

Ramathunga v Mazzota
2010 NY Slip Op 33867(U)
August 13, 2010
Supreme Court, New York County
Docket Number: 107235/2007
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

RAMATHUNGA, ALEXANDER

INDEX NO. 107235/2007

vs.

MOTION DATE _____

MAZZOTA, JOSEPH and D.L. PETERSON TRUST

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

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

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

FILED
AUG 27 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 motor vehicle accident, Defendants Joseph Mazzota and D.L. Peterson Trust (collectively "Defendants") move pursuant to CPLR §3212 for an order granting summary judgment and dismissing the Plaintiff Alexander Ramathunga's ("Plaintiff's") complaint 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 that, as a result of the accident, he sustained a serious injury including disc herniations at C3-C4, C5-C6 and C6-C7 with impingement and a disc bulge at C4-C5.

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.

Defendants' Expert Reports

"[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 examined the plaintiff and conclude that no objective medical findings support the plaintiff's

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

FOR THE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

claim" (*Grossman v Wright*, 268 AD2d 79, 83-84 [1st Dept 2000]). Reports by a defendant's own retained physician must be in the form of sworn affidavits or affirmations because a party may not use an unsworn medical report prepared by the party's own physician on a motion for summary judgment. Defendant may also rely upon plaintiff's sworn testimony or plaintiff's unsworn treating physician's records (*see Arjona v Calcano*, 7 AD3d 279, 280 [1st Dept 2004]; *Nelson v Distant*, 308 AD2d 338, 339 [1st Dept 2003]; *McGovern v Walls*, 201 AD2d 628, 628 [2d Dept 1994]). 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" (*Grossman v Wright*, 268 AD2d 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]).

In support of this motion, Defendants submit the affirmed expert reports of Dr. Daniel Feuer, Dr. P. Leo Varriale and Dr. Mark Decker. Dr. Feuer conducted a neurological examination of Plaintiff on April 13, 2009. He performed range of motion testing and found no limitation in motion for Plaintiff's cervical and lumbar spine. However, Dr. Feuer's report does not indicate what specific objective testing he utilized to conclude that Plaintiff had normal range of motion when compared to normal. Therefore, this report is insufficient to establish Defendants' *prima facie* entitlement to summary judgment (*Beazer v Webster*, 2010 NY Slip Op 1584 [1st Dept]).

Dr. Varriale performed an orthopedic examination of Plaintiff on May 18, 2009. He conducted range of motion testing through visual inspection and did not find any limitations in Plaintiff's motion for his cervical and lumbar spine. Dr. Varriale concluded that Plaintiff had suffered from a cervical and lumbosacral strain, which had resolved and had pre-existing degenerative disc disease and arthritis of the cervical spine. Dr. Varriale's expert report satisfies Defendants' 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]).

Dr. Decker conducted a radiology review of Plaintiff's cervical spine MRI taken on February 9, 2005 and lumbar spine MRI taken on March 14, 2005. He concluded that Plaintiff suffered from degenerative disc disease and disc bulges at C3-C4, C4-C5 and C5-C6. However, Dr. Decker does not offer an opinion on causation as to Plaintiff's cervical disc bulges. Therefore, his report is insufficient to meet Defendants' burden (*Grossman v Wright*, 268 AD2d 79, 84 [1st Dept 2000]; *Valentin v Pomilla*, 59 AD3d 184 [1st Dept 2009]).

Plaintiff's Expert Reports

In order to rebut defendant's *prima facie* case, plaintiff must submit objective medical evidence establishing that the claimed injuries were caused by the accident, and "provide objective evidence of the extent or degree of the alleged physical limitations resulting from the injuries and their duration" (*Noble v Ackerman*, 252 AD2d 392, 394 [1st Dept 1998]; *Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d 345, 350 [2002]). Plaintiff's subjective complaints "must be sustained by verified objective medical findings" (*Grossman v Wright*, 268 AD2d 79, 84 [2d Dept 2000]). Such medical proof should be contemporaneous with the accident, showing what quantitative restrictions, if any, plaintiff was afflicted with (*see Nemchyonok v Ying*, 2 AD3d 421, 421 [2d Dept 2003]). The medical proof must also be based on a recent examination of

plaintiff, unless an explanation otherwise is provided (*see Bent v Jackson*, 15 AD3d 46, 48 [1st Dept 2005]; *Nunez v Zhagui*, 60 AD3d 559, 560 [1st Dept 2009]).

