

**Mitrotti v Elia**

2010 NY Slip Op 33787(U)

August 13, 2010

Sup Ct, New York County

Docket Number: 112025/2006

Judge: George J. Silver

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. George J. Silver, Justice PART 22

ROBERTO P. MITROTTI  
vs.  
FRANK J. ELIA

INDEX NO. 112025/2006  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 003  
MOTION CAL. NO. \_\_\_\_\_

FOR THE

The following papers, numbered 1 to 3 were read on this motion to/for SUMMARY JUDGMENT

Notice of Motion/Order to Show Cause — Affidavits — Exhibits	<u>1</u>
Answering Affidavits — Exhibits	<u>2</u>
Replying Affidavits	<u>3</u>

**FILED**  
AUG 17 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

In this action to recover for personal injuries allegedly sustained in a December 9, 2003 motor vehicle accident, Defendant Frank J. Elia ("Defendant") moves pursuant to CPLR §3212 for an order granting summary judgment and dismissing the complaint of Plaintiff Roberto P. Mitrotti ("Plaintiff") on the grounds that Plaintiff did not sustain an injury that qualifies as "serious" as defined by New York Insurance Law §5102(d).

Plaintiff alleges in his Verified Bill of Particulars and Supplemental Bill of Particulars that, as a result of the accident, he sustained a serious injury under NY Insurance Law §5102(d) including cervical and lumbosacral sprain/strain, patellofemoral syndrome of the left knee, disc bulges from C3-C4 through C6-C7, disc herniation at C7-T1 and L2-L3, disc bulging at L3-L4, L4-L5 and L5-S1, and unspecified meniscus tears.

Under New York Insurance Law §5102(d), a "serious injury" is defined as a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or 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.

"[A] defendant can establish that [a] plaintiff's injuries are not serious within the meaning of Insurance Law §5102 (d) by submitting the affidavits or affirmations of medical experts who

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE  SETTLE/SUBMIT ORDER/JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (*Grossman v Wright*, 268 AD2d 79, 83-84 [1st Dept 2000]). If this initial burden is met, "the burden shifts to the plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law" (*id.* at 84). The Plaintiff is required to present nonconclusory expert evidence sufficient to support a finding not only that the alleged injury is serious within the meaning of §5102(d), but also that the injury was causally related to the accident (*Valentin v Pomilla*, 59 AD3d 184 [1st Dept 2009]).

#### Defendant's Expert Reports

In support of this motion, Defendant submits the affirmed expert reports of Dr. S. W. Bleifer and Dr. A. Robert Tantleff. Dr. Bleifer conducted an orthopedic examination of Plaintiff on April 8, 2008. He performed range of motion testing on Plaintiff's cervical spine, shoulders, lumbosacral spine and knees. Dr. Bleifer concluded that Plaintiff had sustained a cervical and lumbar sprain and left knee derangement, which had all resolved. However, Dr. Bleifer did not specify the objective testing he used to determine range of motion measurements. Therefore, Dr. Bleifer's report does not satisfy Defendant's burden.

Dr. Tantleff reviewed Plaintiff's MRI films of the cervical and lumbar spine and left knee. The cervical spine films were taken on March 1, 2002 (pre-accident). Dr. Tantleff concluded that Plaintiff had degeneration and desiccation with loss of height if the intervertebral discs, especially at C5-C6 and C6-C7. He also observed regional facet arthropathy and degenerative spondylosis most pronounced at C4-C5, C5-C6 and C6-C7. Dr. Tantleff found osteodiscal complexes from C3-C4 through C7-T1 contributing to neural foraminal stenosis. Overall, he concluded that the findings represented chronic, degenerative and longstanding related to wear-and-tear and aging. The MRI film of the lumbar spine is dated November 10, 2006. Dr. Tantleff compared the film to a previous film taken on March 1, 2002 and did not find any definable interval changes in the comparison. He concluded that Plaintiff suffered from long standing age-related degenerative discogenic changes, not related to the accident. Lastly, Dr. Tantleff's review of the February 19, 2004 MRI film of Plaintiff's left knee revealed wear-and-tear degenerative changes consistent with age and unrelated to the accident, with no evidence of acute or recent injury.

