

Switzer v Langewell

2010 NY Slip Op 32852(U)

September 30, 2010

Supreme Court, Nassau County

Docket Number: 022911/08

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

ROBERT A. SWITZER,

Plaintiff,

Index No.: 022911/08
Motion Sequence...02, 03
Motion Date...07/15/10

-against

XXX

JOHN D. LANGEWELL and HANNE L.
LANGWELL,

Defendants.

_____ X

Papers Submitted:

- Notice of Motion.....X
- Notice of Cross-Motion.....X
- Affirmation in Reply.....X

Upon the foregoing papers, the Defendants' motion seeking an order granting summary judgment pursuant to CPLR § 3212 and dismissing the complaint of the Plaintiff, on the grounds that the Plaintiff's injuries do not satisfy the "serious injury" threshold requirement of Insurance Law § 5102 (d) is determined as hereinafter provided. The Plaintiff's unopposed cross-motion, seeking an order granting him summary judgment on the issue of liability, is also determined as hereinafter provided.

The Plaintiff's personal injury action arises out of a motor vehicle accident that occurred on September 5, 2008 at or near the intersection of Atlantic Avenue and Carnation Avenue, Baldwin, County of Nassau. At the time of the accident, the Plaintiff was an occupant of a legally parked vehicle that was struck by a vehicle owned by the Defendant, JOHN D. LANGWELL and operated by the Defendant, HANNE L. LANGWELL. The Plaintiff alleges that, as a result of the accident, he sustained "serious injuries" as defined by Insurance Law § 5102. The Defendants argue that they are entitled to judgment as a matter of law as the Plaintiff suffered only minor strains and sprains as a result of the motor vehicle accident.

The Plaintiff's Verified Bill of Particulars, dated March 6, 2009, and Supplemental Verified Bill of Particulars, dated September 21, 2009, state that the Plaintiff sustained the following injuries as a result of the accident:

A fractured chipped left front upper tooth.

C4-5, C5-6, C7-T1 and T1-T2 herniation with multilevel nerve root impingement; cervical radiculitis, neuritis, neuralgia, C5-6 peripheral polyradiculoneuropathic dysfunction, severe neck pain, numbness, tingling, burning sensation in the right shoulder, arm and hand cervical sprain/strain.

Chronic L4-5 and L5-S1 herniation with multilevel nerve root impingement and exacerbation of prior back injury. Lumbar radiculitis, numbness, tingling, burning sensation in the right buttock, leg and foot.

L5-S1 peripheral polyradiculoneuropathic dysfunction lumbar sprain/strain. Diminished strength and range of motion, advanced arthritic changes.

See Plaintiff's Verified Bill of Particulars and Supplemental Verified Bill of Particulars, attached to the Defendants' Notice of Motion as Exhibits "C" and "G", respectively.

Plaintiff's Prior Injuries:

The Plaintiff testified on September 14, 2009 at his Examination Before Trial that on July 23, 1988, he sustained a job related injury to his lower back. As a result of that accident, the Plaintiff was diagnosed with a herniation at L4-L5 and subsequently underwent surgery on December 4, 1990, where the L4 and L5 discs were fused. In or about November, 1995, the Plaintiff was involved in an motor vehicle accident that resulted in injury to the L4-L5 region of his back. As a result of that accident, the Plaintiff underwent physical therapy from January 1996 through July 1996. Also, on November 23, 2002, the Plaintiff was involved in another motor vehicle accident which resulted in a herniated disc at L4-L5. Plaintiff treated with a chiropractor from December, 2002 through July, 2003. The Plaintiff has been out on disability since 1990 due to the previous work-related injury in 1988.

Defendants' Proof in Support of Motion:

In support of their motion for summary judgment, the Defendants submitted the medical reports of Michael J. Katz, M.D., an orthopedic surgeon, Steven Ender, D.O., a neurologist, and Audrey Eisenstadt, M.D., a radiologist.

