

Frederique v Krapf

2010 NY Slip Op 33839(U)

August 4, 2010

Sup Ct, Nassau County

Docket Number: 9433/08

Judge: Roy S. Mahon

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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON
Justice

YVES FREDERIQUE,

Plaintiff(s),

- against -

DEBRA M. KRAPP and JASON A. KRAPP,

Defendant(s).

TRIAL/IAS PART 7

INDEX NO. 9433/08

MOTION SEQUENCE
NO. 2

MOTION SUBMISSION
DATE: May 18, 2010

The following papers read on this motion:

- Notice of Motion X
- Affirmation in Opposition X
- Affirmation in Reply X

Upon the foregoing papers, the motion by the defendants for an Order dismissing the complaint of plaintiff and granting summary judgment (CPLR 3212) to the defendant on the threshold issue, is determined as hereinafter provided:

This personal injury action arises out of a motor vehicle accident that occurred on January 29, 2008 at approximately 3:40 pm on Strathmore Drive at or near its intersection with Deer Park Avenue, Suffolk Count, New York.

The plaintiff in the plaintiff's Verified Bill of Particulars sets forth:

"7. Plaintiff sustained the following injuries:

- OBLIQUE TEAR OF THE POSTERIOR HORN OF THE MEDIAL MENISCUS OF LEFT KNEE;
- BULGING DISCS AT L3-L4 AND L4-L5;
- HERNIATED DISC AT L4-L5 AND L5-S1;
- LEFT HIP SPRAIN/STRAIN;
- LEFT KNEE SPRAIN/STRAIN
- CERVICAL RADICULOPATHY;

CERVICAL SPRAIN/STRAIN;
 LUMBOSACRAL RADICULOPATHY;
 LUMBAR SPRAIN/STRAIN;
 RESTRICTION OF MOTION OF LEFT KNEE;
 DEPRESSION;
 HEADACHES;
 ANXIETY;
 FEAR;
 EMOTIONAL UPSET AND SHOCK."

The defendants in support of the defendants' application, amongst other things, submit the plaintiff's June 3, 2009 deposition transcript; an affirmed letter report dated October 30, 2009 of Michael Katz, MD, an orthopedist of orthopedic examination of the plaintiff conducted on October 30, 2009 and two affirmed undated letter reports of Stewart Berliner, MD, a radiologist of a review of a March 1, 2008 MRI of the plaintiffs' left knee and an April 5, 2008 MRI of the plaintiff's lumbosacral spine:

The rule in motions for summary judgment has been succinctly re-stated by the Appellate Division, Second Dept., in **Stewart Title Insurance Company, Inc. v. Equitable Land Services, Inc.**, 207 AD2d 880, 616 NYS2d 650, 651 (Second Dept., 1994):

"It is well established that a party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*State Bank of Albany v. McAuliffe*, 97 A.D.2d 607, 467 N.Y.S.2d 944), but once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572; *Zuckerman v. City of New York*, *supra*, 49 N.Y.2d at 562, 427 N.Y.S.2d 595, 404 N.E.2d 718)."

It is noted that the question of whether the plaintiff has made a prima facie showing of a serious injury should be decided by the Court in the first instance as a matter of law (see *Licaro v. Elliot*, 57 NY2d 230, 455 NYS2d 570, 441 NE2d 1088; *Palmer v. Amaker*, 141 AD2d 622, 529 NYS2d 536, Second Dept., 1988; *Tipping-Cestari v. Kilhenny*, 174 AD2d 663, 571 NS2d 525, Second Dept., 1991).

In making such a determination, summary judgment is an appropriate vehicle for determining whether a plaintiff can establish prima facie a serious injury within the meaning of Insurance Law Section 5102(d) (see, *Zoldas v. Louise Cab Corp.*, 108 AD2d 378, 381, 489 NYS2d 468, First Dept., 1985; *Wright v. Melendez*, 140 AD2d 337, 528 NYS2d 84, Second Dept., 1988).

Serious injury is defined, in Section 5102(d) of the Insurance Law, wherein it is stated as follows:

"(d) 'Serious injury' means 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."