Additionally, Plaintiff submits Plaintiff's treating MRI reports of the cervical and lumbar spine dated March 4, 2002 (pre-accident). The cervical spine report concludes that Plaintiff has disc herniations at C3-C4, C4-C5, C5-C6 and C6-C7 levels that impinge upon the thecal sac. The lumbar spine report finds a disc herniation at L5-S1.

Defendant's evidence satisfies their burden of establishing *prima facie* that Plaintiff did not suffer a serious injury (*Yagi v Corbin*, 2007 NY Slip Op 7749 [1st Dept]; *Becerril v Sol Cab Corp*, 50 AD 3d 261, 854 NYS2d 695 [1st Dept 2008]). Plaintiff must now bear the burden of overcoming Defendant's submissions by demonstrating that a serious injury was sustained through the presentation of nonconclusory expert evidence causally linking the serious injury, as defined by New York Insurance Law §5102(d), to the accident in question. (*Grossman v Wright*, 268 AD2d 79, 84 [1st Dept 2000]; *Valentin v Pomilla*, 59 AD3d 184 [1st Dept 2009]).

#### Plaintiff's Expert Report

Under the permanent consequential limitation and significant limitation categories of New York Insurance Law §5102(d), Plaintiff must submit medical proof containing "objective,

quantitative evidence with respect to diminished range of motion or a qualitative assessment comparing plaintiff's present limitations to the normal function, purpose and use of the affected body organ, member, function or system" (*Gorden v. Tibulcio*, 2008 NY Slip Op 3382 [1st Dept] quoting *John v Engel*, 2 AD3d 1027, 1029 [3d Dept 2003]).

In opposition to Defendant's motion, Plaintiff submits expert affirmations from Dr. Andrew Dowd, Dr. Mark McMahon and Dr. Javier Chacon. Dr. Dowd examined Plaintiff on March 5, 2004. He conducted range of motion testing and concluded that Plaintiff suffered from cervical and lumbar radiculopathy and a left knee meniscal tear. Dr. Mark McMahon performed an orthopedic examination of Plaintiff on March 18, 2004. He concluded that Plaintiff suffered from a left knee meniscal tear and pain in his right knee. However, Dr. Dowd and Dr. McMahon did not indicate what objective testing they utilized to obtain range of motion measurements, nor did they compare Plaintiff's range of motion to normal. Therefore, their reports are insufficient to rebut Defendant's *prima facie* entitlement to summary judgment (*Page v Rain Hacking Corp.*, 52 AD3d 229, 859 NYS2d 159 [1st Dept 2008]).

Dr. Javier Chacon examined Plaintiff at the Long Island City Pain Management and Rehabilitation Offices. Though Dr. Chacon conducts range of motion testing and compares Plaintiff's limitations to normal, his report is based upon a January 30, 2004 examination. Further, Dr. Dowd's and Dr. McMahon's reports are based upon a 2004 examinations. Therefore, Plaintiff has failed to demonstrate a limitation of range of motion by objective medical findings that are "based on a recent examination of the plaintiff" unless an explanation otherwise is provided (*Thompson v. Abbasi*, 15 AD3d 95 [1st Dept 2005] quoting *Grossman v Wright*, 268 AD2d 79, 84, 707 NY2d 233 [2000]; *Bent v Jackson*, 15 AD3d 46, 48 [1st Dept 2005]; *Nunez v Zhagui*, 60 AD3d 559, 560 [1st Dept 2009]). Further, Courts have held that an examination performed two to three years before the date of defendants' motion is insufficiently recent to be considered. (*See Mejia v DeRose*, 35 AD3d 407 [2006]; *Beckett v Conte*, 176 AD2d 774 [1991]; *Tudisco v James*, 28 AD3d 536 [2006] [examinations held one year before defendant's motion were insufficient to meet plaintiff's burden on summary judgment])

Plaintiff's most recent examination is dated March 18, 2004. This examination is not recent and therefore not sufficient to provide evidence of Plaintiff's injury. Therefore, despite providing reports from Dr. Dowd, Dr. McMahon and Dr. Chacon, Plaintiff does not submit any objective medical findings that can provide evidence of a triable issue of fact and Plaintiff's claims of serious injury under New York Insurance Law §5102(d) (*see Grasso v Angerami*, 79 N.Y.2d 813, 580 N.Y.S.2d 178 [1991]).

