph*, 32 AD3d 212, 214 (1st Dept. 2006); *Sellitto v Casey,* 268 AD2d 753 (2d Dept. 2000). The subjective reports of pain reported by the plaintiff, prior to and during the examination, do not undermine the objective findings of the medical doctors. *Catalano v Kopmann,* 73 AD3d 963 (2d Dept. 2010); *Sham v B & P Chimney Cleaning and Repair Co.,* 71 AD3d 978 (2d Dept. 2010). Contrary to the plaintiff's assertions, the Court does not find that the defendants' examining physicians disagreed with one another to any significant degree, such that an issue of fact was created as to the presence of a "serious injury".

In response, the plaintiff submits his own deposition transcript, two affirmed reports from radiologists, and the affidavit of plaintiff's treating chiropractor. The plaintiff describes

restrictions on activities that did not exist prior to the accident. One radiologist, Dr. John Himelfarb, took an MRI of the cervical spine on May 7, 2009 and made findings of a straightening of the cervical spine with some loss of the normal lordosis, and posterior disc bulges at C5-6 and C6-7, with encroachment on the ventral aspect of the thecal sac. The other radiaologist, Dr. Michele Rubin, took an MRI of the right elbow on November 14, 2008. and made findings compatible with mild lateral epicondylitis.

The transcript does little more that provide subjective reports of discomfort and restrictions, without medical support, and the radiologists' reports, standing alone, do not state that their findings were related to the accident of August 23, 2008. However, when read with the affidavit of his treating chiropractor, the plaintiff has raised an issue of fact as to whether he has sustained a significant limitation of a body system, the cervical spine.

In his affidavit plaintiff's treating chiropractor, Dr. Nicholas Martin, reports that he first saw the plaintiff six days after the accident, and that he was complaining of pain in the cervical and lumbar spines. Testing was positive for the Distraction Test, indicating "cervical root involvement." It was also positive for other tests, as described. Dr. Martin performed range of motion testing, and found restrictions on cervical flexion, where the plaintiff's range was 30 degrees where the normal range was 60 degrees. Cervical extension was also restricted (20 degrees, 50 normal), as was rotation to left (40 vs. 80) and right (50 vs. 80), and lateral flexion left (15 vs. 40) and right (20 vs. 40). Lumbar revealed the most restriction with left lateral flexion, at 5 degrees, where 20 is normal.

After this initial examination he treated plaintiff on a regular basis. He retested plaintiff for range of motion on February 6, 2009. Cervical spine flexion was 40 degrees,

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where normal was 60. Extension was 30, normal 50, left rotation 50, normal 80, right rotation 60, normal, 80. Left and right lateral flexion was 20, normal 40.

The last treatment was March 23, 2010. He was released from treatment at that time because, according to Dr. Martin, he was not expected to show any further improvement and additional treatment would have been palliative in nature.

Dr. Martin reexamined plaintiff on July 9, 2010. The range of motion testing was performed at that time, and cervical flexion was 45 degrees where normal is 60, cervical extension was to 20 where normal is 50. Left rotation was to 50 degrees when normal is 80, and right rotation was 60 where normal is 80. Left lateral flexion remained restricted at 20, normal is 40, and right lateral flexion was 30 and normal is 40. Jackson Compression, Kemps bilaterally and Maximum Cervical Compression tests were positive.

Referring to his findings and the MRI noting posterior disc bulges and cervical spine derangement, and the passage of time since the accident, Dr. Martin finds that the plaintiff has sustained a significant limitation to this cervical spine, and that the injuries are a direct result of the trauma plaintiff received in the accident of August 23, 2008.

The Court finds, reading plaintiff's submissions together, that he has sustained his burden, demonstrating that an issue of fact exists as to whether he has suffered a "serious injury" to the cervical spine area, necessitating denial of the present motion. *See, Solomon v Val Leasing Co.,* 282 AD2d 519 (2d Dept. 2001); *Ventura v Moritz,* 255 AD2d 506 (2d Dept. 1998). The same areas found affected immediately after the accident were still affected almost two years post, as proven by objective testing. Accordingly, this motion should be denied.

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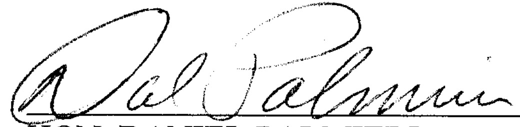
This shall constitute the Decision and Order of this Court

ENTER

DATED: August 24, 2010



HON. DANIEL PALMIERI
Acting Supreme Court Justice

ENTERED
AUG 26 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE

TO: Cannon & Acosta, LLP
Attorneys for Plaintiff
1923 New York Avenue
Huntington Station, NY 11746

Paganini, Cioci, Pinter,
Cusumano & Farole
Attorneys for Defendants John E. Appelt, 3rd and John E. Appelt, Jr.
1979 Marcus Avenue, Ste. 220
Lake Success, NY 11042

Dergarabedian, Dillon,
Grizopoulos & Nathan, P.C.
Attorneys for Plaintiffs Coronel
11 Clinton Avenue
Rockville Centre, NY 11570

Dwayer & Taglia, Esqs.
Attorneys for Defendant Ferdy Garcia Reyes
111 John Street
New York, NY 10038