Ajaz v Dyro
2010 NY Slip Op 32574(U)
September 13, 2010
Supreme Court, Nassau County
Docket Number: 19127/08
Judge: Thomas P. Phelan
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 3
NASSAU COUNTY

MONAWAR AJAZ,

Plaintiff(s),

-against-

WILLIAM J. DYRO and WILLIAM P. DYRO,

Defendant(s).

ORIGINAL RETURN DATE: 05/27/10
SUBMISSION DATE: 08/10/10
INDEX No.: 19127/08

MOTION SEQUENCE #1

The following papers read on this motion:

Notice of Motion.. 1
Answering Papers.. 2
Reply.. 3

Defendants move pursuant to CPLR 3212 seeking an order dismissing the within complaint on the basis that plaintiff has not sustained a serious injury within the ambit of Insurance Law §5102(d).

The underlying cause of action results from an automobile accident which occurred on August 4, 2007. Plaintiff alleges that the vehicle he was driving was struck by the vehicle owned by defendant, William J. Dyro, and operated by defendant, William P. Dyro. Plaintiff claims that as a consequence thereof, he has sustained serious injuries as defined in Article 51 of the New York State Insurance Law and which fall within the following enumerated categories: a permanent consequential limitation of use of a body organ or member; a significant limitation of use of a body function or system, and; and a medically determined injury or impairment 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 ("the 90/180 category").

In moving for summary judgment, defendants provide the affirmed independent medical reports of Isaac Cohen, M.D., Scott Coyne, M.D. and Vishnubhakat, M.D.

Dr. Cohen, an orthopedic surgeon, conducted an examination of plaintiff on July 22, 2009, which included a review of various medical records including an MRI of plaintiff's cervical spine conducted on October 8, 2007, which indicated the presence of a "mild midline disc herniation [at] C5-6, contacting the ventral aspect of the cervical cord" (Movant's Ex. F). Dr. Cohen also

reviewed a report in relation to a CT scan of plaintiff's lumbar spine, which revealed the presence of a "posterior midline herniation [at] L5-S1 with central stenosis," as well as an MRI of plaintiff's brain, which was unremarkable (*Id.*).

Dr. Cohen's examination included an evaluation of plaintiff's cervical and lumbosacral spines, as well as both shoulders and the upper and lower extremities (*Id.*). With regard to the cervical spine, range of motion testing was conducted by way of a goniometer and revealed normal findings (*Id.*). Dr. Cohen noted the absence of spasm and stated that the Compression test and Spurling test were negative (*Id.*). As to the lumbosacral spine, range of motion testing was conducted via a goniometer, which revealed normal findings and Dr. Cohen noted that there was no evidence of trigger points or muscle spasm (*Id.*). With respect to the shoulders, Dr. Cohen found normal range motion and noted the absence of tenderness and that the Hawkins, Neer and Spurling's tests were all negative (*Id.*). As to the upper extremities, Dr. Cohen opined that "there was no evidence of muscle atrophy, and no sensorial deficit or motor weakness" (*Id.*). Finally, as to the lower extremities, Dr. Cohen noted that straight leg raising was negative to 90 degrees bilaterally and that there was no "muscle atrophy and no sensorial deficit" (*Id*).

Dr. Cohen ultimately diagnosed plaintiff as having sustained cervical and lumbosacral strain, as well as multiple soft tissue contusions, all of which had resolved and opined that there was "no evidence of active sequelae or permanency related to the accident of record" (*Id.*). Dr. Cohen further opined that the disc herniation at C5 - C6, as indicated by the MRI, was due to a preexisting degenerative condition (*Id.*).

Dr. Coyne conducted an independent radiologic review of various radiology reports, including the following: a CT scan conducted on 8/31/07 as to plaintiff's cervical spine; a CT scan of plaintiff's thoracic spine, done on 8/31/07, and; a CT scan of plaintiff's lumbosacral spine, conducted on 9/6/2007 (Movant's Ex. G). As to the scan of the cervical spine, Dr. Coyne opined that "except for mild degenerative disc changes * * * appropriate and expected for age, the discs are normal in appearance" (*Id.*). As to the CT scan of the thoracic spine, Dr. Coyne stated that "the thoracic spine is normal" (*Id.*). Finally, with respect to the CT scan of the lumbosacral spine, Dr. Coyne noted the existence of degenerative changes at L4-5 and L5-S1, as well as degenerative narrowing of the central spinal canal at L4-L5 and L5-S1 (*Id.*). Dr. Coyne opined that the "CT examinations of the cervical spine, thoracic spine and lumbosacral demonstrate no evidence of any osseous or soft tissue abnormality or other trauma causally related to the accident * * * on August 4, 2007" (*Id.*).

