

Phipps v Robinson

2010 NY Slip Op 33529(U)

December 20, 2010

Supreme Court, Nassau County

Docket Number: 10976/08

Judge: Antonio I. Brandveen

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

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

RAY PHIPPS,

Plaintiff,

- against -

HENRY ROBINSON, JR.,

Defendant.

TRIAL / IAS PART 29
NASSAU COUNTY

Index No. 10976/08

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	<u>4</u>
Defendant's / Respondent's	<u> </u>

The defendant moves pursuant to CPLR 3212 and Insurance Law § 5102 for summary judgment because the plaintiff cannot establish serious injury. The plaintiff opposes this motion claiming serious injury. The defense replies to the plaintiff's opposition. The Court carefully reviewed and considered all of the parties' submissions.

The action arises from a July 6, 2005 accident between the plaintiff bicyclist and the defendant motorist in Hempstead, New York. The retired plaintiff, who was born January 31, 1946, testified at a deposition on September 25, 2009. The plaintiff testified an ambulance took him from the accident site to Winthrop University Hospital where he complained about pain to the right waist and lower back; received x-ray examination; and was released the same day after treatment. The plaintiff also testified he commenced

additional treatment with Dr. Mendoza in Hempstead, New York where he complained about pain to his head, right side and right leg. Dr. Mendoza's office provided chiropractic and physical therapy treatment to the plaintiff three to four times a week for approximately six months. The plaintiff testified he has sexual function and athletic difficulties because of right side pain.

Edward Mills, M.D., a board certified orthopedic surgeon, examined the plaintiff on December 10, 2009. The plaintiff told Dr. Mills about the July 6, 2005 accident, and the subsequent health care regarding his complaints. Dr. Mills performed range of motion tests on the plaintiff which revealed age appropriate results for the cervical spine and the lumbar spine. Dr. Mills opined the plaintiff's sprain and strain for the cervical spine and the lumbar spine were resolved, and there was no evidence of causally related disability attributed to the July 6, 2005 accident.

Naunihal Sachdev Singh, M.D., a board certified neurologist, examined the plaintiff on December 10, 2009. The plaintiff told Dr. Singh about the July 6, 2005 accident, and the subsequent health care regarding his complaints. Dr. Singh observed a large healed scar over the right side of the plaintiff's face, and an examination of the cervical spine by the doctor did not reveal any abnormalities. Dr. Singh performed range of motion tests on the plaintiff which revealed limited range of motion of the cervical spine. Dr. Singh examined the lumbar spine, after the plaintiff took off a lumbosacral brace, which revealed minimal vertebral tenderness at L4, L5 and S1 spine upon palpation. Dr. Singh performed range of motion tests of the lumbar spine which revealed limited range of motion of the lumbar spine, but the straight leg raising test was normal, as well as the sitting straight leg raising test. Dr. Singh's overall impression was the plaintiff's sprain and strain for the cervical spine and the lumbar spine were resolved. Dr. Singh opined there was underlying age-related cervical spine and the lumbar degenerative disc disease. Dr. Singh also opined the plaintiff was not disabled from performing daily living activities, and there were no permanent residuals resulting from the July 6, 2005 accident.

The plaintiff's counsel provides only an affirmation dated September 20, 2010 in opposition to this defense motion. The plaintiff's counsel asserts the defendant fails to make a *prima facie* showing that the plaintiff did not sustain a serious injury. The plaintiff's counsel contends the sworn statements of the orthopedic surgeon and the neurologist show the plaintiff exhibited restrictions in ranges of motion in the cervical spine and lumbar spine. The plaintiff's counsel argues Dr. Mills never rendered an opinion whether these ranges of motion are causally related to the July 6, 2005 accident, and Dr. Singh never explained the plaintiff's restriction in ranges of motion nor indicated whether those restrictions are not causally related to that accident. The plaintiff's counsel notes these doctors differ in their opinions of normal ranges of motion of the left lateral rotation

of the cervical spine, flexion of the lumbar spine, extension of the lumbar spine, and right and left lateral flexion of the lumbar spine.