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 Defendants' motion, Plaintiff submits expert affirmations from Dr. Michael Trimba, Dr. Mark Freilich, and Dr. Jon Randazzo. Dr. Trimba examined Plaintiff on February 4, 2005 and March 16, 2005. Dr. Trimba's reports are not based upon a recent examination of Plaintiff as required to defeat Defendants' *prima facie* entitlement to summary judgment (*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]). 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 submits an uncertified radiology report of Plaintiff's cervical spine MRI taken on February 9, 2005 by Dr. Freilich. Aside from issues with admissibility, Dr. Freilich's report does not refer to the cause of Plaintiff's MRI findings. This deficiency renders Dr. Freilich's report insufficient to defeat Defendants' *prima facie* showing (*Toure*, 98 NY2d at 350 [2002]).

Plaintiff submits the uncertified reports of Dr. Randazzo. It is well settled that a plaintiff may not rely upon unsworn medical evidence to defeat a defendant's summary judgment motion (*see Migliaccio v Miruku*, 56 AD3d 393, 394 [1st Dept 2008]; *DeJesus v Paulino*, 61 AD3d 605, 607 [1st Dept 2009] [unsworn emergency room records and other reports had no probative value]). Although Defendant's experts indicate that they reviewed some of the unsworn medical records, such cursory review does not open the door to Plaintiff's reliance upon these same records to raise a genuine issue of fact. Defendant's experts did not attach copies of the unsworn records in their submissions. Nor did they discuss the results of the prior examinations, or rely upon such results (*see Hernandez v Almanzar*, 32 AD3d 360, 361 [1st Dept 2006]). Therefore, Plaintiff has failed to present any competent objective medical evidence sufficient to rebut Defendants' *prima facie* entitlement to summary judgment.

Additionally, Plaintiff submits his own affidavit. However, Plaintiff's self-serving statements are entitled to little weight and are insufficient to raise triable issues of fact (*See Zoldas v Louise Cab Corp.*, 108 A.D.2d 378, 383 [1st Dept 1985]; *Fisher v Williams*, 289 A.D.2d 288 [2d Dept 2001]).

Defendants also argue that Plaintiff has not addressed has not adequately explained her cessation of treatment. 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*, 2007 NY Slip Op 8001 [1st Dept]; *Pommells v Perez*, 4 NY3d 566, 574, 830 N.E.2d 278, 797 NYS2d 380 [2005]).

Plaintiff does not offer any evidence sufficient to rebut Defendants' gap in treatment argument.

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 Bill of Particulars state that he has been incapacitated and confined to his bed and home since the day of the accident. In light of the evidence, this is clearly an overstatement. Plaintiff's affidavit states that he could not work for a period of two years following the accident, however, his deposition testimony states that following the accident he worked at his friends' video store. Further, Plaintiff has not submitted any proof that his alleged restriction was medically determined. Therefore, this evidence is insufficient to establish a substantial curtailment of Plaintiffs' normal activities during the three-month period immediately following the accident as required under the 90/180 category (*Grimes-Carrion v Carroll*, 17 AD3d 296, 794 NYS2d 30 [App. Div. 1st Dept 2005]; *Lopez v Abdul-Wahab*, 2009 NY Slip Op 8685 [1st Dept]; *Rodriguez v Herbert*, 34 AD3d 345, 825 NYS2d 37 [1st Dept 2006]).

Accordingly, it is hereby

ORDERED that Defendants' motion for summary judgment under New York Insurance Law §5102(d) is granted, and the Plaintiff's summons and complaint is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that Defendants are to serve a copy of this order, with Notice of Entry upon all parties, within 30 days.

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