Plaintiff also submits a report by Dr. Puneet Kumar. However, Dr. Chacon's affirmation is insufficient to lay the proper foundation for admissibility of Dr. Kumar's medical records and report. Medical records and reports by examining and treating doctors that are not sworn to or affirmed under penalties of perjury are not evidentiary proof in admissible form, and are therefore not competent and inadmissible (*See Pagano v Kingsbury*, 182 AD2d 268 [2d Dept 1992]). Based on Plaintiff's failure to raise any triable issues of fact to rebut Defendants' objective medical evidence, summary judgment is granted (*See CPLR §3212; Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Defendant also argues that a gap in treatment interrupts the chain of causation between the accident and Plaintiff's claimed injuries. In opposition, Plaintiff contends that he was forced to discontinue therapeutic treatment because his No-Fault benefits were terminated. While a

cessation of treatment is not dispositive, a Plaintiff who terminates therapeutic measures following the accident, while claiming "serious injury," must offer some reasonable explanation for having done so (*DeLeon v Ross*, 44 AD3d 545 [1st Dept 2007]; *Pommells v Perez*, 4 NY3d 566, 574 [2005]). Plaintiff has offered a reasonable explanation and as such, Defendant's gap in treatment argument fails (*see Wadford v Gruz*, 35 AD3d 258 [1st Dept 2009]).

To qualify under the "permanent loss of use of a body organ, member, function or system," the loss must not only be permanent, but must be a total loss of use (*Gaddy v. Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]; *Oberly v Bangs Ambulance, Inc.*, 96 NY2d 295, 727 NYS2d 378 [2001]). Plaintiff has not demonstrated that he sustained a permanent and total loss of use of his shoulder or cervical spine. Therefore, Defendant's summary judgment motion as to Plaintiff's permanent loss claim under New York Insurance Law §5102(d) is granted.

A defendant can establish the nonexistence of a serious injury under the 90/180 category of Insurance Law §5102(d) by citing to evidence, such as plaintiff's own testimony, demonstrating that plaintiff was not prevented from performing all of the substantial activities constituting his usual and customary daily activities for the prescribed period (*see Copeland v Kasalica*, 6 AD3d 253, 254 [1st Dept 2004]). Further, Plaintiff's injuries must restrict him from performing "substantially all" of his daily activities to a great extent rather than some slight curtailment (*Szabo v. XYZ, Two Way Radio Taxi Ass'n, Inc.*, 700 NYS2d 179 [1999]; *Thompson v. Abbasi*, 788 NYS2d 48 [1st Dept 2005]; *Hernandez v. Rodriguez*, 63 A.D.3d 520 [1st Dept 2009]). Plaintiff's Verified Bill of Particulars states that he was confined to bed for two weeks following the accident and confined to home for two months. This time period is far less than the 90/180 category requires (*see Copeland*, 6AD3d at 253 [1st Dept 2004] [home and bed confinement for less than the prescribed period evinces lack of serious injury]).

Accordingly, it is hereby

ORDERED that Defendant Elia's motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to Defendant Elia as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that Defendant Elia is to serve a copy of this order, with Notice of Entry upon all parties, within 30 days; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

**FILED**  
AUG 17 2010  
NEW YORK COUNTY CLERK'S OFFICE

Dated: August 13, 2010  
New York, New York

George J. Silver, J.S.C.  
George J. Silver, J.S.C.  
**GEORGE J. SILVER**