Dr. Vishnubhakat conducted an examination of plaintiff on November 17, 2009, at which time plaintiff complained of bilateral shoulder pain, as well as pain in his neck and back (*Movant's Ex.* H). Said examination included an evaluation of plaintiff's cervical and lumbar spines, in addition to the left and right shoulders (*Id.*). As to the cervical spine, range of motion testing, accomplished by way of a goniometer, revealed normal findings; and Dr. Vishnubhakat noted the absence of tenderness or spasm (*Id.*). With respect to the lumbar spine, range of motion testing again revealed normal findings, and Dr. Vishnubhakat noted that there was no evidence of spasm or tenderness

(*Id.*). As to the shoulders, joint movement was normal, and once again there was no evidence of tenderness (*Id.*). Dr. Vishnubhakat ultimately opined that examination did not reveal "any evidence of brain, spinal chord, cervical or lumbosacral nerve injuries as a result of the accident of 8/4/07" (*Id.*).

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact (*Sillman v Twentieth Century Fox*, 3 NY2d 395 [1957]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Zuckerman v City of New York,* 49 NY2d 557 [1980]; *Bhatti v Roche*, 140 AD2d 660 [2d Dept 1998]). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the Court to direct judgment in the movant's favor (*Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065 [1979]). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation (CPLR 3212 (b); *Olan v Farrell Lines*, 64 NY2d 1092 [1985]).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). When considering a motion for summary judgment, the function of the court is not to resolve factual issues but rather to determine if any material issues of fact exist (*Sillman v Twentieth Century Fox,* 3 NY2d 395 [1957]).

Within the particular context of a threshold motion seeking dismissal of a personal injury complaint, the movant bears a specific burden of establishing that plaintiff did not sustain a "serious injury" as enumerated in Article 51 of the Insurance Law §5102(d) *(Gaddy v Eyler*, 79 NY2d 955 [1992]). Upon such a showing, it becomes incumbent upon the nonmoving party to come forth with sufficient evidence, in admissible form, to raise an issue of fact as to the existence of a "serious injury"(*Licari v Elliott*, 57 NY2d 230 [1982]). Within the scope of the defendant's burden, a defendant's medical expert must specify the objective tests upon which the stated medical opinions are based and when rendering an opinion with respect to plaintiff's range of motion, must compare any findings to those ranges of motion considered normal for the particular body part *(Qu v Doshna*, 12 AD3d 578 [2d Dept 2004]; *Browdame v Candura*, 25 AD3d 747 [2d Dept 2006]; *Mondi v Keahan*, 32 AD3d 506 [2d Dept 2006]).

Applying the aforesaid criteria to the reports of Drs. Cohen and Vishnubhakat, the Court finds that based thereon the moving defendants have established their *prima facie* case entitling them to judgment as a matter of law as to those injuries within the following categories: a permanent consequential limitation of use of a body organ or member and a significant limitation of use of a body function or system (*Gaddy v Eyler*, 79 NY2d 955 [1992], *Kearse v New York City Transit Authority*, 16 AD3d 45 [2d Dept 2005]).

As stated above, Dr. Cohen found plaintiff to have normal ranges of motion with respect to the cervical and lumbosacral spines, as well as the shoulders. Further, Dr. Cohen noted that there was no atrophy or sensorial deficit with respect to the upper and lower extremities. Additionally, Dr. Vishnubhakat determined that plaintiff exhibited complete ranges of motion in his cervical and lumbar spines and that joint movement was normal in the shoulders. Moreover, the Court notes that both medical experts stated the specific tests upon which their respective medical conclusions were predicated and compared plaintiffs ranges of motion to those ranges of motion considered normal (*Qu v Doshna*, 12 AD3d 578 [2d Dept 2004]; *Browdame v Candura*, 25 AD3d 747 [2d Dept 2006]).

However, as to those injuries within the 90/180 category, the Court finds that the moving defendants have failed to demonstrate the absence of a material issue of fact (*Gaddy v Eyler*, 79 NY2d 955 [1992]). Where, as here, a plaintiff is claiming that he or she has sustained an injury within the 90/180 category, it is incumbent upon the examining medical expert to relate their medical findings to this category of serious injury for the period of time immediately following the subject accident (*Daddio v Shapiro*, 44 AD3d 699 [2d Dept 2007]; *Colacino v Andrews*, 50 AD3d 615 [2d Dept 2008]; *Guzman v Joseph*, 50 AD3d 741 [2d Dept 2008]; *Scinto v Hoyte*, 57 AD3d 646 [2d Dept 2008]).