At the request of the Defendants, Dr. Katz performed an orthopedic exam on October 9, 2009 which revealed the following:

Range of motion of the Plaintiff's cervical spine: flexion 50 degrees (normal 50 degrees) extension 60 degrees (normal 60 degrees); right sided lateral flexion 45 degrees (normal 45 degrees) left-sided lateral flexion 45 degrees (normal 45 degrees); right sided rotation 80 degrees (normal 80 degrees) left-sided rotation 80 degrees (normal 80 degrees). Adson's test was negative.

Range of motion of the Plaintiff's lumbar spine: forward flexion 60 degrees (normal 90 degrees); full extension 30 degrees (normal 30 degrees); full lateral and side bending 30 degrees (normal 30 degrees). Straight leg raising was negative. No paravertebral muscle spasm was present. Babinski and Patrick test was negative.

See Report of Dr. Katz, dated October 9, 2009, attached to the Defendants' Notice of Motion as Exhibit "P". The range of motion of the Plaintiff's cervical and lumbar spine was determined using a goniometer. At the conclusion of the examination, Dr. Katz' diagnosis was that the Plaintiff's cervical radiculopathy and left shoulder contusion were now resolved and the lumbar strain is resolved with pre-existing lumbosacral radiculopathy unrelated to the accident of September 5, 2008. Dr. Katz further opined that the Plaintiff currently shows no signs or symptoms of permanent loss of use relative to the neck or left shoulder and that with regard to his lower back, his pathology predates this accident by 20 years. Dr. Katz commented that the MRI reports of the cervical and lumbar spine indicate multi-level pre-existing degenerative disc disease. Dr. Katz stated that the Plaintiff is capable of performing his activities of daily living.

The neurological exam, conducted by Dr. Ender on November 10, 2009, revealed the following results:

Range of motion testing of the neck: lateral rotation 80 degrees (normal 80 degrees); flexion/extension 45 degrees (45 degrees normal).

Range of motion testing of the lumbar spine: the Plaintiff can flex his lumbar spine to 110 degrees (90 degrees normal); bilateral cervical paraspinal muscle tenderness, but no spasm noted. Straight leg raising was negative. There was bilateral lumbosacral paraspinal muscle tenderness. No spasm noted.

See Report of Dr. Ender, dated November 10, 2009, attached to the Defendants' Notice of Motion as Exhibit "Q". Dr. Ender's impression revealed post cervical and lumbosacral paraspinal muscle strain. He stated that a causal relationship between the accident and injuries has been established, but opined that there is no residual neurological disability. Dr. Ender further opined that the Plaintiff can continue with his current activities of daily living without restrictions and that his injuries appear to be an exacerbation of the two prior injuries that occurred in 1988 and 2002.

At the Defendants' request, Dr. Eisenstadt, a radiologist, reviewed a cervical spine MRI performed on the Plaintiff on October 6, 2008, approximately one month following the accident. Dr. Eisenstadt's impression revealed the following:

Osteophyte formation C4-5 level. Desiccation of all cervical intervertebral discs. Discogenic ridging C3-4, C4-5, C5-6, and C6-7 levels. Superimposed small disc herniations at the C4-5 and C5-6 levels. Likely protrusion of the T1-2 intervertebral disc space, which based on the images provided, appears to be bulging.

See Dr. Eisenstadt's Report dated February 5, 2010, attached to the Defendants' Notice of Motion as Exhibit "R". Dr. Eisenstadt concluded that MRI revealed

degenerative changes involving the osseous and intervertebral disc structures, which predate the September 5, 2008 accident. The osteophyte formation at the C4-5 level, a bony productive change, was greater than six months in origin predating the accident. The doctor explained that the disc desiccation was a drying out of disc material, greater than three months in origin, which could not have occurred in the short time interval between the MRI and the injury. Dr. Eisenstadt opined a similar result with respect to the bulging at the C4-5, C5-6 and C6-7 levels, stating that the bulging discs have no traumatic basis. With respect to the protrusion at the T1-2 level, Dr. Eisenstadt concluded that the bulging was not traumatic in origin, but instead, related to ligamentous laxity, a degenerative process. *See* Dr. Eisenstadt's Report, dated February 5, 2010, attached to the Defendants' Notice of Motion as Exhibit "R".

