

Kolbert v Flippen

2010 NY Slip Op 32851(U)

September 29, 2010

Supreme Court, Nassau County

Docket Number: 21498/08

Judge: Michele M. Woodard

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

-----X
STEVEN KOLBERT, ANA KOLBERT and LILIA
KOLBERT, an infant by her parent and Natural Guardian,
ANA KOLBERT,

Plaintiffs,

-against-

**MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 12
Index No.: 21498/08
Motion Seq. Nos.: 01 & 02**

PAOLO C. FLIPPEN,

Defendant.

DECISION AND ORDER

-----X
Papers Read on this Motion:

Defendant's Notice of Motion	01
Defendant's Notice of Motion	02
Plaintiff Ana Kolbert's Sur-Reply	xx
Plaintiff Steven Kolbert's Affirmation in Opposition	xx
Plaintiff Ana Kolbert's Affirmation in Opposition	xx
Plaintiff Steven Kolbert's Reply Affirmation	xx
Defendant's Reply Affirmation	xx

In motion sequence number one and two, the defendant Paolo C. Flippen moves by Notice of Motion for an order pursuant to CPLR §3212 for summary judgment as to plaintiffs Steven Kolbert and Ana Kolbert claiming that they did sustain serious injuries as required by Insurance Law CPLR §5102(a).

Plaintiffs commenced this action for injuries allegedly sustained in an automobile collision that occurred on November 25, 2007. The collision occurred on the westbound Long island Expressway at or near the Cross Island Parkway. Plaintiff Steven Kolbert ("Steven") was driving; co-plaintiff Ana Kolbert ("Ana") was a front seat passenger. Plaintiff alleges their stopped or almost stopped vehicle was struck from behind by defendant at a high rate of speed (40 m.p.h.).

As to Ana, defendant offers the affirmation of Dr. S. Murthy Vishnubhakat a neurologist (the report is dated November 5, 2009 and is annexed to defendant's motion as Exhibit G). Dr. Vishnubhakat found no adverse neurological prognostic indicators, permanencies, or disabilities related to the November 23, 2007 collision. Dr. Vishnubhakat opined that Ana could perform all activities of

daily living and of her profession without any evidence of a neurologic disability.

As to Ana's deposition (see Exhibit E annexed to defendant's motion as to Ana; the following pages refer to that exhibit) Ana received no treatment at the scene from ambulance attendants (pgs. 29-30); Ana exited the vehicle on her own (p. 24); Ana had a prior back injury in 1995 from a fall (p. 57); in 2004, she sustained a small fracture of her back (p. 53-55); she missed a few days from work but no doctor prescribed rest for her to stay home (p. 59); she has the same responsibilities at work as before the collision (p. 72); there has been no change in her relationship with her husband after the collision (p. 71); and Ana had no doctors appointment scheduled as of the day of the deposition (p.71).

As to Steven, the defendant offers the affirmation of Dr. John C. Killian, an orthopedist (the report is dated October 20, 2009 and is annexed to defendant's motion as to Steven as Exhibit F). Dr. Killian found that Steven had disc abnormalities that were due to Steven's age (mid-fifties) and his weight of about 300 lbs. (Dr. Killian categorized Steven as "obese"). Dr. Killian found the abnormalities to be degenerative in nature. As to the issue of Carpel Tunnel Syndrome, Dr. Killian notes Steven had a long, pre-collision history of hand numbness and bilateral Carpel Tunnel Syndrome. As to the surgery to relieve the Carpel Tunnel Syndrome in Steven's right wrist (done by a Dr. Toledano in January 2009), Dr. Killian found the left wrist was the only wrist to which the E.R. nurse indicated Steven had a complaint.

Defendant notes the deposition of Steven (see Exhibit E annexed to defendant's motion as to Steven; the following pages refer to that exhibit). Steven walked around his vehicle to assess the damage (p. 31); Steven left the collision scene in an ambulance (p. 35); Steven took a few (2-3 days) off after the collision (p. 70); Steven stopped afternoon appointments to go home, rest up, take medicine and then resume his evening appointments; Steven has increased his household cleaning help (p. 93).

Dr. Silvergleid, Steven's expert (see Exhibit G annexed to Steven's affirmation in opposition) does state Steven has degenerative disc narrowing of the cervical spine.

