

Posy v Chivazzi

2010 NY Slip Op 33044(U)

October 18, 2010

Supreme Court, Nassau County

Docket Number: 16155/08

Judge: Antonio I. Brandveen

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

MIRLANDE POSY and DAVID POSEY,

Plaintiffs,

- against -

STEVEN CHIAVZZI,

Defendant.

TRIAL / IAS PART 29
NASSAU COUNTY

Index No. 16155/08

Motion Sequence No. 001

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1</u>
Answering Affidavits	<u>2</u>
Replying Affidavits	<u>3</u>
Briefs: Plaintiff's / Petitioner's	_____
Defendant's / Respondent's	_____

The defendant moves for summary judgment pursuant to CPLR 3212 on the ground the plaintiffs' claimed injuries do not meet the serious injury requirements of Insurance Law § 5102 (d). The plaintiffs oppose this motion on the ground there are material issues of fact. The defendant replies to the plaintiffs' opposition, and contends the plaintiffs fail to refute the defendant's assertion. The underlying personal injury action arises from an July 2, 2007 motor vehicle accident.

The plaintiffs allege Mirlande Posy sustained certain injuries from the subject incident, to wit tears of the right shoulder and a disc herniation in the cervical spine, as well as a tear of the right knee and other injuries. Posy claims pain in the neck, right shoulder and right hand coupled with interference with daily activities, including difficulty combing hair, showering,

bending, lifting, carry heavy things, cleaning, grocery shopping, and writing. Posy admits stopping health care treatment for these injuries, but indicates an inability to afford the cost of medical examination, treatment and consultation when the no-fault benefits stopped, and an inability to pay co-payments for medical examination, treatment and consultation for private insurance with a job as a nursing assistant for physical therapy.

The plaintiffs allege the plaintiff David Leveille sustained certain injuries from the subject incident, to the right knee, cervical and lumbosacral radiculopathy and other injuries. Leveille claims pain coupled with interference with daily activities. Leveille admits stopping health care treatment for these injuries, but indicates an inability to afford the cost of medical examination, treatment and consultation when the no-fault benefits stopped.

The defense counsel points, in a June 15, 2010 supporting affirmation, to the October 23, 2009 deposition testimony by Posy and Leveille concerning the operation of the plaintiff's motor vehicle, the resulting injuries, and the health care services for the plaintiffs' alleged conditions. The defense counsel contends the medical proof dated December 10, 2009 and January 5, 2010, respectfully from Maria Audrie DeJesus, M.D., a board certified neurologist and Lee M. Kupersmith, M.D., an orthopedist do not support the plaintiffs sustained serious injuries from the accident. Each plaintiff was examined by the defense experts with objective tests, including range of motor testing, and each expert opined, within a reasonable degree of medical certainty the plaintiffs' injuries are neither permanent, significant nor substantial. Dr. DeJesus concluded Posy could work and perform all of the daily activities without restriction or any neurologic limitations resulting from this accident. Dr. Kupersmith concluded Posy exhibited no disability with no objective findings to substantiate the Posy's subjective complaints. Dr. DeJesus concluded Leveille could work, go to school and perform all of the daily activities without restriction or any neurologic limitations resulting from this accident. Dr. Kupersmith concluded Leveille exhibited no disability with no objective findings to substantiate the Leveille's subjective complaints. Dr. Kupersmith also opined Leveille's cervical sprain/strain was resolved, and Leveille's right and left knee contusions had resolved with no evidence for a meniscal tear. The defense counsel asserts the plaintiffs' claimed

injuries do not result in a significant limitation of the use of a body function or system, and there is no testimonial nor medical evidence the plaintiff suffered a permanent or significant limitation of the use of a body function or system. The defense counsel avers the plaintiffs cannot demonstrate the injuries prevented the plaintiffs from performing substantially all of the material acts which constituted the plaintiffs' usual and customary daily activities for not less than ninety days during the 180 days immediately following the accident.

The plaintiffs' attorney states, in an August 16, 2010 opposing affirmation, the defense failed to dispute the existence of serious injuries resulting from the July 2, 2007 motor vehicle accident. The plaintiffs' attorney points to the June 8, 2010 affidavits by the plaintiffs, who details the circumstances of the July 2, 2007 motor vehicle accident, their injuries, and the effect and treatment of those injuries.

