

Aziz v Manley

2010 NY Slip Op 33279(U)

November 16, 2010

Supreme Court, Nassau County

Docket Number: 18210/08

Judge: Thomas A. Adams

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS A. ADAMS,

Acting Supreme Court Justice

TRIAL/IAS, PART 33
NASSAU COUNTY

ABDUL AZIZ,

Plaintiff(s),

MOTION DATE: 9/17/10

INDEX NO.: 18210/08

-against-

SEQ. NOS. 4 & 5

DIANE MANLEY, ROBERT F. DEMINICO and FANTASTIC
TRANSPORTATION CORP.,

Defendant(s)

The defendants' motions, pursuant to CPLR 3212, for summary judgment due to the plaintiff's failure to sustain a serious injury as defined by Insurance Law §5102(d) on March 29, 2008 are determined as hereinafter provided.

This personal injury action arises out of a March 29, 2008 motor vehicle accident that occurred at or near the intersection of Prospect Avenue and Von Elm Avenue in East Meadow. The plaintiff was a passenger in a taxi cab, operated by the defendant Robert F. Deminico and owned by the defendant Fantastic Transportation Corp., which collided with the defendant Diane Manley's vehicle.

Upon the completion of disclosure, the case was certified for trial on January 25, 2010 and on March 30, 2010 a note of issue was filed. The April 28, 2010 motion and May 24, 2010 cross motion are therefore timely (see CPLR 3212[a]).

During an October 13, 2009 deposition, the plaintiff testified, inter alia, that at the time of the accident he was on his way to a friend's home (see defendants Robert F. Domenico and Fantastic Transportation Corp.'s Exhibit D, p.16,L16). Afterwards, the friend drove the plaintiff to the friend's home (p.32,L23). The next morning, the plaintiff took some non-prescription pain medication (p.33,L2) and traveled to the Nassau County Medical Center Emergency Room (p.34,L10), where he was treated and released (p.35,L14).

Approximately two weeks later (p.40,L8), he returned to a chiropractor, Fred Jones (p.36,L3), who had previously treated him after a June 17, 2006 accident in which he was struck by a motor

vehicle while riding a bicycle (p.37,L3). Following that accident, he received chiropractic treatment for about three to four months (p.40,L20) and on August 16, 2006 he saw an orthopedist, Richard L. Parker, M.D., who referred him for cervical and lumbosacral MRI examinations and a CT scan of the chest (see plaintiff's affirmation in opposition, Exhibit 2). Ultimately, on May 9, 2008 another orthopedist, Ben Benetar, M.D. performed a total replacement of the plaintiff's right knee (p.49,L20).

With respect to this accident, he saw his chiropractor, Fred Jones, D.C., for approximately eight (8) months (p.41,L5), initially six times a week (p.41,L24). The chiropractor recommended that he see Dr. Benetar (p.42,L17) who treated him between April 28, 2008 and July 9, 2010 (see Dr. Benetar's 7/30/10 affirmation, para.3). He also attended physical therapy until September 13, 2008 (p.95,L14) or for about six months (p.45,L2), was referred for MRI examinations (p.44,L3-11) and underwent acupuncture "maybe four times" (p.47,L19). He received no other treatment for the injuries allegedly sustained in this accident (p.48,L13). At the time of the (10/13/09) deposition, he continued to complain that his "entire body" hurt (p.56,L8).

The defendants Robert F. Deminico and Fantastic Transportation Corp.'s motion is primarily premised upon the December 1, 2009 and December 9, 2009 affirmations of a neurologist (Edward M. Weiland, M.D.) and orthopedist (John C. Killian, M.D.), respectively (see defendants Robert F. Deminico and Fantastic Transportation Corp.'s Exhibits E & F). Notably, although his December 2, 2008 bill of particulars alleges numerous herniated discs (i.e., C7-T1,C5-6,L2-3,L4-5 and L5-S1) in addition to rotator cuff tears and associated tendinitis of both shoulders (see defendant Diane Manley's Exhibit B, para.11), in response to the defendants' motions the plaintiff's claims are limited to his shoulders because "[t]he injuries to the other parts of [his] body pale in comparison" (see plaintiff's 8/11/10 affidavit, para.3 and 8/12/10 affirmation in opposition of Michael S. Levine, Esq., para.5).

Dr. Weiland's December 1, 2009 affirmation is based upon a November 25, 2009 neurological examination utilizing objectively measured medical criteria and found, inter alia, "full range of motion of the neck, both shoulders, as well as the lumbar spine region". He concluded that the plaintiff incurred cervical, thoracic and lumbosacral "sprain[s]/strain[s]" which have resolved with "no

evidence of any lateralizing neurological deficits" related to the March 29, 2008 accident.

