

Fontus v Sonnick

2010 NY Slip Op 33632(U)

December 31, 2010

Supreme Court, Nassau County

Docket Number: 18693/2008

Judge: Joel K. Asarch

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU: I.A. PART 19

----- X
LESLY FONTUS,

Plaintiff,

- against -

ROBERT A. SONNICK, JR.,

Defendant.
----- X

DECISION AND ORDER

Index No.: 18693/2008

Original Return Date: 05/14/10

Motion Seq. No.: 001

P R E S E N T :

HON. JOEL K. ASARCH,
Justice of the Supreme Court.

The following named papers numbered 1 to 9 were submitted on this Motion on June 16, 2010:

Papers numbered:

Notice of Motion, Affirmations (2) and Affidavit in Support	1-4
Affirmations (3) and Affidavit in Opposition	5-8
<u>Reply Affirmation</u>	<u>9</u>

The motion by the defendant, ROBERT A. SONNICK, JR., for an Order pursuant to CPLR 3212, awarding him summary judgment dismissing plaintiff's complaint on the ground that the plaintiff's injuries do not satisfy the "serious injury" threshold requirement of Insurance Law § 5102(d), is decided as follows:

This action arises out of a motor vehicle that occurred on November 1, 2005 at approximately 5:00 p.m. on Rockwood Avenue, in Baldwin, New York. At the time of the accident, the plaintiff, LESLY FONTUS, was the driver of a vehicle stopped behind another vehicle that was making a left hand turn. Plaintiff claims that while he was stopped behind the vehicle making the left turn, the

defendant's vehicle struck his vehicle in the rear.

At the time of the accident, the 46-year old plaintiff was self- employed as a taxi cab driver (*Fontus Tr.*, p. 8). At his oral examination before trial, the plaintiff testified that he began driving a cab for himself in the 1990s and stopped in 2007 because he had surgery unrelated to this accident (*Id.*). As a result of this accident however, plaintiff, of his own volition, stopped driving his cab for approximately six months (*Id.* at 10). He testified that he was not advised by any doctor not to work or drive a cab (*Id.* at 11-12). He states in his bill of particulars that, as a result of this accident, he was confined to his bed and home "intermittently from November 1, 2005 to present" (*Bill of Particulars*, ¶6). He also states in his bill of particulars that he is not totally disabled (*Id.*). At his deposition, plaintiff testified that as a result of this accident, he is no longer able to clean the backyard or walk as fast as he was able to prior to the accident.

In his bill of particulars, plaintiff alleges, that, as a result of this accident, his sustained, *inter alia*, the following:

Right Knee: oblique tear of the anterior body of the medial meniscus contacting the inferior surface of the knee; 4 cm long popliteal cyst between the medial head of the gastrocnemius and the semimembranosus; large knee joint effusion; loss of range of motion.

Lumbar Spine: posterior herniation of the L4/5 intervertebral disc impinging upon the thecal sac; moderate stenosis of the spinal canal and mild stenosis of the bilateral neural foramina; loss of range of motion.

Cervical Spine: anterior and posterior bulge of the C3/4 and C7/T1 intervertebral disc impinging upon the thecal sac; anterior bulge and posterior herniation of the C4/5, C5/6 and C6/7 intervertebral disc impinging upon the thecal sac.

Plaintiff has failed to identify the specific categories of the serious injury statute into which his injuries fall. Nevertheless, whether he can demonstrate the existence of a compensable serious injury depends upon the quality, quantity and credibility of admissible evidence (*Manrique v.*

Warshaw Woolen Associates, Inc., 297 AD2d 519 [1st Dept. 2002]). Based upon a plain reading of the papers submitted herein, it is obvious that the plaintiff is not claiming that his injuries fall within the first five categories of "serious injury:" to wit, death; dismemberment; significant disfigurement; a fracture; or loss of a fetus.

Further, inasmuch as the plaintiff has failed to allege and claim that he has sustained a "total loss of use" of a body organ, member, function or system, it is plain that his injuries do not satisfy the "permanent loss of use" category of Insurance Law §5102(d) (*Oberly v. Bangs Ambulance, Inc.*, 96 NY2d 295 [2001]). Similarly, plaintiff's claims of serious injury under the 90/180 category of Insurance Law § 5102(d) is also contradicted by his own testimony wherein he states that he voluntarily stopped working as a cab driver and that he is not, nor was he medically impaired from doing any activities as a result of this accident for 90 days within the first 180 days following this accident. In light of these facts, this Court determines that plaintiff has effectively abandoned his 90/180 claim for purposes of defendant's initial burden of proof on a threshold motion (*Joseph v. Forman*, 16 Misc.3d 743 [Sup. Ct. Nassau 2007]). Thus, this Court will restrict its analysis to the remaining two categories as it pertains to the plaintiff; to wit, "permanent consequential limitation of use of a body organ or member"; and, "significant limitation of use of a body function or system."