In pertinent part, the report of Dr. Katz sets forth:

"Physical Examination:

The claimant stands 6'2" tall and weighs 190 pounds.
The claimant is right-hand dominant.
The claimant was using no canes, walkers or crutches.
The claimant walked briskly into and out of the examining room.
The claimant changed positions normally.
The claimant was identified by a valid picture ID.

Examination of the Cervical Spine: There is no tenderness about the cervical spine and there is no paravertebral muscle spasm. Flexion is present to 50 degrees (normal 50 degrees) and extension is present to 60 degrees (normal 60 degrees). Lateral flexion is present with right-sided lateral flexion to 45 degrees (normal 45 degrees) and left-sided lateral flexion is 45 degrees (Normal 45 degrees). Right-sided rotation is present to 80 degrees (normal 80 degrees) and left-sided rotation is present to 80 degrees (normal 80 degrees). Motor strength is present in the C5-T1 innervated segments. Sensation is intact in the C5-T1 innervated dermatomes. Reflex testing reveals the biceps, triceps, and brachioradialis reflexes to be 2+ and symmetric. Adson's test is negative.

Examination of the Lumbar Spine: The gait was normal without antalgic or Trendelenberg component. No paravertebral muscle spasm was present. Active range of motion revealed forward flexion to 90 degrees (normal 90 degrees) extension to 30 degrees (normal 30 degrees), and lateral and side bending to 30 degrees (normal 30 degrees). Straight leg raising test was negative. Sensory examination revealed full sensation to light touch in the L3-S1 dermatomes. Reflexes of the quadriceps, tibialis posterior, and Achilles tendon were 2+ and symmetric bilateral. Babinski was negative and there was no demonstrable clonus. Patrick was negative.

Examination of the Left Knee: There is a normal valgus attitude about the knee in the standing position. There is no swelling about the knee. There is no effusion within the knee. The range of motion is 0-135 degrees (normal 135 degrees) in the flexion/extension arc. The patellar reflex is 2+. There is no medial or lateral joint line tenderness. Lachman's test is negative for anterior/posterior instability. The patellar apprehension test is negative. The motor strength of the Quadriceps is 5/5. The knee is stable to varus and valgus stress. There is a negative pivot shift test. The posterior drawer sign

is negative. The posterior sag sign is negative. There is no demonstrable crepitus. The prepatellar bursa is supple and lacks swelling, erythema, or induration.

Examination of the Left Hip. The gait is normal with no sign of a Tredelenburg gait. Flexion is present from 0-110 degrees (normal 110 degrees), present to 40 degrees (normal 40 degrees), and external rotation is present to 60 degrees (normal 60 degrees). Abduction is 0-40 degrees (normal 0-40 degrees), adduction is 0-20 degrees (normal 0-20 degrees). There is no crepitation, erythema, or induration. The trochanteric bursa is supple without signs of erythema or induration. There are no contractures. The iliotibial band is supple. There are no demonstrable skin lesions.

Range of motion was determined using a goniometer.

Range of Motion Reference: Roaas A. Anderson G.B., ACTA Orthopaedic Scandinavia 1982 April; 53(2): 205-8.

The following measurements were taken: Circumferential measurement at the midportion of the right humerus was 12 inches. Circumferential measurement at the midportion of the left humerus was 12 inches. Using the power pinch meter to measure pinch strength, there was 8 kg of force on the right and 8 kg of force on the left. Using the Jamar dynamometer to measure grip strength, there was 24 kg of force on the right and 24 kg of force on the left. Circumferential measurement at the tibial tubercle on the right was 15 inches. Circumferential measurement at the tibial tubercle on the left was 15 inches.

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Diagnosis

Cervical strain - resolved.
Lumbosacral strain - resolved.
Left hip contusion - resolved.
Left knee contusion - resolved.

Comment:

The claimant is a 19 year old male who alleges an injury of 01/30/08 as a seatbelted driver. Currently he shows no signs or symptoms of permanence relative to the musculoskeletal system relative to 01/30/08. He is currently not disabled. He is capable of gainful employment as a student and a waiter. He has no complaints referable to this accident any longer. He is capable of his activities of daily living."

The respective reports of Dr. Berliner state:

"As per your request, I performed an independent radiology review on the above named claimant on June 17, 2009. The study was obtained on April 5, 2008. The films available for my review are labeled with the claimants'

name. Please note that this study was obtained on a low fiend strength magnet and is of limited resolution. My findings are as follows:

Images from an MRI of the lumbosacral spine were submitted for interpretation.

