

Apicella v Madera

2010 NY Slip Op 32514(U)

September 8, 2010

Supreme Court, Nassau County

Docket Number: 022853/08

Judge: Randy Sue Marber

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
JUSTICE

TRIAL/IAS PART 20

_____ X

ARTHUR R. APICELLA, JR.,

Plaintiff,

Index No. 022853/08
Motion Sequence...01, 02
Motion Date... 07/14/10
XXX

-against-

DOMINGO D.J. MADERA AND
ANDREA MADERA,

Defendants.

_____ X

Papers Submitted:

- Notice of Motion (Mot. Seq. 01).....X
- Notice of Motion (Mot. Seq. 02).....X
- Affirmation in Opposition.....X
- Affirmation.....X

Upon the foregoing papers, the Defendants' motion, (Mot. Seq. 01) pursuant to CPLR § 602 (a), seeking an order joining this action and the action entitled *Andrea Madera and Rosamis Garcia v. Arthur Apicella, Jr.*, under Index No. 9338/09 for a joint trial and the Defendants' motion, (Mot. Seq. 02) seeking an order dismissing the within complaint on the basis that the Plaintiff has not sustained a serious injury within the ambit of Insurance Law § 5102 [d], is determined as hereinafter provided.

This action arises out of a motor vehicle accident that occurred on June 14, 2008 at 8:15 a.m. at the intersection of Sunrise Highway and Long Beach Avenue in Freeport, New

York. At the time of the accident, the Plaintiff was traveling westbound in the middle of three lanes on Sunrise Highway in light traffic. At his examination before trial, the Plaintiff testified that the accident occurred when he was already in the intersection of Sunrise Highway and Long Beach Avenue. He claims that the Defendants' vehicle, traveling southbound on Long Beach Avenue, proceeded through the intersection at the same time and struck his vehicle on the passengers' side. The Plaintiff testified that he had the green light in his favor.

At his examination before trial, the 40-year old Plaintiff testified that in 1986, while in the military, he injured his back at the L4/5 level. He stated that he was diagnosed with degenerative disc disease, a herniated disc and as a result was granted a medical discharge six months early from his military service. The Plaintiff also testified that in 2005, he underwent a microdiscectomy (surgical removal of herniated disc material) to his L4/5 disc and attended physical therapy after that surgery as recently as 2007.

In this instant motion, the Defendants seek summary judgment dismissing the Plaintiff's complaint on the grounds that his alleged injuries do not satisfy the "serious injury" threshold of Insurance Law § 5102 (d).

In moving for summary judgment, the Defendants are required to make a prima facie case showing that the Plaintiff did not sustain a "serious injury" within the meaning of the statute. Once this is established, the burden shifts to the Plaintiff to come forward with evidence to overcome the Defendants' submissions by demonstrating a triable issue of fact that a "serious injury" was sustained (*see Pommels v. Perez*, 4 N.Y.3d 566 [2005]; *see also Grossman v. Wright*, 268 A.D.2d 79, 84 [2nd Dept. 2000]).

The Defendants are not required to disprove any category of serious injury which has not been properly pled by the Plaintiff (*Melino v. Lauster*, 82 N.Y.2d 828 [1993]). Moreover, even pled categories of serious injury may be disproved by means other than the submission of medical evidence by the Defendants, including the Plaintiff's own testimony and his submitted exhibits (*Michaelides v. Martone*, 186 A.D.2d 544 [2nd Dept. 1992]; *Covington v. Cinnirella*, 146 A.D.2d 565, 566 [2nd Dept. 1989]).

In support of their claim that the Plaintiff has not sustained a serious injury, the Defendants may rely either on the sworn statements of their examining physician or the unsworn reports of the Plaintiff's examining physician (*see Pagano v. Kingsbury*, 182 A.D.2d 268 [2nd Dept. 1992]). However, unlike the movant's proof, unsworn reports of the Plaintiff's examining doctor or chiropractor are not sufficient to defeat a motion for summary judgment (*Grasso v. Angerami*, 79 N.Y.2d 813 [1991]).

Essentially, in order to satisfy the statutory serious injury threshold, the legislature requires objective proof of a plaintiff's injury. The Court of Appeals in *Toure v. Avis Rent A Car Systems*, 98 N.Y.2d 345 (2002), stated that a plaintiff's proof of injury must be supported by objective medical evidence, such as MRI and CT scan tests (*Toure v. Avis Rent A Car Sys.*, *supra* at 353). However, the MRI and CT scan tests and reports must be paired with the doctor's observations during his physical examination of the plaintiff (*see Toure v. Avis Rent A Car Systems*, *supra*). In addition, unsworn MRI reports are not competent evidence unless both sides rely on those reports (*see Gonzalez v. Vasquez*, 301 A.D.2d 438 [1st Dept. 2003]).