Dr. Eisenstadt also reviewed two MRI scans of the lumbar spine, one which predates the accident by three months, and one that was taken one month after the accident. Dr. Eisenstadt opined that the pre-trauma examination revealed extensive degenerative changes which are longstanding in origin. *Id.* She further stated that the degenerative and surgical changes were present on the pre-trauma study and remained unchanged on the post-trauma examination. *Id.*

Plaintiff's Proof in Opposition:

In opposition to the Defendants' motion, the Plaintiff submitted the affirmation of Benzion Benatar, M.D., an orthopedic surgeon, and an affidavit of the Plaintiff's treating

chiropractor, William S. Thatcher, D.C. An examination was performed by Dr. Benatar on October 1, 2008, which revealed significant range of motion limitations in all planes of the Plaintiff's cervical spine. There was a mild restriction of the Plaintiff's left shoulder and straight leg raising tests were positive. As a result of the October 1, 2008 examination, Dr. Benatar concluded that the findings suggested the presence of a left cervical radiculopathy and left lumbar radiculopathy. *See* Affirmation of Dr. Benatar, dated April 28, 2010, attached to the Plaintiff's Opposition as Exhibit "B". Dr. Benatar also examined the Plaintiff on October 22, 2008, December 9, 2008 and April 28, 2010.

Notably, while Dr. Benatar opines on the limited ranges of motion of the Plaintiff's cervical spine, lumbar spine and shoulder, he fails to demonstrate what injuries are related to the Plaintiff's prior work related accident and two prior car accidents and what injuries, if any, are causally related to the September 5, 2008 accident. Further, Dr. Benatar stated that the most recent examination of the Plaintiff, conducted on April 28, 2010, revealed significant restrictions of motion to his cervical and lumbar spine, without stating the basis upon which he arrived at those conclusions and the extent of the limited ranges of motion.

The Plaintiff also submitted the affidavit of his treating chiropractor, Dr. Thatcher. The Plaintiff has treated with Dr. Thatcher since his work related accident on May 7, 1988. Dr. Thatcher first treated the Plaintiff with respect to the September 5, 2008 accident on September 12, 2008. Based on his examination of the Plaintiff's cervical and

lumbar spine, Dr. Thatcher found significant limited ranges of motion. *See* Affidavit of Dr. Thatcher, dated May 14, 2010, attached to the Plaintiff's Opposition as Exhibit "C". On September 12th, Dr. Thatcher opines that the Adams and Kemps tests showed lower back pain, Sotohall test revealed neck and upper back pain, Bechtrew test revealed lower back pain, left thigh and lower back pain, Ely's test revealed lower back pain, Straight leg raising was positive, Bowstrings test revealed lower back pain and left thigh pain and Valsalvas test revealed lower back pain as well. Thereafter, the Plaintiff began a treatment of chiropractic manipulation and adjustments which began on September 12, 2008 and continued on a three times a week basis until March 25, 2009 and thereafter decreased to twice a week and then once a week. Dr. Thatcher then examined the Plaintiff again on October 7, 2008 and most recently on May 7, 2010. The most recent examination of the Plaintiff revealed limited ranges of motion of the Plaintiff's cervical and lumbar spine. Unlike Dr. Benatar's affirmation, Dr. Thatcher does compare the range of motion to normal ranges of motion identifying the related percentage decreases.

Dr. Thatcher states in the last paragraph of his affidavit that the Plaintiff's injuries as stated in the report are causally related to his accident of September 5, 2008 without any further explanation as to whether any of the Plaintiff's injuries were related to his prior accidents of May 7, 1988 and two prior motor vehicle accidents of 1995 and 2002.

Standard of Review:

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. Eyler*, 79 N.Y.2d 955 (1992). Upon such a showing, it becomes incumbent upon the non-moving 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). 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.

