

Requejo v Cuban Transp.

2011 NY Slip Op 30387(U)

February 3, 2011

Supreme Court, Nassau County

Docket Number: 015904/08

Judge: Randy Sue Marber

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

JUSTICE

TRIAL/IAS PART 18

X
ROGER REQUEJO,

Plaintiff,

Index No.: 015904/08
Motion Sequence...02, 03
Motion Date...11/01/10

-against

CUBAN TRANSPORTATION, MARVIN F.
CRUZ-CRUZ, and LEONARD F. JARVIS,

Defendants.

X

- Papers Submitted:
- Notice of MotionX
- Memorandum of Law.....X
- Notice of Cross-MotionX
- Affirmation in Opposition.....X
- Reply Affirmation.....X

Upon the forgoing papers, the Defendants, CUBAN TRANSPORTATION and MARVIN CRUZ-CRUZ's motion and the Defendant, LEONARD F. JARVIS's cross-motion, pursuant to CPLR § 3212, seeking an order granting summary judgment and dismissing the Plaintiff's complaint on the grounds that the Plaintiff's injuries do not satisfy the "serious injury" threshold requirement of Insurance Law § 5102 (d), are decided as hereinafter provided.

This action arises out of a motor vehicle accident that occurred at or near the

intersection of the Meadowbrook Parkway exit and Old Country Road on May 21, 2008. The Plaintiff was a back seat passenger in a taxi cab when it was involved in a collision with another vehicle. As a result of the accident, the Plaintiff alleges that he sustained a serious injury as defined by Insurance Law § 5102 (d).

According to the Plaintiff's Affidavit submitted in opposition to the Defendants' respective motions, the impact of the collision was extremely hard, which caused the right side of the Plaintiff's head and left shoulder to come into contact with the rear of the driver's seat. The Plaintiff states in his Affidavit that he was bleeding from his head and right leg, he was very dizzy and had a severe headache as a result of the impact. The Plaintiff was transported to Nassau University Medical Center by ambulance. The Plaintiff was admitted to the hospital on May 21, 2008 and was discharged the next day. The Plaintiff underwent x-rays at the hospital and was prescribed pain medication.

The day after the Plaintiff was discharged from the hospital, he went to Dr. Nizarali Visram, a physician affiliated with Sports Medicine and Spine Rehabilitation. Dr. Visram's affirmed report is attached to the Plaintiff's opposition papers as Exhibit "D". According to Dr. Visram's affirmed report, the Plaintiff presented to Dr. Visram as a result of the injuries he allegedly sustained in the accident of May 21, 2008. *Id.* After a physical examination of the Plaintiff, Dr. Visram made the following assessment: post-traumatic cervical spine sprain and strain, with myofascial pains; post-traumatic left shoulder sprain and strain, with contusion; post-traumatic right-sided forehead contusion; and post-traumatic left leg contusion/laceration. *Id.* Dr. Visram recommended physical therapy, prescribed

Motrin and indicated that the Plaintiff should be re-evaluated in 2-3 weeks.

According to the Plaintiff's deposition, conducted on October 15, 2009, he underwent physical therapy four times per week for a period of seven or eight months which consisted of electro-stimulation and hot packs. After seeing Dr. Visram, the Plaintiff began treatment with Dr. Ben Benatar, a medical doctor who specializes in orthopedic medicine. Dr. Benatar initially examined the Plaintiff on August 4, 2008 regarding the injuries he allegedly sustained as a result of the accident. A physical examination of the Plaintiff's left shoulder revealed the impingement sign was positive and abduction across the chest with internal rotation produced impingement pain. *See* Affirmation of Dr. Benatar, dated July 16, 2010, attached to the Plaintiff's Opposition. Dr. Benatar next examined the Plaintiff on September 2, 2008 which revealed left shoulder rotator cuff tendonitis. Dr. Benatar also administered a series of cortisone shots to the Plaintiff's left shoulder and recommended continued physical therapy. *Id.* Dr. Benatar recommended surgery for the left shoulder, but prior to the surgery ordered a further MRI. The MRI, dated August 19, 2009, upon which Dr. Benatar relied for his conclusions, demonstrated a small tear at the musculoskeletal junction of the infraspinatus muscle with retraction of a small tendon bundle; and tendinosis at the greater tuberosity insertion. *Id.*

Upon palpation of the Plaintiff's left shoulder, Dr. Benatar stated that the Plaintiff experienced tenderness in the trapezius region. Dr. Benatar further stated that upon active forward flexion, the Plaintiff's range of motion of his left shoulder was limited to 140 degrees (normal 180 degrees). Active abduction was similarly limited to 140 degrees. Dr.

Benatar stated in his Affirmation that the Plaintiff demonstrated a positive Neer's test and positive Hawkin's sign, both of which are used to determine the existence of impingement of the shoulder.