The plaintiff's attorney provides the July 7, 2010 affirmation of John T. Rigney, M.D., a board certified radiologist, who conducted MRI tests on Posy's right shoulder on September 15, 2007, and reviewed MRI films taken that same date. Dr. Rigney opines there is presence of impingement, partial thickness tear of the supraspinatus tendon anteriorly along the articular surface and an intra substance tear at the confluence between the supraspinatus and infrasplnatus muscles. The plaintiff's attorney provides the July 9, 2010 affirmation of Michael D. Green, M.D., a board certified radiologist, who conducted MRI tests on Posy's cervical spine on July 30, 2007, and reviewed the MRI films. Dr. Green opines there is straightening which reflects the presence of underlying muscle spasm, and it should be correlated clinically. Dr. Green also opines central disc herniation at the C4-5 level without a contour deformity of the cervical cord seen and without a canal stenosis noted. The plaintiff's attorney provides the July 14, 2010 affirmation of Donald I. Goldman, M.D., a board certified orthopedic surgeon, who conducted an examination of Posy on July 6, 2007, and performed range of motion tests on Posy. Dr. Goldman opines Posy sustained a permanent orthopaedic disability demonstrated by MRI revealing tears in the rotator cuff structures, and clinically Posy has evidence of a painful functional restriction of motor by more than 25% with obvious weakness against resistance and now decreased grip strength in the right hand based upon objective findings.

Dr. Green also opines the injury to Posy's cervical spine and right shoulder were causally related to the July 2, 2007 motor vehicle accident, and should be considered permanent. Dr. Green recommended for arthroscopic surgery for Posy's right shoulder. The plaintiff's attorney also provides the August 16, 2010 affirmation of Jean-Marie L. Francois, M.D., an internist associated with Freeport Medical, P.C., who performed range of motion tests on Posy on July 6, 2007. Dr. Francois opined Posy's cervical spine showed antalgic guarding with decreased lordosis, moderate to severe tenderness noted on paraspinal palpation with pain radiating to the scapulae, and range of motion markedly restricted when flexion, extension, lateral flexion, and rotation are tested bilaterally.. Dr. Francois also opined Posy's both shoulders were tender on passive range of motion, and adjacent soft tissue palpation, and range of motion was decreased when both shoulder elevation, abduction, internal rotation and external rotation were tested. Dr. Francois found, on a neurologic examination, Posy's upper extremity strength appeared decreased on both sides, and considered Posy's prognosis for long term recovery as guarded. Dr. Francois followed up examinations and treatment of Posy on subsequent occasions detailed in other submitted papers. Dr. Francois states Posy stopped treating with Freeport Medical, P.C. because Posy's no-fault benefits were cut off, and Posy could afford to pay for treatment, but Posy was still experiencing pain due to the injuries from the July 2, 2007 motor vehicle accident

The plaintiff's attorney provides the July 16, 2010 affirmation of Dr. Green, who conducted MRI tests on Leveille's right knee on August 29, 2007, and reviewed the MRI films. Dr. Green opines there is an oblique linear tear of the anterior horn of the lateral meniscus with grade II signal seen in the posterior horn of the medial and lateral meniscus. The plaintiff's attorney provides the August 10, 2010 affirmation of Dr. Goldman, who conducted an examination of Leveille on July 21, 2007, and performed range of motion tests on Leveille. Dr. Goldman opines Leveille sustained a permanent orthopaedic impairment to the right knee, and a MRI identified a lateral meniscus tear and probable injuries to the medial and lateral meniscus. Dr. Goldman opines Leveille sustained a painful functional restriction of motion by approximately 20%, and there is patellofemoral pain, pain over the medial and odd facet of the