The defense attorney states, in a reply October 27, 2010 affirmation, the plaintiff fails to allege the category of the threshold definition which he claims is applicable in this litigation, so partial summary judgment should at least be awarded to the defendant. The defense attorney argues the plaintiff's opposition only challenges the defense establishing a *prima facie* showing, but fails to submit any competent medical evidence regarding the plaintiff's injuries to satisfy any of the required threshold categories. The defense attorney asserts both physicians found the restrictions was attributed to the plaintiff's age, and the restrictions were not causally related to the July 6, 2005 accident. The defense attorney adds the plaintiffs also fails to rebut the defense showing there is no medically determined injury or impairment of non-permanent nature which prevented the retired plaintiff from performing substantially all of the material acts which constitute his usual and customary daily activities for no less than 90 days of the first 180 days immediately after the accident. The defense attorney avers the plaintiff fails to present any recent findings of any significant limitation nor submit in admissible form a recent examination by a medical professional.

This Court carefully reviewed and considered all of the papers submitted by the parties with respect to this motion. The Second Department held:

Contrary to the plaintiff's contentions, the defendants' submissions in support of their separate motions for summary judgment, i.e., a copy of the plaintiff's deposition testimony, her medical records and the affirmed reports of the defendants' examining physicians, were sufficient to make a *prima facie* showing that she did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955 [1992]; *Luckey v Bauch*, 17 AD3d 411 [2005]; *Paul v Trerotola*, 11 AD3d 441 [2004]; *Mastaccioula v Sciarra*, 11 AD3d 434 [2004])...Moreover, it is well settled that the mere existence of a bulging disc is not conclusive evidence of a serious injury in the absence of objective evidence of a related disability or restriction (*see Kears v New York City Tr. Auth.*, 16 AD3d 45 [2005]; *Fauk v Jenkins*, 301 AD2d 564 [2003]; *cf. Pommells v Perez*, 4 NY3d 566 [2005]).

Hernandez v. DIVA Cab Corp., 22 A.D.3d 722, 722-723, 804 N.Y.S.2d 396 [2nd Dept, 2005].

The Second Department also held:

“if the opponent is to succeed in defeating a summary judgment motion he [or she], too, must make [a] showing by producing evidentiary proof in

admissible form”, unless he or she demonstrates an “acceptable excuse for [the] failure to meet the strict requirement of tender in admissible form” (*Zuckerman v City of New York, supra*, at 562)

Pagano v. Kingsbury, 182 A.D.2d 268, 270, 587 N.Y.S.2d 692 [2nd Dept, 1992].

Here, the defendant made a *prima facie* showing the plaintiff did not suffer a serious injury. Moreover, there is no competent medical evidence from the plaintiff indicating a causal relationship of the plaintiff’s resolved injuries with the July 6, 2005 accident nor the plaintiff’s inability to perform substantially all of his daily activities for not less than 90 out of the first 180 days as a result of the subject accident (*see Ersop v. Variano*, 307 A.D.2d 951, 763 N.Y.S.2d 482 [2nd Dept, 2003]). In addition, there is no conflicting expert opinions by the Dr. Mills and Dr. Singh as to serious injury sustained by the plaintiff in the July 6, 2005 accident, so no question of credibility arises which requires resolution by a jury. The defense submitted affirmed reports from Dr. Mills and Dr. Singh who each examined the plaintiff, but the plaintiff submits only an attorney’s affirmation. Both doctors set forth quantified range-of-motion findings or a qualitative assessment of the plaintiff’s cervical spine and the lumbar spine on their recent separate examinations of the plaintiff (*see Acosta v. Alexandre*, 70 A.D.3d 735, 894 N.Y.S.2d 136 [2nd Dept, 2010]). The defense submission is sufficient to make a *prima facie* showing the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d). In opposition, the plaintiff fails to raise a triable issue of fact regarding serious injury (*see Grossman v. Wright*, 268 A.D.2d 79, 707 N.Y.S.2d 233 [2nd Dept, 2000]).

Accordingly, the motion is granted.

So ordered.

Dated: **December 20, 2010**

ENTER:



J. S. C.

FINAL DISPOSITION

ENTERED
DEC 23 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE