

Clemons v Alston

2010 NY Slip Op 32711(U)

September 23, 2010

Supreme Court, Nassau County

Docket Number: 020180/08

Judge: Randy Sue Marber

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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
ERNEST CLEMONS,

Plaintiff,

Index No.: 020180/08
Motion Sequence...01, 02
Motion Date...07/09/10

-against

WILLIS R. ALSTON, PATRICIA A. WOODS
and MORRIS D. BURGESS,

Defendants.

_____X

Papers Submitted:

- Notice of MotionX
- Notice of Cross-MotionX
- Affirmation in Opposition.....X
- Reply Affirmation.....X

The Defendant, MORRIS D. BURGESS's ("BURGESS") moves, seeking an order granting summary judgment pursuant to CPLR §3212 and dismissing the Plaintiff's complaint on the grounds that the Plaintiff's injuries do not satisfy the "serious injury" threshold requirement of Insurance Law § 5102 (d). The Defendants, WILLIA R. ALSTON ("ALSTON") and PATRICIA A. WOODS ("WOODS") cross-move for summary judgment based upon similar grounds. Upon the foregoing papers, the Defendants' respective motions are decided as hereinafter provided.

The Plaintiff's personal injury action arises out of a motor vehicle accident that occurred on March 17, 2008 at or near the intersection of Front Street and Main Street in the Town of Hempstead, County of Nassau. At the time of the accident, the Plaintiff was a passenger in a car operated by the Defendant, WOODS and owned by the Defendant, ALSTON. Their vehicle collided with a vehicle owned and operated by the Defendant, BURGESS. The Plaintiff was wearing his seatbelt at the time of the accident and the airbags did not deploy as a result of the collision. The Plaintiff testified at his Examination Before Trial that no ambulance came to the scene and that he did not go to a hospital after the accident. The Plaintiff alleges that, as a result of the accident, he was caused to sustain serious injuries as defined by New York Insurance Law § 5102 (d).

Specifically, the Plaintiff claimed in his Verified Bill of Particulars the following injuries:

C4-C5 herniated disc with impingement, C5-C6 herniated disc with impingement, C6-C7 herniated disc with impingement, cervical radiculitis, cervical sprain/strain, restriction of motion of cervical spine, L3-L4 disc herniation with impingement, L4-L5 disc herniation with impingement, lumbar radiculitis, lumbar sprain/strain, restriction of motion of lumbar spine, right shoulder sprain and restriction of motion of the right shoulder.

See Plaintiff's Verified Bill of Particulars, dated April 15, 2009, attached to the Defendant's Notice of Motion as Exhibit "C". The Defendants, in support of their respective motion and cross-motion for summary judgment, submitted affirmed physician's reports of Dr. Ronald Mann, an orthopedist, and Dr. Iqbal Merchant, a neurologist, who examined the

Plaintiff at the Defendants' request. Dr. Mann examined the Plaintiff on September 9, 2009. His orthopedic examination revealed normal ranges of motion of the Plaintiff's cervical spine, lumbar spine and right shoulder. More specifically, the examination revealed the following:

Range of motion for cervical spine: flexion at 60 degrees (45-60 degrees normal), extension at 60 degrees (45-60 degrees normal), right lateral flexion at 45 degrees (45-60 degrees normal) and left lateral flexion at 45 degrees (45-60 degrees normal), and right rotation at 90 degrees (70-90 degrees normal) and left rotation at 90 degrees (70-90 degrees normal)

Range of motion for lumbar spine: flexion at 100 degrees (75-100 degrees normal), extension at 20 degrees (20-30 degrees normal), right lateral bending at 30 degrees (30-45 degrees normal), and left lateral bending at 30 degrees (30-45 degrees normal) and left rotation at 20 degrees (20-30 degrees normal). Straight leg raise was negative bilaterally.