In a serious injury matter, when a defendant seeks summary judgment on the issue that the plaintiff did not sustain a serious injury, the burden is placed on the defendant to prove through admissible evidence that the plaintiff failed to meet the statutory threshold of "serious injury." (*Gaddy v Eyer*, 79 NY2d 955 [1992]; *Lagois v Public Administrator of Suffolk County*, 303 AD2d 644 [2d Dept 2003])

The affirmed medical reports of defendant's physicians (here a neurologist and an orthopedist) as well as the plaintiffs' deposition testimony can be sufficient to establish *prima facie* that the plaintiffs did not sustain serious injury in a motor vehicle collision within the meaning of Insurance Law § 5102(d) (see *Park v Orellana*, 49 AD3d 721 [2d Dept 2008]; *Tarhen v Kabashi*, 44 AD3d 847 [2d Dept 2007]).

A defendant moving for summary judgment on the grounds that the plaintiffs did not sustain a "serious injury" under Insurance Law § 5102(d) must meet the initial burden of establishing *prima facie* entitlement to judgment (*Matthew v Cupie Transportation Corp.*, 302 AD2d 566 [2 Dept 2003]). In an automobile negligence case, it is only after a defendant has made a *prima facie* showing of entitlement to summary judgment that it becomes incumbent on the plaintiff to present competent medical evidence to support plaintiff's claim of serious injury (*Franchini v Palmiere*, 307 AD2d 1056 [3d Dept 2003]).

A defendant in an automobile negligence/serious injury case can establish his or her entitlement to judgment by a physician's report, from the qualitative assessment therein, that the plaintiff has not sustained a serious injury (*Toure v Avid Rent a Car System, Inc.*, 98 NY2d 345, 350 [2002]; *Gonzales v Fiallo*, 47 AD3d 706 [2d Dept 2008]).

Examining the report of defendant's physicians, there are enough tests set forth to provide an objective basis so that their respective qualitative assessment of plaintiffs could readily be challenged by any of plaintiffs' experts during cross-examination at trial as well as to provide enough to be evaluated by the trier of fact. (*Toure v Avid Rent a Car Systems, Inc.*, *supra*; *Gonzales v Fiallo*, *supra*).

Thus, as noted, defendant's submission of relevant portions of plaintiffs' deposition (*Jackson v Colvert*, 24 AD3d 420 [2d Dept 2005]; *Batista v Olivo*, 17 AD3d 494) and affirmations of defendant's physicians are sufficient herein to make a *prima facie* showing that the plaintiffs did not sustain a serious injury within the meaning of Insurance Law § 5102(d) (*Paul v Treotola*, 11 AD3d 441 [2d Dept 2004]). The plaintiffs are now required to come forward with viable, valid objective evidence to verify their complaints of pain and limitations of motion (*Farozees v Kamran*, 22 AD3d 458 [2d Dept 2005]).

Here, plaintiffs have not met their respective burdens.

Plaintiffs have offered the MRI report of Drs. Richard Silvergleid and Harold Tice, radiologists (see Exhibit 5 and 6 annexed to plaintiff's affirmation in opposition). The report reflects MRIs that occurred shortly after the November 27, 2007 incident. The MRI reports do not causally relate the

plaintiffs' herniations and disc bulges to the November 27, 2007 incident (*see Garcia v Lopez*, 59 AD3d 593; *Munoz v Koyfman*, 44 AD3d 914 [2d Dept 2009]).

Also the mere existence of a herniated or bulging disc is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from disc injury and its duration (*Luizzi-Schwenk v Singh*, 58 AD3d 811 [[2d Dept 2009]; *Luna v Mann*, 58 AD3d 699 [2d Dept 2009]).

The plaintiffs' own affidavits (see Exhibits 1 and 2 annexed to plaintiffs' respective affirmations in opposition) are insufficient to raise triable issues of fact as to whether they sustained a serious injury (*see Niles v Lam Pakie Ho*, 61 AD3d 657 [2d Dept 2009]; *Cantave v Gelle*, 60 AD3d 988 [2d Dept 2009]).

Also, as to Ana and Steven, Dr. Cohen offers reports dated January 8, 2010 with the last pre-motion report dated September 11, 2008 in which Dr. Cohen reports on Ana's last visit of September 8, 2008, or roughly two years ago. Both reports by Dr. Cohen present a "gap in treatment" issue.

In *Pommells v Perez*, 4 NY3d 566 [2005], the Court of Appeals held that a gap in treatment would interrupt the chain of causation between the collision and the alleged injury.

While a cessation of treatment is not totally dispositive since it is not required that the plaintiff continue needless treatment in order to survive a summary judgment motion, the Court of Appeals has recently stated that a plaintiff who terminates therapeutic measures following the accident while claiming serious injury must offer some reasonable explanation for having done so (*Pommells v Perez*, *supra*; *see also, Mohamed v Siffrain*, 19 AD3d 561 [2d Dept 2005]).