On the other hand, even where there is ample objective proof of the plaintiff's injury, the Court of Appeals held in *Pommels v. Perez, supra*, that certain factors may nonetheless override a plaintiff's objective medical proof of limitations and permit dismissal of the plaintiff's complaint. Specifically, in *Pommels v. Perez*, the Court of Appeals held that additional contributing factors, such as a gap in treatment, an intervening medical problem, or a pre-existing condition, would interrupt the chain of causation between the accident and the claimed injury (*Pommels v. Perez*, 4 N.Y.3d 566 [2005]).

In this case, the Plaintiff alleges in his bill of particulars that he sustained the following "serious and permanent injuries: recurrent disc herniation at L4-5 with indentation of the thecal sac and compression of the bilateral L4-5 roots as well as displacement of the left L5 root; disc bulge L3-4; aggravation and/or exacerbation of degenerative disc disease of the lumbar spine, status post left L4 hemilaminectomy (microdiscectomy)" (*Bill of Particulars*, ¶ 9). He also alleges that he was "confined to bed and home" and "has been totally disabled" from August 4, 2008 through August 6, 2008, August 11 through August 12th, August 18 through August 20th and September 8th up to the present date and continuing" (*Id.* at ¶¶ 11, 12). The Plaintiff was a car salesman in Rockville Center at the time of the accident and he claims that he "was incapacitated from employment from August 4, 2008 to August 6, 2008, August 11 through August 12, 2008 then again on January 8, 2009 when he was terminated from said employment due to excessive absences" (*Id.* at ¶15).

The Plaintiff fails to identify the specific categories of the serious injury statute into which his injuries fall. Nevertheless, whether he can demonstrate the existence of a

compensable serious injury depends upon the quality, quantity and credibility of admissible evidence (*Manrique v. Warshaw Woolen Associates, Inc.*, 297 A.D.2d 519 [1st Dept. 2002]). Based upon a plain reading of the papers submitted herein, it is obvious that the Plaintiff is not claiming that his injuries fall within the first five categories of “serious injury:” to wit, death; dismemberment; significant disfigurement; a fracture; or loss of a fetus. Moreover, inasmuch as the Plaintiff does not claim that he sustained a *total* loss of use of a body organ, member, function or system, it is plain that his injuries do not fall within the sixth category of the “serious injury” statute, i.e., “permanent loss of use of a body organ, member, function or system” (*Oberly v. Bangs Ambulance, Inc.*, 96 N.Y.2d 295 [2001]).

Therefore, this Court will restrict its analysis to the remaining three categories of Insurance Law §5102(d): to wit, 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 the one hundred eighty days immediately following the occurrence of the injury or impairment.

Initially, it is noted that the Plaintiff’s claims of serious injury under the 90/180 category of Insurance Law § 5102 (d) is contradicted by his own testimony and claims in his Bill of Particulars wherein he states that he only missed approximately 6-10 random days within the first 180 days following this accident. In light of these facts, this Court determines that the Plaintiff has effectively abandoned his 90/180 claim for purposes of the Defendants’

initial burden of proof on a threshold motion (*Joseph v. Forman*, 16 Misc.3d 743 [Sup. Ct. Nassau 2007]).

Thus, this Court will restrict its analysis to the remaining two categories as it pertains to the Plaintiff; to wit, “permanent consequential limitation of use of a body organ or member”; and, “significant limitation of use of a body function or system.”

To meet the threshold “significant limitation of use of a body function or system” or “permanent consequential limitation”, the law required that the limitation be more than minor, mild, or slight and that the claim be supported by medical proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition (*Gaddy v. Eyley*, 79 N.Y.2d 955 [1992]; *Licari v. Elliot*, 57 N.Y.2d 230 [1982]; *Scheer v. Koubeck*, 70 N.Y.2d 678 [1987]). A minor, mild or slight limitation shall be deemed “insignificant” within the meaning of the statute (*Licari v. Elliot*, *supra*; *see also Grossman v. Wright*, 268 A.D.2d 79, 83 [2nd Dept. 2000]).

When a claim is raised under the “permanent consequential limitation of use of a body organ or member” or “significant limitation of use of a body function or system” categories, then, in order to prove the extent or degree of the physical limitation, an expert’s designation of a numeric percentage of a plaintiff’s loss of range of motion is acceptable (*see Toure v. Avis Rent A Car Systems, Inc.*, 98 N.Y.2d 345). In addition, an expert’s qualitative assessment of a plaintiff’s condition is also probative, provided that: (1) the evaluation has an objective basis, and, (2) the evaluation compares the plaintiff’s limitations to the normal function, purpose and use of the affected body organ, member, function or system” (*see id.*).

With these guidelines in mind, this Court will now turn to the merits of defendant's motion at hand.