patell and lateral joint line pain and pain on flexion loading. Dr. Goldman opines the injury to Leveille's right knee was causally related to the July 2, 2007 motor vehicle accident, and should be considered permanent. Dr. Green recommended for arthroscopic surgery for Leveille's right knee. The plaintiff's attorney also provides the August 16, 2010 affirmation of Dr. Francois, M.D., who performed range of motion tests on Leveille on July 6, 2007. Dr. Francois opined Leveille's knees showed tender on mobilization and soft tissue palpation with range of motion limited when both knee flexion and extension were tested. Dr. Francois also stated dysesthesia was reported on sensory testing; DTR was decreased to grossly normal; lower extremity strength appeared decreased; tip toe and heel walking was impaired; sensory was depressed with decreased light touch; and knee jerk was asymmetrical. Dr. Francois' clinical impression was acute sprain of the cervical spine, and r/o internal derangement of both knees, and opined straightening of curvature of cervical spine, oblique tear of anterior horn of lateral meniscus, and grade II signal in posterior horn of the medial and lateral meniscus. Dr. Francois also opined the injuries sustained by Leveille were related to the July 2, 2007 motor vehicle accident, and due to the nature of those injuries Leveille's prognosis must be considered guarded as completed resolution or overall long term prognosis is unpredictable. Dr. Francois opined it was expected that stress will periodically be placed on the injured parts, and thus may cause re-exacerbation of the injury and ensuing pain of variable degree and frequency. Dr. Francois recommended long term follow care as may be necessary for pain control and maintenance of mobility and function with followup with an orthopedic surgeon strongly advised. Dr. Francois followed up examinations and treatment of Leveille on subsequent occasions detailed in other submitted papers. Dr. Francois states Leveille stopped treating with Freeport Medical, P.C. because Leveille's no-fault benefits were cut off, and Leveille could afford to pay for treatment, but Leveille was still experiencing pain due to the injuries from the July 2, 2007 motor vehicle accident.

The defense counsel reiterates, in a August 20, 2010 reply affirmation, the plaintiff's claimed injuries do not meet the serious injury requirements of Insurance Law § 5102 (d). The

defense counsel contends the plaintiff counsel's affirmation is not probative nor admissible evidence on the issues. The defense counsel again points to the sworn statements by Dr. Goldman and Dr. Francois as deficient with respect to both plaintiff's burden of proof.

The defense counsel notes Dr. Goldman first examined the Posy on July 6, 2010, approximately three years after the subject accident, and that examination of Posy revealed Posy's cervical spine had normal flexion, extension and left rotation and left lateral bending. The defense counsel avers Dr. Goldman failed to provide any numerical range of motion findings of Posy taken contemporaneous with the July 2, 2007 motor vehicle accident. The defense counsel asserts Dr. Goldman was not the Posy's treating physician, so his opinions as to causation, permanence and significance should be rejected as conclusory and speculative. The defense counsel states, while Dr. Francois attempts to offer numerical range of motion findings for Posy's cervical spine and right shoulder soon after the July 2, 2007 motor vehicle accident, the August 9, 2007, September 15, 2007, and March 11, 2008 reports do not contain any numerical range of motion findings for Posy. The defense counsel adds Dr. Francois did not perform an updated examination of the plaintiff prior to the preparation of the August 16, 2010 affirmation of this doctor.

The defense counsel notes Dr. Goldman first examined the Posy on July 21, 2010, approximately three years after the subject accident, and that examination of Leveille revealed Leveille had negative findings regarding his right knee, negative Bachman's test, no pivotal shift, no lateral laxity and no knee effusion. The defense counsel points out Dr. Goldman noted Leveille's cervical spine complaints had resolved, and adds Dr. Goldman failed to provide any numerical range of motion findings of Leveille taken contemporaneous with the July 2, 2007 motor vehicle accident. The defense counsel asserts Dr. Goldman was not the Leveille's treating physician, so his opinions as to causation, permanence and significance should be rejected as conclusory and speculative. The defense counsel states, while Dr. Francois attempts to offer numerical range of motion findings for Leveille's right knee flexion soon after the July 2, 2007 motor vehicle accident, the August 9, 2007, September 26, 2007, and March 11, 2008 reports do not contain any numerical range of motion findings for

Leveille. The defense counsel adds, not only did Dr. Francois fail to offer any numerical range of motion findings taken contemporaneous with the July 2, 2007 motor vehicle accident, Dr. Francois fail to perform an updated examination of Leveille prior to the preparation of this doctor's August 16, 2010 affirmation.