In moving for summary judgment dismissal of the plaintiffs' complaint on the grounds that the plaintiff has not sustained a serious injury within the meaning of the Insurance Law, the defendant is not required to disprove any category of serious injury which has not been pled by the plaintiff (*Melino v. Lauster*, 82 NY2d 828 [1993]). Moreover, even pled categories of serious injury may be disproved by the defendant by means other than the submission of medical evidence, including the plaintiff's own testimony and their submitted exhibits (*Michaelides v. Martone*, 186

AD2d 544 [2nd Dept. 1992]; *Covington v. Cinnirella*, 146 AD2d 565, 566 [2nd Dept. 1989]).

In support of a claim that the plaintiff has not sustained a serious injury, defendant may rely either on the sworn statements of the defendant's examining physician or the unsworn reports of the plaintiff's examining physician (*Pagano v. Kingsbury*, 182 AD2d 268 [2nd Dept 1992]). It must be noted that a chiropractor is not one of the persons authorized by the CPLR to provide a statement by affirmation and thus, for a chiropractor, only an affidavit containing the requisite findings will suffice (CPLR 2106; *see also Pichardo v. Blum*, 267 AD2d 441 [2nd Dept. 1999]).

When a defendant's motion is sufficient to raise the issue of whether a "serious injury" has been sustained, the burden shifts and it is then incumbent upon the plaintiff, in opposition to defendant's motion, to produce prima facie evidence in admissible form to support the claim for serious injury (*see Licari v. Elliot*, 57 NY2d 230 [1982]). In order to be sufficient to establish a prima facie case of serious physical injury, the affirmation or affidavit must contain medical findings, which are based on the physician's own examinations, tests and observations and review of the record, rather than manifesting only the plaintiff's subjective complaints. However, unlike the movant's proof, unsworn reports of plaintiff's examining doctor or chiropractor are not sufficient to defeat a motion for summary judgment (*Grasso v. Angerami*, 79 NY2d 813 [1991]). Otherwise, a medical affirmation or affidavit which is based on a physician's personal examination and observations of plaintiff, is an acceptable method to provide a doctor's opinion regarding the existence and extent of a plaintiff's serious injury (*see Reid v. Wu*, 2003 WL 21087012 [Sup Ct. Bronx Co. 2003], *citing O'Sullivan v. Atrium Bus Co.*, 246 AD2d 418 [1st Dept. 1998]).

Essentially, in order 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 NY2d 345 [2002], stated that plaintiff's proof of injury must be supported by objective medical evidence, such as MRI and CT scan tests (*Toure v. Avis Rent A Car Sys.*, supra at 353). Unsworn MRI reports are not competent evidence unless both sides rely on those reports (*see Gonzalez v. Vasquez*, 301 AD2d 438 [1st Dept. 2003]). However, even the MRI and CT scan tests and reports must be paired with the doctor's observations during his physical examination of the plaintiff (*see Toure v. Avis Rent A Car Systems*, supra).

On the other hand, even where there is ample objective proof of plaintiff's injury, the Court of Appeals held in *Pommels v. Perez*, 4 NY3d 566 [2005], that certain factors may override a plaintiff's objective medical proof of limitations and nonetheless permit dismissal of plaintiff's complaint. Specifically, in *Pommels v. Perez*, the Court of Appeals held that additional contributing factors, such as gap in treatment, an intervening medical problem, or a preexisting condition, would interrupt the chain of causation between the accident and the claimed injury (*Id.* at 566). The Court held that while "the law surely does not require a record for needless treatment in order to survive summary judgment, where there has been a gap in treatment or cessation of treatment, a plaintiff must offer some reasonable explanation for the gap in treatment or cessation of treatment" (*see id.*; *see also Neugebauer v. Gill*, 19 AD3d 567 [2nd Dept. 2005]).

