

Russo v Hoffman

2010 NY Slip Op 32811(U)

September 24, 2010

Supreme Court, Nassau County

Docket Number: 21547/08

Judge: Ute W. Lally

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SHORT FORM ORDER

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

**Present: HON. UTE WOLFF LALLY
Justice**

FRANKLIN RUSSO,

Plaintiff,

-against-

IRA R. HOFFMAN,

Defendant.

**Motion Sequence #01
Submitted July 22, 2010**

INDEX NO: 21547/08

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

Notice of Motion and Affs.....1-5
Affs in Opposition.....6-10
Affs in Reply.....11&12
Affs in Sur Reply.....13-15
Memorandum of Law.....16

Upon the foregoing, it is ordered that this motion by defendant, Ira R. Hoffman ("Hoffman"), for an Order pursuant to CPLR 3212 granting him summary judgment in his favor dismissing plaintiff's complaint on the grounds that plaintiff can not prove that he sustained a "serious injury" as defined in Insurance Law § 5102(d) and required by Insurance Law § 5104(a) is denied.

This is an action to recover money damages for serious personal injuries allegedly sustained as the result of the defendant's negligence which arises out of a motor vehicle accident that occurred on May 31, 2008 at approximately 8:00 a.m. at the intersection of Washington Avenue and Stewart Avenue in Garden City, New York. The plaintiff was traveling in the left lane of the two northbound lanes on Washington Avenue. At his examination he testified that when he entered the subject intersection, he had the green light in his favor. The defendant was traveling in the right lane heading east on Stewart Avenue when he entered the subject intersection and "slammed on the brakes" but the "nose of [his] vehicle" came into contact with the defendant's car on the passenger's side. Plaintiff described the impact as "extremely heavy."

At the time of the accident, the 34-year old plaintiff was employed by the County of Nassau Probation Department. He alleges in his bill of particulars that as a result of this accident, he was confined to his bed for approximately one day immediately after the accident and for an additional ten days intermittently thereafter. He was confined to his home for approximately one day immediately after the accident and for an additional forty days intermittently thereafter. He only missed one day from his work as a result of this accident. At his examination before trial the plaintiff testified that as a result of this accident, he is able to do "handyman stuff" including gardening but only on a limited basis. He also stated that while he can carry his two and a half year old son, he can no longer lift him up over his head.

Plaintiff claims in his bill of particulars that "as a result of this occurrence" he sustained, *inter alia*, C3/4 broad disc herniation causing some impression on the cord without foraminal stenosis; the cord is abutted at C4/5 and C5/6; disc bulging at C3/4 through C6/7; straightening with kyphotic angulation at C3/4; loss of disc hydration at C2/3 and to some extent, C3/4 and C4/5; aggravation of anterior osteophyte at C4/5;

spondylosis at C4/5; cervical disc derangements; loss of cervical lordosis; cervical muscle spasm and pain; cervical radiculopathy; cervical paresthesias; and, numbness of the right and left upper extremities.

Plaintiff alleges that his injuries fall within the following four categories of the serious injury statute: to wit, 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; and 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 inasmuch as the plaintiff has failed to allege and claim that he has sustained a "total loss of use" of a body organ, member, function or system, it is plain that his injuries do not satisfy the "permanent loss of use" category of Insurance Law §5102(d) (*Oberly v Bangs Ambulance, Inc.*, 96 NY2d 295 [2001]). Similarly, plaintiff's claims of serious injury under the 90/180 category of Insurance Law § 5102(d) is also contradicted by his own testimony wherein he states that he only missed one day from work as a result of this accident and that he is not curtailed in his usual activities "to a great extent rather than some slight curtailment" (*Licari v Elliott*, 57 NY2d 230, at 236; *see also Sands v Stark*, 299 AD2d 642). According to his sworn testimony, there is nothing that he cannot do; rather, there are only some activities which he can only do on a limited basis.

In light of these facts, this Court determines that plaintiff has effectively abandoned his 90/180 claim for purposes of defendant's 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.”

Upon his instant motion for summary judgment, defendant is required to 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 the existence of a triable issue of fact, that a “serious injury” was sustained (*Pommels v Perez*, 4 NY3d 566; *see also Grossman v Wright*, 268 AD2d 79, 84). The defendant may disprove any category of serious injury by means other than the submission of medical evidence including plaintiff’s own testimony and her submitted exhibits (*Michaelides v Martone*, 186 AD2d 544; *Covington v Cinnirella*, 146 AD2d 565, 566).