Similarly, Dr. Killian's December 9, 2009 report is premised upon a contemporaneous (11/30/09) orthopedic examination. With respect to the plaintiff's shoulders, Dr. Killian notes, inter alia, that he "vigorously resisted allowing either arm to be forward flexed beyond 100 degrees (normal 180 degrees) which was in contrast to the ease with [which] he raised his arms up when he removed his shirt". Moreover, although he allowed "full external rotation on both sides at 70 degrees (normal 70 degrees) ... on formal testing for internal rotation, he would allow his hands to be brought up to his buttocks only". In conclusion, Dr. Killian opined, in pertinent part, "I do not feel that any of the rotator cuff abnormalities seen in the [plaintiff's] shoulders was caused by injuries from this accident. It is clear that he had been seen for complaints of left shoulder pain in the past. The orthopedic records suggest that he also complained of right elbow pain and was felt to have a contusion to that area although x-rays were negative The physical examination was remarkable for significant exaggerations and inconsistencies. The total rigidity with which he held his entire spine was obviously volitional and was contradicted by more normal motions observed during other portions of the examination. The apparent loss of motion of his shoulders was similarly inconsistent and there was no weakness in external rotation to suggest significant rotator cuff damage". In particular, "[t]he examination of his right elbow was remarkable for subjective complaints of tenderness which did not correspond to the area of alleged injury".

The plaintiff's August 10, 2010 affidavit in opposition acknowledges that, in addition to the injuries to his knees, he had "problems with my left shoulder due to a prior accident" (para.4). However, those problems were allegedly exacerbated by the latter motor vehicle accident. Moreover, he avers, "not once did I complain of, or receive treatment to, my right shoulder" (para.6).

Contrary to the plaintiff's contention, his April 24, 2006 records from the Nassau University Medical Center (see defendant Diane Manley's Exhibit F) which pre-date both the June 17, 2006 and March 29, 2008 accidents, plainly state that the purpose of the visit was "follow-up c/o pain in right shoulder". In addition, during his August 16, 2006 visit to Dr. Parker, the plaintiff complained of, inter alia, "right and left shoulder" pain (see plaintiff's Exhibit

2).

Copies of December 24, 2008 and December 29, 2008 affidavits of the radiologists (i.e., Mahvash Rafii, M.D. and Jonathan D. Klugg, M.D.) who performed August 2, 2008 and July 23, 2008 MRI examinations of the plaintiff's left and right shoulders have also been supplied (see plaintiff's Exhibit 5). However, even assuming, arguendo, the affirmations are in admissible form, neither physician proffers an opinion as to causation (see Collins v Stone, 8 AD3d 321; Munoz v Koyfman, 44 AD3d 914).

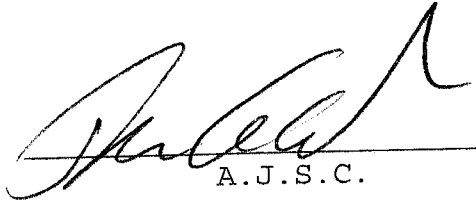
Conversely, Dr. Bemnatar's July 30, 2010 affirmation avers, inter alia, that his April 29, 2008, June 30, 2008, July 21, 2008, August 14, 2008 and July 9, 2010 examinations revealed range of motion restrictions of both shoulders. Furthermore, on August 14, 2008 he reviewed the July 23, 2008 and August 2, 2008 MRI films (para.10) and, notwithstanding the plaintiff's 2006 complaints of bilateral shoulder pain, concludes that the injuries to the shoulders are permanent and causally related to only the March 29, 2008 accident (para.15).

Drs. Weiland and Killian's affirmations, coupled with the plaintiff's medical records, are sufficient to establish the defendants' prima facie entitlement to judgment as a matter of law by demonstrating that he did not sustain a serious injury within the meaning of Insurance Law §5102(d) on March 29, 2008 (see Pommells v Perez, 4 NY3d 566; Toure v Avis Rent A Car Sys., 98 NY2d 345; Kuperberg v Montalbano, 72 AD3d 903; cf. Senior v Mikhailov, 71 AD3d 864). In opposition, the plaintiff has failed to proffer any objective medical evidence sufficient to create a triable issue of fact that the injuries to his shoulders were contemporaneous with the March 29, 2008 accident (Kuperberg, supra at 904). Dr. Benatar's reliance upon the fact that the July 23, 2008 and August 2, 2008 MRI examinations "did not reveal degeneration associated with the complete full thickness tear of the supraspinatus tendons" (para.15) is insufficient, by itself, to adequately address the pre-existing condition of the plaintiff's shoulders or causally relate those injuries to the latter accident (see Franchini v Palmieri, 1 NY3d 536, 537; Munoz supra at 915-916; Houston v Gajdos, 11 AD3d 514, 515).

Accordingly, the defendants' motions, pursuant to CPLR 3212, for summary judgment due to the plaintiff's failure to incur a serious injury within the meaning of Insurance Law §5102(d) on March 29, 2008

is granted.

Dated: NOV 16 2010


A.J.S.C.
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