To meet the threshold significant limitation of use of a body function or system or permanent consequential limitation, the law required that the limitation be more than minor, mild, or slight and that the claim be supported by medical proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition (*Licari v. Elliot*, supra; *Gaddy v. Eyer*, 79 NY2d 955 [1992]; *Scheer v. Koubeck*, 70 NY2d 678 [1987]). A minor, mild or slight limitation shall be deemed "insignificant" within the meaning of the statute (*Licari v. Elliot*, supra; *see also*

Grossman v. Wright, 268 AD2d 79, 83 [2nd Dept. 2000]).

When, as in this case, a claim is raised under the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, then, in order to prove the extent or degree of the physical limitation, an expert's designation of a numeric percentage of plaintiff's loss of range of motion is acceptable (*Toure v. Avis Rent A Car Systems, Inc.*, supra). In addition, an expert's qualitative assessment of a plaintiff's condition is also probative, provided that: (1) the evaluation has an objective basis, and, (2) the evaluation compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system" (*Id.*).

With these guidelines in mind, this Court will now turn to the merits of defendants' motion at hand. For the sake of clarity, this Court will address each plaintiff's injuries separately and in turn.

In support of his motion, defendant submits the sworn, affirmed report of Dr. Isaac Cohen, M.D., Board Certified Orthopedic Surgeon, who performed an independent orthopedic examination of the plaintiff on October 21, 2009; and the sworn affidavit of Jeffrey C. Ritholtz, D.C. who performed an independent chiropractic examination of the plaintiff on January 4, 2006.

Initially, it is noted that inasmuch as Dr. Ritholtz's findings are contained in a sworn affidavit, said affidavit constitutes competent evidence in support of defendant's motion (CPLR 2106; see also *Pichardo v. Blum*, supra). Having said that, this Court finds that Dr. Ritholtz's independent chiropractic examination performed approximately two months after the date of plaintiff's accident, while competent evidence, does not help establish defendant's prima facie case. Specifically, in his report, Dr. Ritholtz, claims to have performed a neurological examination and has done range of motion testing on plaintiff's cervical and lumbar spine. However, it remains

unclear to this Court as to how a chiropractor can perform a "neurological examination" of the plaintiff. Moreover, although Dr. Ritholtz sets forth range of motion of the plaintiff's cervical and lumbar spine, he fails to set forth what objective testing was used to determine such measurements. Failure to indicate which objective test was performed to measure the loss of range of motion is contrary to the requirements of *Toure v. Avis Rent a Car Systems*, supra. It renders the "expert's" opinion as to any purported loss worthless, and the Court therefore will not consider such (*Id*; *Powell v. Alade*, 31 AD3d 523 [2nd Dept. 2006]).

Therefore, the defendant's sole proof, submitted in support of defendant's motion for summary judgment is in fact the sworn affirmation of Dr. Issac Cohen, who notes, in pertinent part, as follows:

Cervical Spine: On inspection of the cervical spine area, there are no gross abnormalities noted. Palpation reveals muscles to be supple and non-tender. No evidence of muscle spasms or trigger points is noted. In active fashion, the range of motion is satisfactory with flexion and extension in the 45 degree range (both normal 45 to 65), lateral bending to the right and the left in the 45 degree range (normal 46 +-6.5) and rotational motion of 75 degrees to right and left (normal 78 +-15). Compression test is negative; Spurling test is negative to the right and left.

Lumbosacral Spine: Palpation of the paravertebral muscles is supple and non-tender without spasm or trigger points. Range of motion in active fashion reveals flexion of 65 degrees (normal up to 66 +-15), hyperextension of 25 degrees (normal up to 33 +- 5.5), and right and left lateral bending to 25 degrees (normal up to 29 +- 6.6). Left and right rotational motion is possible to 30 degrees (normal up to 30). Straight leg sign is negative to 90 degrees in the sitting position bilaterally (normal 90).

Right Knee: On examination, no erythema or effusion is noted. Full extension is possible with flexion, in active fashion, of 130 degrees and is pain-free (normal up to 130-150). There is no medial or lateral instability noted. McMurray's and Drawer sign are negative. Patellar tracking is normal. He moves about freely and walks with a normal heel/toe gait. Mr. Fontus does not use any walking appliances.

Ranges of motion were determined guided by the clinical measurements of joint motion issued by the American Academy of Orthopedic Surgeons, edited by Drs. Greene and

Heckman. All measurements were taken with the goniometer.

DIAGNOSIS:

1. Status post motor vehicle accident.
2. Cervical and lumbosacral strain, resolved.
3. Internal derangement, right knee, improved.

DISCUSSION:

At the time of this evaluation, Mr. Fontus is performing his normal activities in an unrestricted fashion. He has not received any form of active treatment since sometime in early 2006 for complaints arising from the previously described motor vehicle accident of 11/1/05. The work up performed at that time, including MRI examinations and electrical studies, is documented.