Range of motion of right shoulder: forward flexion at 170 degrees (170-180 degrees normal), extension at 40 degrees (40 degrees normal), abduction at 170 degrees (170-180 degrees normal), adduction at 45 degrees (45 degrees normal), internal rotation at 80 degrees (80-90 degrees normal), and external rotation at 80 degrees (80-90 degrees normal).

See Sworn Report of Dr. Mann, dated September 9, 2009, attached to the Defendant's Notice of Motion as Exhibit "E". These findings were pursuant to AMA guidelines and a goniometer was used to measure all ranges of motion. Other objective tests, such as the straight leg raise and pinprick tests also revealed normal results.

With respect to the Plaintiff's physical capabilities and limitations, Dr. Mann opined that the Plaintiff, who was unemployed at the time of the accident, is capable of

performing normal activities of daily living without limitations. *Id.* Dr. Mann further opined that there is no need for physical therapy.

Dr. Merchant examined the Plaintiff on September 9, 2009. His neurological examination of the Plaintiff revealed normal ranges of motion of the Plaintiff's cervical spine, thoracic spine and lumbar spine. More specifically, the examination revealed the following:

Range of motion of cervical spine: flexion at 50 degrees (50 degrees normal), extension at 60 degrees (60 degrees normal), right rotation at 80 degrees (80 degrees normal), and left rotation at 80 degrees (80 degrees normal), and right lateral flexion at 45 degrees (45 degrees normal) and left lateral flexion at 45 degrees (45 degrees normal).

Range of motion of lumbar spine: forward flexion at 90 degrees (90 degrees normal), extension at 30 degrees (30 degrees normal), and right lateral flexion at 30 degrees (30 degrees normal) and left lateral flexion at 30 degrees (30 degrees normal).

See Sworn Report of Dr. Merchant, dated September 9, 2009, attached to the Defendant's Notice of Motion as Exhibit "E". Dr. Merchant also noted from an examination of the Plaintiff's thoracic spine that there was no tenderness to palpation over the spinous process from T1 through T12 disc space levels bilaterally. All range of motion tests conducted by Dr. Merchant were performed pursuant to AMA guidelines and a goniometer was used to measure same. Dr. Merchant's final diagnosis was that the Plaintiff's cervical spine sprain/strain and lumbar spine sprain/strain were resolved. Dr. Merchant opined that, based on his examination, the Plaintiff did not require any treatment.

Based on the examinations of Dr. Mann and Dr. Merchant, the Defendants argue that the Plaintiff's injuries do not meet any definition of "serious injury" as defined in any part of Insurance Law § 5102 (d) and, therefore, move and cross-move for summary judgment pursuant to CPLR § 3212 seeking the dismissal of the Plaintiff's complaint in its entirety.

The Plaintiff, in opposition to the Defendants' respective motions, contends that the reports of Dr. Mann and Dr. Merchant are insufficient to permit summary judgment. In that regard, the Plaintiff contends that Dr. Mann failed to address the Plaintiff's MRI reports, failed to report with enough specificity either the procedure or method by which he performed any objective testing, and failed to explain the etiology and progression of the Plaintiff's injuries and how they resolved.

In further opposition, the Plaintiff submits the affirmation of Nizarali Visram, M.D., a duly licensed medical doctor, dated May 26, 2010. The Plaintiff began treatment with Dr. Visram on April 23, 2008. During the Plaintiff's initial visit, Dr. Visram performed range of motion tests of the Plaintiff's cervical and lumbar spine. Dr. Visram found significant limited range of motion of the cervical spine and decreased range of motion of the lumbar spine. The findings were based on objective testing. *See* Affirmation of Dr. Visram, dated May 26, 2010, attached to the Plaintiff's Affirmation in Opposition as Exhibit "C". An X-Ray of the lumbar spine revealed mild lumbar tilt and disc space narrowing at L4-5. *Id.*