In support of a claim that the plaintiff has not sustained a serious injury, defendant may rely either on the sworn statements of his examining physician or the unsworn reports of the plaintiff’s examining physician (*see Pagano v Kingsbury*, 182 AD2d 268). However, unlike the movant’s proof, unsworn reports of plaintiff’s examining doctor or chiropractor are not sufficient to defeat a motion for summary judgment (*Grasso v Angerami*, 79 NY2d 813). 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 NY2d 345, stated that plaintiff’s proof of injury must be supported by objective medical evidence, such as MRI and CT scan tests (*Toure v Id.*, 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, Id.*). In addition, unsworn MRI reports are not competent evidence unless both sides rely on those reports (*see Gonzalez v Vasquez*, 301 AD2d 438).

On the other hand, even where there is ample objective proof of 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 plaintiff's complaint. Specifically, in *Pommels, Id.*, the Court of Appeals held that additional contributing factors, such as a gap in treatment, an intervening medical problem, or a preexisting condition, would interrupt the chain of causation between the accident and the claimed injury (*Pommels, Id.*, at p 566).

To meet the threshold of significant limitation of use of a body function or system or permanent consequential limitation, the law requires 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 Eyler*, 79 NY2d 955; *Scheer v Koubeck*, 70 NY2d 678; *Licari v Elliot, supra*). A minor, mild or slight limitation shall be deemed "insignificant" within the meaning of the statute (*Licari, Id.*; *Grossman v Wright, supra*, at p 83).

When, as in this case, 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 plaintiff's loss of range of motion is acceptable (*see Toure v Avis Rent A Car Systems, Inc., supra*). 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" (*Toure, Id.*).

With these guidelines in mind, this Court will now turn to the merits of defendant's motion at hand. In support of his motion, the defendant submits, *inter alia*, the affirmed "film review" report of Dr. Sheldon Feit, M.D. of an MRI performed on July 3, 2008 of plaintiff's cervical spine; and the affirmed report of Dr. Alan J. Zimmerman, M.D., an Orthopedic Surgeon who performed an independent medical examination of the plaintiff on September 15, 2009.

Initially, it is noted that inasmuch as Dr. Sheldon Feit, M.D. reviewed the actual MRI films (dated July 3, 2008) of the plaintiff on September 2, 2009, said report constitute competent admissible evidence herein. MRI reports are admissible if another radiologist, i.e., not the radiologist who prescribes and performs the MRI scan, avers that he or she personally reviewed either the actual MRI films or the sworn MRI reports of the prescribing radiologist, rather than just the unsworn MRI reports of another physician (*Porto v Blum*, 39 AD3d 614; *Beyel v Console*, 25 AD3d 636; *Dioguardi v Weiner*, 288 AD2d 253). Here, Dr. Feit reviewed the actual MRI films. His impression of plaintiff's MRI is as follows:

Impression:

Bulging discs identified at the C3-4, 4-5, 5-6 and 6-7 levels.

Degenerative spondylosis.

No evidence of focal herniation.

Conclusion:

Review of the cervical spine MRI obtained one month following the date of injury reveals preexisting degenerative change. Disc bulges are not posttraumatic but are degenerative secondary to annular degeneration and/or ligamentous laxity. No posttraumatic changes are noted. These findings are not causally related to the injury of May 31, 2008.

In addition, Dr. Zimmerman, in his independent orthopedic examination of the plaintiff on September 15, 2009, notes the following range of motion in plaintiff's cervical spine:

Motion	Claimant	Normal
Flexion	45°	45-60°
Extension	45°	45-60°
Lateral Right	45°	30-60°
Lateral Left	45°	30-60°
Rotation Right	60°	45-60°
Rotation Left	60°	45-60°

Dr. Zimmerman notes the following diagnosis and conclusions:

DIAGNOSIS: Cervical sprain, resolved.

CONCLUSIONS: All the MRI findings are degenerative, preexisting, and not causally related, as evidenced by the multiplicity of levels involved and the findings of osteophytes and loss of disk hydration, which all indicate prior degenerative disk disease.

DISABILITY AND WORK COMMENTARY: Per my physical evaluation based on the objective findings the claimant has no disability.