Courts that have applied *Pommells v Perez*, *supra*, have consistently held that to be reasonable, the explanation must be concrete and substantiated by the record.

Thus the plaintiffs' experts' affirmations are insufficient to counter the inference that naturally arises (from the termination of treatment to the injury that the plaintiff allegedly sustained as a result of the collision) that the injuries allegedly sustained by the plaintiffs were not "serious injuries" as defined under Insurance Law § 5102(d).

As to Steven, Dr. Cohen offers a report dated March 15, 2010. However the last date for an examination by Dr. Cohen of Steven prior to the defendant's motion was September 26, 2008 (see Exhibit 4 annexed to Steven's affirmation in opposition).

There is no concrete reason substantiated by the record for the gaps. Clearly, none of plaintiffs' experts explained the lengthy gap in treatment (*see Hackett v AAA Expedited Freight Systems, Inc.*, 54 AD3d 721 [2d Dept 2008]).

As to Ana, the reports of Dr. Harold Tice of Ana's lumbar and cervical spines (see Exhibit 3 annexed to Ana's affirmation in opposition) are not sworn or affirmed. Thus, it does not constitute competent evidence to defeat defendant's summary judgment motion (*see Rabolt v Park*, 50 AD3d 995 [2d Dept 2008]).

As to the medical affirmations presented by Ana, the conclusions of her medical expert that injuries and limitations so noted by Ana's experts that the injuries and limitations resulted from the accident of November 27, 2007 are speculative since Ana's expert failed to acknowledge her prior back incidents/accidents (*see Yun v Barber*, 63 AD3d 1140 [2d Dept 2004]; *Joseph v A& M Livery*, 55 AD3d 663 [2d Dept 2008]).

As to Steven, Dr. David Manevitz (see Exhibit 3 annexed to Steven's affirmation in opposition) offers no results of recent examinations (*see Luizzi-Schwenk v Sing*, 58 AD3d 811 [2d Dept 2009]) although Dr. Manevitz states he last saw Steven in February 2010.

As to Steven, his medical experts are aware of his Carpel Tunnel Syndrome, but they do not address the fact that defendant's experts concluded that Steven's Carpel Tunnel Syndrome was in existence long before the collision of November 27, 2007.

Minor or slight limitation of use is insignificant within the meaning of the No-Fault Statute (*Gaddy v Eyler, supra*).

Also, the plaintiffs' experts do not properly address the degenerative conditions set forth by defendant's experts (as noted earlier) (*see Pommells v Perez, supra; Young Soo Lee v Troia*, 41 AD3d 469 [2d Dept 2007]).

Plaintiffs must set forth competent medical evidence to establish that they sustained a medically determined injury or impairment of a nonpermanent nature which prevented them from performing substantially all of the material acts which constituted this usual and customary daily activities for 90 of the 180 days following the subject collision (*Ly v Holloway*, 60 AD3d 1006 [2d Dept 2009]; *Rabolt v Park*, 50 AD3d 995).

These plaintiffs offer no visible medical evidence on the 90/180 day issue. Clearly, the

plaintiffs' deposition does not support a 90/180 day issue in plaintiffs' favor. Even if the deposition did so, the deposition testimony does not indicate "competent medical evidence" that they were unable to perform substantially all of his daily activities for 90 out of the 180 days after the November 25, 2007 collision.

Here, as noted, the defendant made a *prima facie* showing through the plaintiffs' deposition testimony, that the plaintiffs did not sustain a serious injury as defined under Insurance Law § 5102(a) in that they did not miss much time from work right after the collision, and their alleged injuries did not prevent them from performing "substantially all" of the material acts constituting their customary daily activities during at least 90 out of the first 180 days following the collision (*see Sanchez v Williamsburg Volunteer of Hatzolah, Inc.*, 48 AD3d 664 [2d Dept 2008]).

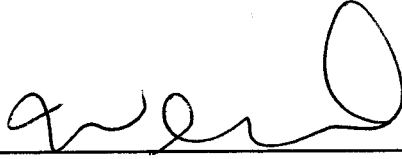
All of the above reasons prevent the plaintiffs' medical expert from raising triable issues of facts herein. As such, the Defendant's motions are **granted** and the plaintiffs' complaint is **dismissed**. It is hereby

ORDERED, that the remaining parties are directed to appear for trial on December 2, 2010 at 9:30 a.m. in Central Jury.

This constitutes the Decision and Order of the Court.

DATED: September 29, 2010
Mineola, N.Y. 11501

ENTER:



HON. MICHELE M. WOODARD
J.S.C.

ENTERED

OCT 07 2010

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**