Based upon his physical examination of the Plaintiff and review of the MRIs, Dr. Benatar concluded that seventeen (17) months after the accident the Plaintiff continued to experience symptoms, that he sustained an impingement syndrome and that he should undergo a diagnostic arthroscopy and a subacromial bursectomy. Dr. Benatar opined that the Plaintiff's injuries were the result of the subject accident.

Dr. Benatar most recently examined the Plaintiff on June 8, 2010. He stated in his Affirmation that his opinion remained unchanged. His physical examination of the Plaintiff revealed that he was still experiencing left shoulder pain that was worse with lifting, pushing or pulling. Dr. Benatar opined that the Plaintiff was in need of surgery and that conservative treatment, including cortisone injections, has not resulted in improvement.

According to the Plaintiff's Verified Bill of Particulars, dated November 26, 2008, at the time of the accident the Plaintiff was employed at Formed Plastic, Inc., located at 207 Stonehinge Lane, Carle Place, NY 11514. The Plaintiff testified at his deposition that he returned to work approximately 2-3 weeks after the accident. However, after working for approximately 2 weeks, the Plaintiff was unable to continue working because he could not perform the duties of his job due to the injuries he sustained in the accident.

In addition to the above stated injuries, the Plaintiff also claims that he suffered a cerebral concussion with post-traumatic right-side forehead contusion, persistent

headaches, and resultant post concussion syndrome. Dr. Visram's assessment after an examination of the Plaintiff was that he suffered from post-traumatic right-sided forehead contusion. *See* Affirmation of Nizrali Visram, dated May 28, 2008.

Based on the above, the Plaintiff's counsel contends that, pursuant to Insurance Law § 5102 (d), the Plaintiff's injuries qualify as a serious injury under the seventh, eighth or ninth categories, specifically: (7) permanent consequential limitation of use of a body organ or member; (8) significant limitation of use of a body function or system; and (9) a medically determined injury of a non-permanent nature that prevents the injured person from performing substantially all of the material acts which constitute the Plaintiff's usual and customary daily activities for not less than ninety days during the one hundred and eighty days immediately following the occurrence of the injury.

The Defendants' move, pursuant to CPLR § 3212, seeking summary judgment against the Plaintiff based upon the Plaintiff's failure to meet the serious injury threshold requirement as defined by New York's Insurance Law.

In moving for summary judgment, the Defendants must make a prima facie showing that the Plaintiff did not sustain a "serious injury" within the meaning of the statute. Once this is established, 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. *See Pommels v. Perez*, 4 N.Y.3d 566 (2005); *see also Grossman v. Wright*, 268 A.D. 2d 79, 84 (2nd Dept. 2000).

Within the particular context of a threshold motion which seeks dismissal of

a personal injury complaint, the movant bears a specific burden of establishing that the Plaintiff did not sustain a “serious injury” as enumerated in Article 51 of the Insurance Law § 5102 (d). *Gaddy v. Eyles*, 79 N.Y.2d 955 (1992). Upon such a showing, it becomes incumbent upon the nonmoving party to come forth with sufficient evidence in admissible form to raise an issue of fact as to the existence of a “serious injury”. *Licari v. Elliot*, 57 N.Y.2d 230 (1982).

Within the scope of the Defendant’s burden, a Defendant’s medical expert must specify the objective tests upon which the stated medical opinions are based and when rendering an opinion with respect to the Plaintiff’s range of motion, must compare any findings to those ranges of motion considered normal for the particular body part. *Qu v. Doshna*, 12 A.D.3d 578 (2nd Dept. 2004); *Browdame v. Candura*, 25 A.D.3d 747 (2nd Dept. 2006); *Mondi v. Keahan*, 32 A.D.3d 506 (2nd Dept. 2006).

In support of the motions for summary judgment, the Defendants submit the Affirmations of Robert Israel, M.D., a board certified orthopedic surgeon and Edward M. Weiland, a neurologist. Dr. Israel performed an orthopedic examination of the Plaintiff on November 23, 2009 at the request of the Defendant’s counsel. Dr. Israel performed range of motion testing, using a goniometer, of the Plaintiff’s left shoulder and cervical spine which revealed normal ranges of motion of both body parts. Dr. Israel concluded, after an examination of the Plaintiff, that the orthopedic evaluation was entirely within normal limits and there were no positive findings. Dr. Israel further opined that there is no permanency and no residuals relative to the incident date.

Dr. Weiland performed a neurologic examination of the Plaintiff on November 25, 2009, also at the request of the Defendant's counsel. The examination revealed that the Plaintiff's cognitive functions were intact, without evidence of aphasia or apraxia. In his Affirmation, Dr. Weiland states that a fundoscopic examination failed to reveal any signs of raised intracranial pressure. Dr. Weiland's examination of the Plaintiff's cervical spine, lumbar spine, thoracic spine and left shoulder, using a goniometer, revealed normal ranges of motion. Dr. Weiland's impression was that the neurologic examination of the Plaintiff was normal. He concluded that he found no evidence of any lateralizing neurological deficits. He further concluded that he found no reason why the Plaintiff should be unable to perform any of his normal, customary, daily activities without restriction, from a neurological standpoint. Dr. Weiland also concluded that based on his examination there was no neurological disability nor any finding of neurologic residual or permanency.