Based upon the foregoing, this Court finds that the defendant has satisfied his *prima facie* burden of judgment as a matter of law (see *Franchini v Palmieri*, 1 NY3d 536; see also *Luciano v Luchsinger*, 46 AD3d 634). 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 defendant's submissions by demonstrating a triable issue of fact that a "serious injury" was sustained (see *Pommels v Perez*, *supra*; see also *Grossman v Wright*, *supra*).

In opposition, plaintiff submits the sworn affidavit of chiropractor, Elliott Strauss who first treated the plaintiff on June 13, 2008 (within one month after the accident); the

unsworn, un-notarized report of Elliot Strauss dated March 24, 2009; and his own affidavit.

Initially it is noted that Elliott Straus does not use the title “M.D.” or “D.O.” or the like following his signature; taken together with the fact that he works at the Hempstead Family Chiropractic Group, this Court is led to believe that Elliot Strauss is a chiropractor, not a medical doctor. Mr. Strauss is therefore required, under the CPLR, to provide a sworn affidavit attesting to his findings (CPLR 2106; *see also Pichardo v Blum*, 267 AD2d 441). In that regard, while Strauss’s sworn report dated January 18, 2010 constitutes competent medical evidence, his unsworn report dated March 24, 2009 does not and therefore cannot be considered in opposition to defendant’s prima facie showing.

Notably, in his report dated January 18, 2010, Strauss indicates that he first treated the plaintiff on June 13, 2008. His January 18th report discusses his observations and findings as of the June 13, 2008 examination. He states, in pertinent part, as follows:

Orthopedic Examination of 06/13/08:

The Cervical Distraction test was positive for nerve root compression. The Shoulder Depression test was positive for spinal nerve adhesionsMuscles spasm was evident in the cervical paraspinal muscles, rhomboid muscles, thoracic paraspinal muscles and the latissimus muscles.***Pinwheel examination of the upper extremities revealed hypoaesthesia at the bilateral C6 through C8 dermatomes. On 07/10/08 an upper extremity EMG/NCV revealed a left C5/C6 nerve root irritation.

Neurological Examination:

Tricep and brachioradialis DTRs were normal; the left bicep DTR was decreased (+1). Wartenberg Pinwheel examination of the upper extremities revealed hypoaesthesia at the bilateral C6 through C8 dermatomes. On 07/10/08 an upper extremity EMG/NCV revealed a left C5/C6 nerve root irritation. ***

Strauss’s sworn report also includes his findings based upon his range of motion testing of the plaintiff on February 19, 2009 and November 13, 2009. As these findings are also sworn to by chiropractor, Elliott Strauss, in his affidavit and made part and parcel of his

overall January 18, 2010 report, these constitute competent admissible evidence herein.

Ranges of Motion Examination

Cervical Spine	Date of Exam: 02/19/09	Date of Exam: 11/13/09
Flexion	50°/60°	55°/60°
Extension	40°/55°	45°/55°
Right Lateral Flexion	35°/45°	35°/45°
Left Lateral Flexion	35-40°/45°	40°/45°
Right Rotation	65°/80°	70°/80°
Left Rotation	70°/80°	70°/80°

Diagnoses:

It is my opinion, with a reasonable degree of chiropractic certainty, that as a result of this accident Franklin Russo sustained:

- 723.4 Cervical Radiculopathy
- 724.1 Thoracic Myalgia
- 722.0 Cervical Disc Pathology
- 724.9 Cervical Nerve Root Impingement

Keeping in mind that the plaintiff is only required herein to present admissible evidence to raise an issue of fact with respect to the “permanent consequential limitation of use of a body organ or member” and “significant limitation of use of a body function or system,” this Court herewith finds that Elliott Strauss’s affidavit sufficiently raises questions of fact as to whether he sustained a “serious injury.” Strauss’s affidavit is objective evidence of the extent of the plaintiff’s physical limitations resulting from the subject car accident. Specifically, his report is not only based upon a recent examination of the plaintiff (*Cornelius v Cintas Corp.*, 50 AD3d 1085; *Moore v Edison*, 25 AD3d 672) but it is also based upon medical proof contemporaneous with the subject accident (*Ferraro v Ridge Car Service*, 49 AD3d 498; *Manning v Tejada*, 38 AD3d 622).

Therefore, defendant's motion for summary judgment dismissal of plaintiff's complaint on the grounds that his injuries do not satisfy the "serious injury" threshold requirement of Insurance Law §5102(d) is denied.

Dated: September 24, 2010



UTE WOLFF LALLY, J.S.C.

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