The Plaintiff was seen by Dr. Visram for follow-up evaluations on nine (9) occasions: 5/9/08; 5/30/08; 6/13/08; 7/18/08; 9/12/08; 11/6/08; 12/19/08; 2/13/09; and 4/13/09. On April 13, 2009, Dr. Visram found that the Plaintiff's cervical spine flexion was complete, extension was 45 degrees (50 degrees normal); right rotation 65 degrees (80 degrees normal); left rotation 65 degrees (80 degrees normal); lumbar spine flexion 70 degrees (90 degrees normal) and extension was normal. Dr. Visram opined that the findings reflected significant diminished active range of motion to the cervical and lumbar spine. Dr. Visram recommended continued physical therapy, a home exercise program and continued use of over-the-counter pain medication. At that time, Dr. Visram also stated that the Plaintiff had "finally attained maximum medical improvement". *Id.*

Dr. Visram, in his affirmation, also stated that he reviewed the Plaintiff's MRI reports of his cervical and lumbar spine and incorporated them into his treatment plan and diagnoses. *See* Affirmation of Dr. Visram, dated May 26, 2010, attached to the Plaintiff's Opposition as Exhibit "C". The MRIs of the Plaintiff's cervical and lumbar spine, that were performed on June 2, 2008, revealed posterior disc herniations at C4-5, C5-6 and C6-7 impinging on the anterior aspect of the spinal cord at C4-5 and C5-6 and on the anterior aspect of the spinal canal at C6-7. *Id.* The MRI also revealed posterior disc herniations at L3-4 and L4-5 impinging on the anterior aspect of the spinal canal. Dr. Visram attested to the truth and accuracy of the sworn MRI reports and medical opinions contained therein. *Id.* at ¶ 12.

The most recent evaluation of the Plaintiff was conducted by Dr. Visram on April 9, 2010. The range of motion testing of the lumbar and cervical spine revealed the following:

Range of motion testing: flexion is 50 degrees (60 degrees normal), extension is 42 degrees (50 degrees normal), right rotation is 68 degrees (80 degrees normal), left rotation is 66 degrees (80 degrees normal), lumbar flexion is 74 degrees (90 degrees normal), right side bending is normal, left side bending is 22 degrees (25 degrees normal).

See Affirmation of Dr. Visram, dated May 26, 2010, attached to the Plaintiff's Opposition as Exhibit "C". Based upon Dr. Visram's examination of the Plaintiff, in conjunction with his review of the MRI reports, he opined that the Plaintiff sustained post-traumatic cervical spine disc herniations at C4-5 through C6-7 with impingement on the anterior aspect of the spinal cord, and post-traumatic lumbar spine disc herniations at L3-4 and L4-5 impinging on the anterior aspect of the spinal canal. Dr. Visram further opined that the Plaintiff sustained a permanent partial disability causally related to the accident. *Id.* The Plaintiff claims that these personal injuries qualify as "serious injuries," pursuant to Article 51 of the New York State Insurance Law.

In moving for summary judgment, the Defendant must make a prima facie 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 Defendant's submissions by demonstrating a triable issue of fact that a serious

injury” was sustained. *Pommels v. Perez*, 4 N.Y.3d 566 (2005); *see also Grossman v. Wright*, 268 A.D. 2d 79, 84 (2nd Dept. 2000).

Within the particular context of a threshold motion which seeks dismissal of a personal injury complaint, the movant bears a specific burden of establishing that the Plaintiff did not sustain a “serious injury” as enumerated in Article 51 of the Insurance Law § 5102 (d). *Gaddy v. Eyster*, 79 N.Y.2d 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. Elliot*, 57 N.Y.2d 230 (1982). Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *Barr v. County of Albany*, 50 N.Y.2d 247 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 317 (2nd Dept. 1987).

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 the 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 A.D.3d 578 (2nd Dept. 2004); *Browdame v. Candura*, 25 A.D.3d 747 (2nd Dept. 2006); *Mondi v. Keahan*, 32 A.D.3d 506 (2nd Dept. 2006).