In the instant matter, a review of the record herein clearly demonstrates that plaintiff is claiming an injury within this 90/180 category. At his examination before trial, plaintiff testified that following the subject accident of August 4, 2007, he was unable to return to work until March or April, 2008. While Dr. Cohen and Dr. Vishnubhakat noted that plaintiff was out of work seven to eight months following the subject accident, both experts failed to relate their respective medical findings and determinations to the time period which directly followed the subject motor vehicle accident.

Therefore, as defendants have failed to demonstrate their entitlement to judgment as a matter of law with respect to the 90/180 category, it is not necessary to examine the sufficiency of plaintiff's opposition evidence submitted in relation thereto (*Mariaca-Olmos v Mizrhy*, 226 AD2d 437 [2d Dept 1996]). However, as noted above, defendants have made their *prima facie* showing as to those categories of "permanent consequential limitation of use of a body organ or member" and "significant limitation of use of a body function or system," and thus the burden now shifts to plaintiff to demonstrate a triable issue of fact with respect to the existence of a "serious injury" as to those categories (*Licari v Elliott*, 57 NY2d 230 [1982], *supra*).

In opposition to defendants' instant application, plaintiff submits copies of the emergency room records, the affirmed medical reports of Michael Trimba, M.D., as well as the affirmations of Vadim Kolesnikov, M.D. and John T. Rigney, M.D.

As adduced from the annexed records, Dr. Trimba examined plaintiff on August 14, 2007, September 10, 2007, October 15, 2007, December 3, 2007, December 18, 2007, January 7, 2008, January 22, 2008, and June 16, 2010 (plaintiff's Ex. D). Upon initial presentment, plaintiff

complained of injuries to his head, shoulders, wrists, neck and low back (*Id., Ex.* D). Dr. Trimba noted restricted ranges of motion in the cervical and lumbar spines, as well as "moderate limitation in bilateral shoulders and wrists" (*Id*). Dr. Trimba further noted that straight leg raising was positive bilaterally to 30 degrees and rendered an initial impression of "concussion, bilateral shoulder contusion, bilateral wrist sprain, cervical, thoracic, lumbar strain & sprain, posttraumatic headache, insomnia, mood disorder" (*Id.*). Dr. Trimba opined that "to a reasonable degree of medical certainty, there is a probable causal relationship between the current complaint and the injury reported" (*Id.*).

Upon re-examination on September 10, 2007, Dr. Trimba stated that range of motion testing again revealed restrictions in the cervical and lumbar spines and again noted a "moderate limitation in bilateral shoulders and wrists" (*Id.*). In the interim, plaintiff was again examined by Dr. Trimba on 10/15/07, 12/3/07, 12/18/07, 1/7/08 and 1/22/08 (*Id.*). During the course of these follow-up examinations, Dr. Trimba rendered an impression that plaintiff had sustained the following: concussion; bilateral shoulder contusion; bilateral wrist sprain; cervical, thoracic, lumbar strain & sprain; C5-C6 disc herniation, C4-C7 disc bulges; C4 on C5, C5 on C6 anterior displacement; right C5-C6 cervical radiculopathy; occipital neuralgia; L5-S1 disc herniation, L2 through L5 disc bulges; Right S1 lumbar radiculopathy; posttraumatic headache; post-concussion syndrome; memory loss. In all of the reports attendant to these interim examinations, Dr. Trimba stated that "to a reasonable degree of medical certainty, there is a probable causal relationship between the current complaint and the injury reported" (*Id.*).

The most recent examination conducted by Dr. Trimba occurred on June 16, 2010, at which time plaintiff "complained of neck and low back pain," as well as "periodic numbness in arms and legs, occipital headache and poor memory" (*Id.*). Range of motion testing, which was manually conducted, revealed restrictions in plaintiff's cervical and lumbar spines (*Id.*). Upon completion of the examination, Dr. Trimba rendered the following diagnosis: status post cervical, thoracic, lumbar strain, sprain; C5-C6 disc herniation, anterior displacement C4 on C5 and C5 on C6; L2-L3, L3-L4, L4-L5 disc bulges, L5-S1 disc herniation, spinal stenosis; Right C5-C6 radiculpathy; Right S1 lumbar radiculopathy; posttraumatic chronic neck and low back pain; posttraumatic occipital neuralgia; postconcussion syndrome, memory loss (*Id.*). Dr. Trimba opined that "to a reasonable degree of medical certainty, the patient's symptoms and objective findings are consistent with the nature and the onset of injury on 8.04.07, and there is a causal relationship between the current complaint and the injury reported" (*Id.*).