Legal Analysis:

Based upon the proof submitted by the Defendants, the Court finds that the Defendants have established a prima facie case that the Plaintiff did not suffer a “serious injury” as defined by Insurance Law § 5102 (d). The medical reports of Dr. Katz, Dr. Ender and Dr. Eisenstadt sufficiently establish that, while there may be evidence of disc herniations and bulges, these injuries do not result in a significant limitation of range of motion of the Plaintiff’s cervical or lumbar spine and left shoulder. Further, the report of Dr. Eisenstadt

adequately disproves any causal relationship between the Plaintiff's claimed injuries and the accident of September 5, 2008.

It is now incumbent upon the Plaintiff to come forward with evidence to raise an issue of fact with respect to whether the Plaintiff suffered a "serious injury". The Court finds that the Plaintiff failed to meet his burden. While Dr. Thatcher describes the Plaintiff's symptoms, complaints and inability to perform his daily activities, he fails to raise a question of fact as to whether those stated injuries are causally related to the September 5, 2008 accident. At the end of Dr. Thatcher's affidavit, he makes a conclusory statement that the Plaintiff's injuries are causally related to the subject accident and mimics the language in the statute stating that the Plaintiff "has suffered a medically determined injury or impairment of a non permanent nature which prevented him from performing substantially all of the material acts which constitute his usual and customary daily activities for not less than ninety days during the one hundred and eighty days immediately following the occurrence of this injury." See Affidavit of Dr. Thatcher, dated May 14, 2010, attached to the Plaintiff's Opposition as Exhibit "C".

A plaintiff seeking to overcome the defendants' prima facie case of entitlement to summary judgment by establishing triable issue of fact that a serious injury was sustained within the meaning of the no-fault law must present objective evidence of the injury. The mere parroting of language tailored to meet statutory requirements is insufficient. *Powell v. Hurdle*, 214 A.D.2d 720 (2nd Dept. 1995). Even where there is objective medical proof,

when additional contributory factors interrupt the chain of causation between the accident and claimed injury, such as a pre-existing condition, summary dismissal of the complaint may be appropriate under the no-fault law. *Pommells v. Perez*, N.Y.3d 566 (2005). Additionally, Dr. Thatcher fails to set forth what objective tests were performed on May 7, 2010 to derive the limited ranges of motion in the Plaintiff's lumbar and cervical spine. *See Smith v. Askew*, 264 A.D.2d 834 (2nd Dept. 1999).

Dr. Benatar's affirmation similarly fails to raise a question of fact as to whether the Plaintiff suffered a "serious injury". Dr. Benatar stated that an examination was conducted on April 28, 2010 which revealed "continued significant restrictions of motion to his cervical and lumbar spine." However, Dr. Benatar failed to state the objective basis upon which those results were based and failed to compare the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system. While Dr. Benatar's examination of October 1, 2008 set forth the appropriate basis upon which the Plaintiff's limited range of motion was derived from, there is no similar recent evaluation of the Plaintiff. In addition to providing medical proof contemporaneous with the subject accident, the Plaintiff is also required to provide competent medical evidence containing verified objective findings based upon a recent examination of the Plaintiff. *Kauderer v. Penta*, 261 A.D.2d 365 (2nd Dept. 1999); *Constantinou v. Surinder*, 8 A.D.3d 323 (2nd Dept. 2004); *Brown v. Tairi Hacking Corp.*, 23 A.D.3d 323 (2nd Dept. 2005).

In this regard, the Plaintiff did not proffer sufficient proof to rebut the Defendants' prima facie showing that the Plaintiff did not suffer from a "serious injury" as a result of the accident on September 5, 2008. The failure to set forth objective test or tests performed during an examination of the plaintiff which leads a doctor to conclude that the plaintiff suffered significant limitations to the range of motion warrants the granting of summary judgment.

Based upon the foregoing, the Plaintiff's opposition was insufficient to raise a triable issue of fact.

Accordingly, it is hereby

ORDERED, that the motion by the Defendants seeking summary judgment, dismissing the claims against them, is **GRANTED**; and it is further

ORDERED, that in as much as the complaint is dismissed, the Plaintiff's cross-motion is **DENIED** as moot.

This decision constitutes the decision and order of the court.

DATED: Mineola, New York
September 30, 2010



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

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NASSAU COUNTY
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