There is normal alignment of the lumbar spine. The disc spaces are well maintained without evidence of bulge or herniation. No intradural abnormalities are noted. The neural foramen is patent. No discrete vertebral body lesions are seen.

In conclusion, this is a completely normal MRI of the lumbosacral spine. There is no evidence of bulge or hernation. There is no evidence of traumatic injury."

"As per your request, I performed an independent radiology review on the above named claimant on June 17, 2009. The study was obtained on March 1,2008. The films available for my review are labeled with the claimants' name. Please note that this study was obtained on a low fiend strength magnet and is of limited resolution. My findings are as follows:

Images from an MRI of the left knee submitted for interpretation.

The menisci are normal in appearance without evidence of tear. The anterior and posterior cruciate ligaments as well as the medial and lateral collateral ligaments are normal in appearance. The quadriceps and patellar tendons are normal. No bone marrow abnormalities are noted. No joint effusion is noted.

In conclusion, this is a completely normal MRI of the left knee. There is no evidence of traumatic injury."

The Court finds that the defendants have submitted evidence in admissible form to make a "prima facie showing of entitlement to judgment as a matter of law" (**Winegrad v. New York University Medical Center, 64 NY2d 851, 853; Pagano v. Kingsbury, supra at 694**) and is sufficient to establish that the plaintiff did not sustain a serious injury. Accordingly, the burden has shifted to the plaintiff to establish such an injury and a triable issue of fact (**see Gaddy v. Eyer, 79 NY2d 955, 582 NYS2d 990, 591 NE2d 1176; Jean-Meku v. Berbec, 215 AD2d 440, 626 NYS2d 274, Second Dept., 1995; Horan v. Mirando, 221 AD2d 506, 633 NYS2d 402, Second Dept., 1995**).

In opposition to the defendants' requested relief, the plaintiff submits an affidavit of the plaintiff himself; an affirmation of Mark Shapiro, MD a radiologist as to an MRI of the plaintiff's lumbar spine performed on April 5, 2008; an unsworn report of Michael D. Green. MD, a radiologist of a March 1, 2008 MRI of the plaintiff's left knee; an affirmed letter report dated April 23, 2010 of Donald I. Goldman, an orthopedist of a March 31, 2010 orthopedic examination of the plaintiff; and an affirmation of Jean-Marie L. Francois, MD and an affirmation of Jean-Claude Demetrius, MD both of Freeport Medical PC together with certain records relative to the plaintiff's treatment on February 2, 2008, March 8, 2008 and March 22, 2008.

The Court initially observes that the plaintiff was seen at Freeport Medical PC for the period February

2, 2008 to March 22, 2008 and thereafter was seen by Dr. Goldman in March 2010. In this regard, the plaintiff has failed to adequately explain the plaintiff's two year gap in treatment (see, **Pommells v Perez**, 4 NY3d 566, 797 NYS2d 380; **Nemchyonok v Peng Liu Ying**, 2 AD3d 421, 767 NYS2d 811). A review of the report of the plaintiff's radiologist Dr. Shapiro as to the MRI of the plaintiff's lumbar spine does not causally relate the conditions found therein to the accident in issue (see, **Ukonu v Velazquez**, 213 AD2d 628, 624 NYS2d 195 (Second Dept., 1995)).

The plaintiff maintains that the unsworn report of Dr. Green as to the oblique linear tear of the posterior horn of the plaintiff's medial miniscus should be admissible based upon the theory that the results of Dr. Green's scans were set forth in the defendants' examining physician Dr. Katz Report (see, **Lozusko v Miller**, 72 AD3d 908, 899 NYS2d 358 (Second Dept., 2010)). Contrary to the plaintiff's contention, Dr. Katz's report does not address the result of the MRI performed by Dr. Green.

Based upon all of the foregoing, the defendants' application for an Order dismissing the complaint of plaintiff and granting summary judgment (CPLR 3212) to the defendant on the threshold issue, is granted.

SO ORDERED.

DATED: 8/4/2010

Ray S. H. Kahan
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J.S.C.

ENTERED

AUG 11 2010

NASSAU COUNTY
COUNTY CLERK'S OFFICE