In addition to the foregoing, plaintiff has submitted the affirmed MRI report from Vadim Kolesnikov, M. D., which states that the test reveals the presence of a "midline disc herniation at C5-C6, as well as the affirmed report from Dr. Rigney, which states, *inter alia*, that the CT scan of plaintiff's lumbar spine shows "posterior disc bulges at L2-L3, L3-L4 and L4-L5" and a "posterior disc herniation at L5-S1 with central stenosis" (Ex. E).

While a herniated or bulging disc or the presence of radiculopathy may constitute a serious injury within the ambit of Insurance Law §5102(d), a plaintiff is required to provide objective medical

evidence contemporaneous with the subject accident, which demonstrates the extent and degree of the alleged physical limitation resulting from the disc injury and its duration (*Ifrach v Neiman*, 306 AD2d 380 [2d Dept 2003]; *Jason v Danar*, 1 AD3d 398 [2d Dept 2003]; *Felix v New York City Tr. Auth.*, 32 AD3d 527 [2d Dept 2006];*Garcia v Sobles*, 41 AD3d 426 [2d Dept 2007]; *Bestman v Seymour*, 41 AD3d 629 [2d Dept 2007]).

When examining medical evidence offered by a plaintiff on a threshold motion, the Court must insure that the evidence is objective in nature and that a plaintiff's subjective claims as to pain or limitation of motion are sustained by verified medical findings (*Grossman v Wright*, 268 AD2d 79 [2d Dept]2000]). Further, in addition to providing medical proof contemporaneous with the subject accident, plaintiff must also provide competent medical evidence containing objective findings based upon a recent examination, wherein the expert provides an opinion as to the significance of the injury (*Kauderer v Penta*, 261 AD2d 365[2d Dept 1999]; *Constantinou v Surinder*, 8 AD3d 323 [2d Dept 2004]; *Brown v Tairi Hacking Corp.*, 23 AD3d 325 [2d Dept 2005]).

Applying the foregoing principles to the medical evidence proffered by plaintiff, the Court finds that plaintiff has failed to raise a triable issue of fact with respect to those injuries falling within the categories of "permanent consequential limitation of use of a body organ or member" and "significant limitation of use of a body function or system" (*Licari v Elliott*, 57 NY2d 230 [1982]). While the full complement of reports provided by Dr. Trimba indicates that the conclusions expressed therein were properly predicated upon examinations, which were both recent as well as contemporaneous with the subject accident, said reports remain insufficient to defeat defendants' instant application for summary judgment.

In the instant matter, the record reveals that in 1998, plaintiff was involved in an automobile accident in which he claimed to have sustained numerous injuries, which included the following: herniated disc at L5-S1; lumbar sprain; lumbar radiculopathy; restriction and limitation of motion of the lumbar spine; cervical sprain; restriction and limitation of motion of the cervical spine; concussion/post-concussion syndrome; post-traumatic headaches; post traumatic stress disorder; low back pain; back pain radiating into the left lower extremity; pain in the neck; neck pain radiating to the left upper extremity.

However, notwithstanding plaintiff's prior accident in which he allegedly sustained injuries, many of which are identical to those claimed herein, in *none* of the numerous medical reports authored by Dr. Trimba does he mention that plaintiff sustained prior injuries with respect to his cervical spine, lumbar spine or that plaintiff previously suffered post concussion syndrome (*Vidor v Davila*, 37 AD3d 826 [2d Dept 2007]; *Penaloza v Chavez*, 48 AD3d 654 [2d Dept 2008]; *Jules v Caleron*, 62 AD3d 958 [2d Dept 2009]; *Nicholson v Allen*, 62 AD3d 766 [2d Dept 2009]).

[* 7]

Rather, a review of the reports submitted by Dr. Trimba reveals that he notes plaintiff's "Past Medical/Surgical History" and "Past musculoskeletal Trauma" as being "unremarkable" (see Defendant's Exs. C and D). Thus, as Dr. Trimba has failed to sufficiently account for plaintiff's prior injuries and how, if at all, said injuries impacted plaintiff's physical condition, his reports and the conclusions that plaintiff's present complaints were caused by the accident of August 4, 2007, are speculative and insufficient to raise a triable issue of fact.

Based upon the foregoing, the motion by defendants made pursuant to CPLR 3212, which seeks dismissal of plaintiff's complaint is hereby granted as to those injuries within the categories of "a permanent consequential limitation of use of a body organ or member" and "a significant limitation of use of a body function or system" and is denied as to those injuries falling within the 90/180 category.

All applications not specifically addressed herein are denied.

This decision constitutes the order of the court.

Dated: 9-13-10

HON THOMAS P. PHELAN

J.S.C.

ENTERED

SEP 1 6 2010

NASSAU COUNTY
COUNTY CLERK'S OFFICE

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