In support of their instant motion, the Defendants submit, *inter alia*, the affirmed report of Dr. Anthony J. Spataro, M.D., an orthopedic surgeon who performed a medical examination of the Plaintiff on November 19, 2009; and selected, unsworn, unaffirmed pages of the Plaintiff's medical records from Northport VA Medical Center dated, *inter alia*, April 17, 2007, August 19, 2005, and January 2, 2002. Notably, the Defendant's expert, Dr. Spataro, indicates that he also reviewed said unsworn records in conjunction with his examination of the Plaintiff. Accordingly, this Court is mindful that having attached and relied upon the Plaintiff's unsworn records, the Defendants have opened the door to the Plaintiff's reliance upon these same records to raise a genuine issue of fact (*Hernandez v. Almanzar*, 32 A.D.3d 360, 361 [1st Dept. 2006]; *Dembele v. Cambisaca*, 59 A.D.3d 352, 352 [1st Dept. 2009]).

In his affirmed report, Dr. Spataro notes the results of his examination of the Plaintiff's lumbar spine:

There is a scar present on the posterior aspect of his lumbar spine. He has no palpable spasm or deformity or step-off. There is no kyphoscoliosis. He has negative straight leg raising in the right lower extremity, and mildly positive in the left lower extremity. Negative Lasegue's signs biulaterall. Motor functions are 5/5, reflexes are 2/2, and there are no sensory deficits in both lower extremities.

<u>Observed</u>	<u>Normal</u>	
0-60	0-90	Forward flexion
0-25	0-25	Extension
0-15	0-25	Left lateral flexion
0-15	0-25	Right lateral flexion
0-20	0-30	Left rotation
0-20	0-30	Right rotation

* * *

DIAGNOSIS: Chronic lower back pain.

COMMENT: The claimant has pre-existing chronic lower back pain, for which underwent surgery in 2005, which was symptomatic prior to the motor vehicle accident on 6/14/08. The claimant did not seek treatment concurrent with the accident and the motor vehicle accident is not mentioned in any of the several records for treatment he received for his chronic back pain subsequent to the date of accident. Accordingly, a causal relationship between the claimant's lower back pain and the motor vehicle accident of 6/14/08 cannot be established.

There is no need for causally related treatment, from an orthopedic standpoint.

From an orthopedic standpoint, the claimant is not disabled. He is able to do his normal job.

Considered together with the Plaintiff's unsworn hospital records predating the subject accident, this Court finds that the Defendants have established, *prima facie*, that the Plaintiff did not sustain a serious injury. The affirmed medical report of the Defendants' physician and the unsworn hospital records establish that the Plaintiff's spinal injuries were not causally related to the subject motor vehicle accident, were degenerative in nature, and existed prior to the subject accident. Moreover, the Defendants' proof, including the Plaintiff's own sworn deposition testimony, also establishes that such pre-existing conditions were also, in fact, symptomatic before the accident (*Passaretti v. Yung*, 39 A.D.3d 517 [2nd Dept. 2007]).

Thus, based upon the proof submitted herein, this Court finds that the Defendants have satisfied their *prima facie* burden of entitlement to judgment as a matter of law (see *Franchini v. Palmieri*, 1 N.Y.3d 536 [2003]; see also *Luciano v. Luchsinger*, 46

A.D.3d 634 [2nd Dept. 2007]). Having made a prima facie showing that the injured Plaintiff did not sustain a “serious injury” within the meaning of the statute, the burden shifts to the Plaintiff to come forward with evidence to overcome the Defendants’ submissions by demonstrating a triable issue of fact that a “serious injury” was sustained (*see Pommels v. Perez*, 4 N.Y.3d 566 [2005]; *see also Grossman v. Wright*, 268 A.D.2d 79, 84 [2nd Dept. 2000]).

In opposition, the Plaintiff relies solely upon his own affidavit and his unsworn hospital records which, for the most part, pre-date the subject accident. Notably, as stated above, the Plaintiff’s hospital records are properly submitted in opposition since the Defendants submitted the records in support of their motion (*Kearse v. New York City Tr. Auth.*, 16 A.D.3d 45 [2nd Dept. 2005]). These submissions, however, fail to adequately address the Plaintiff’s serious pre-existing back condition, or how the Plaintiff’s current problems, in light of his past medical history, are causally related to the accident (*Kaplan v. Vanderhans*, 26 A.D.3d 468 [2nd Dept. 2006]). In the absence of any credible medical proof by, *inter alia*, any examining physician, which address the findings of pre-existing back conditions, degeneration or any causal relation to the subject accident, this Court herewith **GRANTS** the Defendants’ motion for summary judgment on the issue of serious injury.

Under these circumstances, the Defendants’ motion, pursuant to CPLR § 602 (a), providing for the joint trial of this matter with another action pending in this Court captioned *Andrea Madera and Rosamis Garcia v. Arthur Apicella, Jr.*, under Index No. 009338/09 is **DENIED** as moot.

Accordingly, it is hereby

ORDERED, that the motion by the Defendants, interposed pursuant to CPLR § 3212, seeking an order dismissing the Plaintiff's complaint on the basis that she did not sustain a serious injury, is hereby **GRANTED** and the Plaintiff's complaint is **DISMISSED**.

This shall constitute the decision and order of this Court.

Dated: Mineola, New York
September 8, 2010



Hon. Randy Sue Marber, J.S.C.
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ENTERED

SEP 10 2010

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