The defense counsel contends the conclusions of Dr. Goldman and Dr. Francois are unsupported by admissible, objective evidence, so those conclusions are insufficient to establish the plaintiffs suffered serious injuries as defined by law. The defense counsel also argues the plaintiffs cannot rely upon unsworn medical reports and MRI. The defense counsel asserts the plaintiffs fail to explain the gaps in medical treatment for each defendant, and notes each plaintiff ceased health care after the July 2, 2007 motor vehicle accident. The defense counsel maintains none of the MRI reports causally connect the claimed conditions to the subject motor vehicle accident. The defense counsel avers the mere existence of a bulge or herniated disc is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitation resulting from the injuries and the duration. The defense counsel argues the contents of the medical affirmations of the plaintiff's medical experts are deficient because there is a failure to set forth objective quantified evidence of the extent or degree of the limitations and the durations. The defense counsel asserts Posey did not submit any competent evidence to support the claim of an inability to perform substantially all of Posey's daily activities for not less than 90 of the 180 days immediately following the July 2, 2007 motor vehicle accident.

It is well settled that "[t]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case ... Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853; *see, Alvarez v Prospect Hosp.*, 68 NY2d 320, 324; *Allen v Blum*, 212 AD2d 562; *Indelicato v Wyckoff Hgts. Hosp.*, 205 AD2d 664)

Drago v. Chung Ho King, 283 A.D.2d 603, 725 N.Y.S.2d 859 [2nd Dept 2001].

Once that burden is met, the matter then shifts to plaintiff to come forward with sufficient evidence to overcome defense motion by demonstrating the plaintiff sustained a serious injury

within the meaning of the No-Fault Insurance Law (*see Gaddy v. Eyster*, 79 N.Y.2d 955, 582 N.Y.S.2d 990 [1992]).

The defense neurologist and orthopedist provided their findings of restrictions of range of motion which are sufficiently quantified or qualified to establish the absence of permanent and significant limitations of motion (*see* Insurance Law § 5102 [d]). The defense physicians stated that they had objectively measured each plaintiff's range of motion and provided the range of motion findings. However, the plaintiffs' evidence here fails to raise issues of material fact as to whether Posey and Leveille each sustained a "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system" within the meaning of the No-Fault Insurance Law (*Toure v. Avis Rent A Car Systems, Inc.*, 98 N.Y.2d 345, 352, 746 N.Y.S.2d 865 [2002]). Moreover, the sworn statements of each injured plaintiffs' doctors failed to establish the duration of the alleged limitations occasioned by their alleged injuries, and thus, failed to raise a triable issue of fact regarding a permanent or significant limitation (*see Barbeito v Kesev Taxi*, 281 AD2d 379, 380 [2nd Dept 2001]). Thus, there is no material issue of fact which requires resolution by a trier of fact. Neither plaintiff shows sufficient evidence to overcome defense motion by demonstrating the plaintiff sustained a serious injury within the meaning of the No-Fault Insurance Law.

The Court of Appeals has also stated what is needed to demonstrate a medically determined injury or impairment of a non-permanent nature which prevents a plaintiff from performing substantially all of the material acts which constituted the plaintiff's usual and customary daily activities for not less than ninety days during the 180 days immediately following the accident. This State's highest Court held:

"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" -- the words "substantially all" should be construed to mean that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment. As to the statutory 90/180-day period of disability requirement, it should be considered a

necessary condition to the application of the statute. Where the statute is specific, as it is here, that the period of disability must be "for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment", the Legislature has made it abundantly clear that disability falling within this threshold period must be proved along with the other statutory requirements in order to establish a prima facie case of serious injury.

Licari v. Elliott, 57 N.Y.2d 230, 455 N.Y.S.2d 570 [1982].

Although there is evidence of plaintiff's subjective pain, there is no evidence supporting Posey's claim of injuries which prevented Posey from performing substantially all of the material acts which constituted the Posey's usual and customary daily activities for not less than ninety days during the 180 days immediately following the accident.

As to the issue of a gap in treatment raised by the defense reply, both terminated treatment, as Dr. Francois stated, because no fault insurance cut off, and each plaintiff could not afford to pay out of pocket to continue treatment. The Court of Appeals stated "[a] plaintiff need not incur the additional expense of consultation, treatment or therapy, merely to establish the seriousness or causal relation of his injury" (*Pommells v. Perez*, 4 N.Y.3d 566, 577, 797 N.Y.S.2d 380 [2005]). However, those explanations are moot since the plaintiffs' claimed injuries do not meet the serious injury requirements of Insurance Law § 5102 (d).

Accordingly, the motion is granted as to both plaintiffs.

So ordered.

Dated: **October 18, 2010**

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J. S. C
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