The physical examination performed today, is essentially unremarkable without any evidence of residual disability or permanency related to the cervical and lumbosacral spine area.

Examination of the right knee joint is also unremarkable. Of note is the fact that the MRI was read as an oblique, small tear of the medial meniscus. On a clinical basis, this could not be corroborated today.

In summary, it is my opinion that, as a consequence of this accident of 11/1/05, Mr. Fontus did sustain soft tissue injuries to the neck, back and right knee as indicated which healed uneventfully with conservative management. At the time of this evaluation, the claimant is able to perform his normal activities in an unrestricted fashion. His current functional limitations are related to the secondary GI surgery and treatment, and not to the accident of record. Prognosis is good.

Based upon the foregoing, this Court finds that defendant has satisfied his prima facie burden of proof as a matter of law (*Franchini v. Palmieri*, 1 NY3d 536 [2003]; see also *Luciano v. Luchsinger*, 46 AD3d 634 [2nd Dept. 2007]). Having made a prima facie showing that the injured plaintiff did not sustain a "serious injury" within the meaning of the statute, the burden shifts to the plaintiff to come forward with evidence to overcome the defendants' submissions by demonstrating a triable issue of fact that a "serious injury" was sustained (*Pommels v. Perez, supra.*; see also *Grossman v. Wright, supra* at 84.

In that regard, the plaintiff submits, *inter alia*, his unsworn medical records; the sworn affirmation of Dr. Eddy Rodriguez, M.D., who first examined the plaintiff on November 8, 2005 and then evaluated the plaintiff on June 5, 2010; and, the sworn affirmation of Dr. Jeffrey Chess, M.D., a radiologist who attests to the accuracy of three separate MRI films.

Initially, it is noted that while at first blush, Dr. Chess's affirmation seems to constitute competent medical evidence in opposition to defendant's prima facie establishment of summary judgment as a matter of law, said affirmation is actually insufficient. It is true that Dr. Chess had the MRIs taken under his supervision and was also the physician reading the MRIs. However, his failure to report an opinion as the causality of his findings renders his report incompetent and inadmissible (*Collins v. Stone*, 8 AD3d 321 [2nd Dept. 2004]; *Betheil-Spitz v. Linares*, 276 AD2d 732 [2nd Dept. 2000]).

Further, in light of the fact that the defendant did not rely upon the plaintiff's unsworn medical records in support of his motion, plaintiff's reliance upon the same in opposing defendant's motion is unavailing and insufficient (*Grasso v. Angerami*, 79 NY2d 813 [1991]).

Thus, the sole medical submission by the plaintiff in opposition to defendant's prima facie proof is the sworn affirmation of Dr. Eddy Rodriguez, M.D. who first examined the plaintiff on November 8, 2005 and then re-evaluated the plaintiff on June 5, 2010. However, this affirmation is insufficient to raise a triable issue of fact in the face of defendant's prima facie proof.

Specifically, there is no explanation for the more than four year and nine months gap in treatment of plaintiff's alleged injuries. The "gap" both renders the medical expert's later opinion on causation speculative and places into question the seriousness of the injuries themselves (*Pommells v. Perez*, *supra*). In the absence of an adequate explanation for this large gap of treatment,

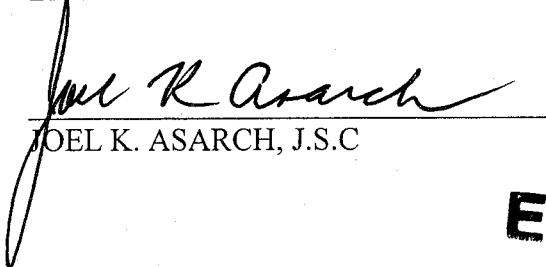
this Court is compelled to grant defendant's motion for summary judgment (*Bennett v. Genas*, 27 AD3d 601 [2nd Dept. 2006]; *Wadford v. Cruz*, 35 AD3d 258 [2nd Dept. 2006]).

Accordingly, in light of plaintiff's failure to raise any triable issue of fact, defendant's motion for summary judgment dismissal of plaintiff's complaint is **granted**. The complaint is dismissed in its entirety.

This shall constitute the decision and order of this Court.

Settle judgment on notice.

ENTER:


JOEL K. ASARCH, J.S.C

Dated: Mineola, New York
December 31, 2010

Copies mailed to:
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