In light of the relevant legal authority, the Court finds that the Defendants met their initial burden of showing by admissible medical evidence that the Plaintiff did not suffer a serious injury as defined in Insurance Law § 5102 (d).

The Defendant, JARVIS's counsel argued that the Plaintiff's proof submitted in opposition of the motion was insufficient to raise any questions of fact and, thereby, insufficient to defeat summary judgment on several grounds. In that regard, the Defendants contend that the Court should not consider Dr. Benatar's reliance upon Dr. Mahvash Rafii's MRI report as there is no evidence establishing that Dr. Benatar reviewed and relied upon affirmed medical reports and that he failed to attach them to his report. In so arguing, the

Defendants relied upon *Merisca v. Alford*, 243 A.D.2d 613 (2d Dept. 1997), where the treating physician's diagnosis was based upon his review of an unsworn medical report prepared by another doctor. That court found that the Plaintiff could not rely on the report as it was unsworn and not attached to the plaintiff's doctor's report. To the contrary, here, a sworn copy of Dr. Raffi's report of is attached to the Plaintiff's opposition as Exhibit "G", which is specifically addressed to Dr. Benatar. Further, Dr. Benatar stated in his Affirmation that he relied upon the sworn report of Dr. Rafii in arriving at his conclusions.

In addition to relying on the sworn report of Dr. Rafii, Dr. Benatar stated that upon palpation, the Plaintiff experienced tenderness in the trapezius region. Further, Dr. Benatar opined that the Neer's test was positive and that there was a positive Hawkin's sign which are used to determine the existence of an impingement of the shoulder.

The Defendants also contend that the MRI reports fail to demonstrate that the Plaintiff's injuries were causally related to the accident, and, thus, should not be considered by the Court. Although reliance on magnetic resonance imaging reports are insufficient on its own to raise a triable issue of fact, Dr. Benatar states in his Affirmation that his impression was based upon his physical examination of the Plaintiff, together with his review of the MRIs. Further, Dr. Benatar opined that the injuries which the Plaintiff sustained were the result of the automobile accident in which he was involved. *See* Affirmation of Dr. Benatar, dated July 16, 2010, attached to the Plaintiff's Affirmation in Opposition. A physician's affidavit or affirmation setting forth his or her observations, supported by objective proof such as x-rays, MRIs or other similarly recognized tests or quantitative results

is sufficient to raise a question of fact as to whether the Plaintiff's injuries meet the serious injury threshold requirement. *Kraemer v. Henning*, 237 A.D.2d 492 (2nd Dept. 1997).

The Defendants next argue that the Plaintiff's opposition papers failed to adequately address his gap in treatment. The Plaintiff was examined by Dr. Benatar on August 4, 2008, September 2, 2008 and June 8, 2010. On September 2, 2008, Dr. Benatar's diagnosis of the Plaintiff's condition was left shoulder rotator cuff tendonitis, for which he ordered additional physical therapy and administered cortisone injections into the Plaintiff's left shoulder. In addition to the recommended treatment, Dr. Benatar recommended two surgical procedures, a diagnostic arthroscopy and a subacromial bursectomy. However, according to the Plaintiff's Affidavit submitted in opposition to the Defendants' motions for summary judgment, the Plaintiff has not received approval from the no-fault insurance carrier and cannot afford the operations without the no-fault coverage. The court in *Akamnonu v. Rodriguez*, 12 A.D.3d 187 (1st Dept. 2004), noted that because a course of treatment is fact specific and is commensurate with the nature of the injuries and the customary standard of care, the issue of a gap in treatment bears only upon the weight to be accorded the medical opinion, a matter which is clearly within the province of a jury. The Plaintiff's sworn testimony and Affidavit sets forth a sufficient explanation regarding his failure to continue with Dr. Benatar's recommended treatment.

Dr. Benatar's Affirmation, along with the sworn MRI reports and sworn testimony of the Plaintiff is sufficient to raise a triable issue of fact. Specifically, Dr. Benatar's conclusions demonstrate that the Plaintiff has significant limited ranges of motion


of his left shoulder and is need of surgery. A question of fact exists as to whether there is permanent, consequential limitation of use of the Plaintiff's left shoulder or a significant limitation of use of same. Further, the Plaintiff's proof raised a triable issue of fact as to whether the Plaintiff was able to perform all of his customary daily activities in that the Plaintiff was unable to lift, push or pull heavy objects and had to leave his employment due to his injuries.

Accordingly, it is hereby

ORDERED, that the Defendants' respective motions for summary judgment, pursuant to CPLR § 3212, seeking an order dismissing the Plaintiff's complaint, are **DENIED**.

This constitutes the decision and order of the Court.

Dated: Mineola, New York
February 3, 2011



Hon. Randy Sue Marber, J.S.C.

ENTERED

FEB 09 2011

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