Applying the aforesaid criteria to the reports of Dr. Mann and Dr. Merchant, this Court finds that the moving Defendants have established a prima facie case that the Plaintiff failed to sustain a serious injury. *Gaddy v. Euler*, 79 N.Y.2d 955 (1992), *supra*.

The reports of Dr. Mann and Dr. Merchant establish that the Plaintiff does not suffer from a significant limitation. The reports are in admissible form and the range of motion of the Plaintiff's cervical and lumbar spine and right shoulder, found to be within normal limits, were based upon objective tests. The Defendants' doctor's failure to reference the MRI reports, as the Plaintiff notes, does not render the reports insufficient to establish a prima facie case that the Plaintiff did not sustain a serious injury.

The burden now shifts to the Plaintiff to come forward with evidence sufficient to raise a triable issue of fact. Whether the Plaintiff 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).

In order for the Plaintiff 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...paired with the doctor's observations during the physical examination of the Plaintiff.

The Plaintiff submitted the affirmation of Dr. Visram outlining his injuries and treatment following the accident on March 17, 2008. The initial physical examination of the

Plaintiff revealed significant limited ranges of motion of the Plaintiff's cervical spine and lumbar spine and post-traumatic right shoulder sprain/strain. The most recent examination of the Plaintiff also revealed limited ranges of motion, although not as significant, of the Plaintiff's cervical and lumbar spine. However, notably, the most recent examination of the Plaintiff's right shoulder did not reveal any significant limitation of range of motion. Dr. Visram's examination of the Plaintiff's right shoulder revealed the following range of motion: forward flexion 176 degrees (180 degrees normal), abduction 170 degrees (180 degrees normal), extension 60 degrees (60 degrees normal), internal rotation 76 degrees (80 degrees normal), external rotation 90 degrees (90 degrees normal).

The Plaintiff's proffered proof, including Dr. Visram's affirmation, together with the sworn MRI reports of the Plaintiff's cervical and lumbar spine, is sufficient to raise a question of fact as to whether or not the Plaintiff suffered a serious injury with respect to his cervical and lumbar spine. The injury relating to the Plaintiff's right shoulder, however, does not meet the serious injury threshold, as a matter of law. Dr. Visram's most recent examination of the Plaintiff's right shoulder, together with the Defendants' doctor's reports, clearly establish that the Plaintiff does not meet the threshold requirement with respect to the right shoulder sprain/strain injury and, thus, must be dismissed.

The other alleged inconsistencies noted by the Defendants in their reply affirmation raise issues of fact which must be determined by the trier of fact.

The Defendants also argue that the Plaintiff did not adequately explain an alleged gap in treatment from late 2008 to the present. Dr. Visram stated in his affirmation that, at the time of his last physical therapy session on April 3, 2009, he had “finally attained maximum medical improvement”. Citing to *Toure, supra*, Plaintiff’s counsel argues in his affirmation in opposition that an explanation for cessation of treatment which indicates that continued treatment would not produce any benefit has been found sufficient when rendered by an expert. As such, the Plaintiff has adequately explained the gap in treatment.


Based upon the foregoing, the question of whether the Plaintiff suffered a “serious injury” which significantly restricted him from performing his normal and customary activities for 90 out of the first 180 days immediately following the accident or whether the Plaintiff’s injuries constitute a significant limitation of use of a body function or system and/or a permanent consequential limitation of use of a body organ or member are questions for the trier of fact.

Accordingly, it is hereby

ORDERED, that the Defendants’ respective motion and cross-motion (Mot. Seq. 01, 02) is **GRANTED** with respect to the Plaintiff’s right shoulder injury and **DENIED** with respect to the Plaintiff’s cervical and lumbar spine injuries.

This decision constitutes the decision and order of the court

DATED: Mineola, New York
September 23, 2010



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

ENTERED
SEP 27 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE