

Iza v Jenkins

2011 NY Slip Op 30668(U)

March 7, 2011

Sup Ct, Nassau County

Docket Number: 022652/08

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

STEVEN IZA,

Plaintiff,

Index No. 022652/08

Motion Sequence...01

-against-

Motion Date... 11/19/10

XXX

MARILYN JENKINS,

Defendant.

_____X

Papers Submitted:

Notice of Motion.....X

Affirmation in Opposition.....X

Reply Affirmation.....X

Upon the forgoing papers, the Defendant’s 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), is decided as hereinafter provided.

This action arises from a motor vehicle accident that occurred on January 9, 2008, on West Seaman Avenue at or near its intersection with North Brooksite Avenue, County of Nassau. The Plaintiff’s vehicle was stopped in traffic when his vehicle was struck in the rear by the Defendant, causing the Plaintiff to strike a fire hydrant. On or about

December 16, 2008, the Plaintiff commenced this action by filing a summons and complaint. On or about April 15, 2009, issue was joined by service of the Defendant's Verified Answer. On or about May 20, 2009, the Plaintiff served a Verified Bill of Particulars alleging that he sustained a serious injury.

Specifically, in his Verified Bill of Particulars, the Plaintiff alleges the following injuries:

Cervical Spine: right side protrusion at C3-4 with moderate to severe right neural foraminal encroachment; achy pain traveling up into the head; constant pain, discomfort, tenderness and spasms; paraspinal muscle spasms; vertebral fixation; hypoesthesia to pinwheel in left C6, right C7-8 dermatomes; significantly decreased range of motion; subluxation complex; hypoesthesia in the bilateral hands; myalgia; total loss of lordosis; cervico-brachial syndrome; bilateral trapezius muscle pain and tightness; hypoesthesia in the bilateral dermatomal levels C6-T1; myofascial pain syndrome.

Lumbar Spine: localized cramping; spasms in the paraspinals; hypoesthesia to pinwheel in the right L4 dermatomes; pain, discomfort, tenderness; significantly decreased loss of range of motion; mild levoscoliosis; mild scoliosis; low back syndrome.

Right Knee: joint effusion; pain, discomfort, tenderness; contusions; gait dysfunction/deviation; internal derangement; antalgic ambulation.

Other: tension headaches; dizziness; bruising on the right side of forehead; loss of consciousness; difficulty and limitations with lifting, bending, reaching with upper extremities, finding a comfortable position to sleep, prolonged sitting, stranding and walking; post concussion syndrome.

See Plaintiff's Verified Bill of Particulars, dated May 20, 2009, attached to the

Defendant's Notice of Motion as Exhibit "D".

In support of the motion for summary judgment, the Defendant submits the emergency room records from South Nassau Communities Hospital, the deposition testimony of the Plaintiff, the CT scan of the Plaintiff's lumbar spine supervised by the Plaintiff's doctor, and the affirmed findings of Dr. Robert Israel, a board certified orthopedic surgeon and Dr. Melissa Sapan Cohn, a board certified radiologist.

The emergency room records from South Nassau Communities Hospital revealed a cervical sprain. The x-rays taken of the Plaintiff's spine revealed no fractures and the examining physician reported full range of motion of the cervical spine. *See* Emergency Room Records, South Nassau Communities Hospital, dated January 9, 2008, attached to the Defendant's Notice of Motion as Exhibit "E".

The Plaintiff, testified at his examination before trial that he was involved in a prior accident in 2001 where he was shot in the back. *See*, Plaintiff's Examination Before Trial, dated January 18, 2009, attached to the Defendant's Notice of Motion as Exhibit "F". As a result of the prior accident, one bullet still remains in the Plaintiff's back. The Plaintiff testified that the pain in his back as a result of the gunshots lasted for approximately two months. *Id.* According to the Plaintiff, the last time he was medically checked to determine the location of the bullets was about two and one half years prior to the Plaintiff's deposition. The Plaintiff further testified that one of the bullets is located to the left side of his colon and are pressing on the nerves that control his left leg. The other bullet, to the Plaintiff's

knowledge, was removed.

The CT scan taken of the Plaintiff's lumbar spine, reviewed by Dr. Shapiro, revealed that "1. There is disc disease at L5-S1 characterized by loss of height. There is metallic artifact in this region, which limits evaluation. Underlying impingement cannot be excluded. 2. Mild scoliosis". *See* CT Scan, dated March 29, 2008, attached to the Defendant's Notice of Motion as Exhibit "G". The Defendant contends that the Plaintiff's testimony and the CT scan together establish that the Plaintiff had a prior injury to his back and a degenerative condition which interrupts the causation between the accident of January 9, 2008 and the Plaintiff's claimed injuries.

On March 12, 2010, the Plaintiff underwent a physical examination by Dr. Israel, the Defendant's orthopedic surgeon. Dr. Israel's examination of the Plaintiff's cervical and lumbar spine, tested using a goniometer, revealed normal ranges of motion. Dr. Israel's examination of the Plaintiff's right knee revealed the following:

"The gait is normal. There is no tenderness or effusion. The knee is in 7 degrees of valgus and muscle strength is graded at 5/5. The knee was found to be stable on valgus and varus stress, anterior stress at 30 and 90 degrees. The posterior drawer is negative. Range of motion of the knee is normal from 0 to 130 degrees of flexion (0 to 130 degrees being normal). The McMurray test was negative. There is no patella-femoral crepitus and the patella-femoral compression test is negative".

See Affirmed Report of Dr. Israel, dated March 12, 2010, attached to the Defendant's Notice of Motion as Exhibit "H". Dr. Israel's impression after his examination of the Plaintiff was resolved sprain of the cervical spine, resolved sprain of the lumbar spine

and resolved sprain of the right knee.

The Defendant also submits three affirmed reports of the Defendant's radiologist, Dr. Sapan Cohn, regarding the Plaintiff's cervical spine CT scan, lumbosacral spine CT scan and right knee CT scan. The CT scan of the Plaintiff's cervical spine revealed straightening of the normal cervical lordosis. Dr. Sapan Cohn opines that the reversal of the normal cervical lordosis may reflect muscular spasm or may be the result of the position of the Plaintiff's neck. She further opines that the Plaintiff's symptoms are consistent with degenerative disc disease.

According to Dr. Sapan Cohn's review of the lumbosacral spine CT, there is a metallic artifact in the L5-S1 region limiting the evaluation. Her impression was L5-S1 disc space narrowing which she attributes to degenerative disc disease. *See* Affirmed Report of Dr. Sapan Cohn, dated March 13, 2010, attached to the Defendant's Notice of Motion as Exhibit "I".

Dr. Sapan Cohn also reviewed Plaintiff's right knee CT scan. A review of same revealed minimal joint effusion which she states is a nonspecific finding and not indicative of trauma. *Id.*

Based on the proffered evidence by the Defendant, it is argued that the Plaintiff does not suffer from a serious injury which warrants the granting of summary judgment.

The proof submitted in opposition of the motion consists of the unsworn report of Wayne Wagner, D.C., a duly licensed chiropractor, the affirmed report of Dr. David

Khanan, a duly licensed physician, and the affirmed report of Dr. James Liguori, a duly licensed neurologist.

The unsworn report of Wayne Wagner will not be considered by this Court as it is not in admissible form. Dr. Wagner's report requires notarization, as chiropractors are not included in the class of medical professionals for which only an affirmation is required. *See* CPLR § 2106.

On January 12, 2009, the Plaintiff was examined by Dr. Khanan. Dr. Khanan conducted a computerized spinal range of motion exam of the Plaintiff's cervical spine on January 29, 2008 which revealed the following losses of range of motion: cervical flexion 32 degrees (50 degrees normal); cervical extension 37 degrees (60 degrees normal); left lateral extension 26 degrees (45 degrees normal); right lateral extension 21 degrees (45 degrees normal); left cervical rotation 63 degrees (80 degrees normal); right cervical rotation 68 degrees (80 degrees normal). The examination of the lumbar spine revealed moderate tenderness and moderate paraspinal muscle spasm.

Dr. Khanan concluded, within his professional medical opinion, that the Plaintiff's injuries were causally related to the motor vehicle accident of January 9, 2008. Notably, while Dr. Khanan acknowledged the Plaintiff suffered a prior gunshot wound in 2002 for which a bullet still remains in the Plaintiff's back, he does not address the prior injury in his report.

The Plaintiff also submits the report of Dr. James Liguori who conducted a

recent examination of the Plaintiff on October 4, 2010. Range of motion testing, conducted with an inclinometer, revealed limitation of the cervical spine flexion of 40 degrees, right rotation 30 degrees, normal at 45 degrees. Range of motion testing of the lumbar spine revealed flexion and extension at 60 degrees, normal at 90 degrees; lateral flexion left 20 degrees, normal 30 degrees. *See* Affirmed Report of Dr. Liguori, dated October 12, 2010, attached to the Plaintiff's Opposition as Exhibit "F".

On a motion for summary judgment the movant must establish his or her cause of action or defense sufficient to warrant a court directing judgment in its favor as a matter of law. *Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966 (1988); *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986), *Rebecchi v. Whitmore*, 172 A.D.2d 600 (2nd Dept. 1991). "The party opposing the motion, on the other hand, must produce evidentiary proof in admissible form sufficient to require a trial of material issues of fact". *Frank Corp. v. Federal Ins. Co.*, *supra*, at 967; *GTF Mktg. v. Colonial Aluminum Sales*, 66 N.Y.2d 965 (1985); *Rebecchi v. Whitmore*, *supra* at 601).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *Barr v. County of Albany*, 50 N.Y.2d 247 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 317 (2nd Dept. 1987).

In a personal injury action, a summary judgment motion seeking to dismiss the

complaint requires that a defendant establish a prima facie case that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d). *Gaddy v. Eyler*, 79 N.Y.2d 955 (1992). Upon such a showing, it becomes incumbent on the plaintiff to come forward with sufficient evidence in admissible form to demonstrate the existence of a question of fact on the issue. *Id.* The court must then decide whether the plaintiff has established a prima facie case of sustaining a serious injury. *Licari v. Elliot*, 57 N.Y.2d 230 (1983).

In support of a claim that the plaintiff has not sustained a serious injury, the defendant may rely either on the sworn statements of the defendant's examining physicians or the unsworn reports of the plaintiff's examining physicians. *See Pagano v. Kingsbury*, 182 A.D.2d 268 (2nd Dept. 1992). However, unlike the movant's proof, unsworn reports of the plaintiff's examining doctors or chiropractors are not sufficient to defeat a motion for summary judgment. *Grasso v. Angerami*, 79 N.Y.2d 813 (1991).

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 N.Y.2d 345 (2002), stated that a plaintiff's proof of injury must be supported by objective medical evidence, such as sworn MRI and CT scan tests. However, these sworn tests must be paired with the doctor's observations during the physical examination of the plaintiff. Unsworn MRI reports can also constitute competent evidence if both sides rely on those reports. *See Gonzalez v. Vasquez*, 301 A.D.2d 438 (1st Dept.

2003).

Conversely, even where there is ample proof of a plaintiff's injury, certain factors may nonetheless override a plaintiff's objective medical proof of limitations and permit dismissal of a plaintiff's complaint. Specifically, additional contributing factors such as a gap in treatment, an intervening medical problem or a pre-existing condition would interrupt the chain of causation between the accident and the claimed injury. *Pommels v. Perez*, 4 N.Y.3d 566 (2005).

Keeping the foregoing legal principles in mind, the Court will now turn to the merits of the Defendant's motion. The Court finds that the report of Dr. Israel is sufficient to establish the Defendant's prima facie case that the Plaintiff did not suffer a serious injury as a result of the accident on January 9, 2008. Dr. Israel reported no limitations in the range of motion of the Plaintiff's cervical and lumbar spine. He tested the Plaintiff's range of motion by use of a goniometer and based his findings upon medically approved guidelines. *See* Affirmed Report of Dr. Israel, dated March 12, 2010, attached to the Defendant's Notice of Motion as Exhibit "H". Further, Dr. Israel opined that based on his examination from an "orthopedic point-of-view", the claimant has no disability as a result of the accident. Accordingly, the Defendant sufficiently established that the Plaintiff did not suffer a serious injury under any of the categories enumerated in New York's Insurance Law.

It is now incumbent upon the Plaintiff to come forward with proof, in admissible form, establishing that an issue of material fact exists in order to defeat the

Defendant's motion. As mentioned earlier, the Court will not consider the unsworn "affidavit" of Chiropractor Wayne Wagner as it is not notarized, and thus, not in admissible form. *Grasso v. Angerami*, 79 N.Y.2d 813 (1991).

The reports of Dr. Khanan and Dr. Liguori are insufficient to raise an issue of fact. Dr. Khanan and Dr. Liguori referenced the prior gunshot injury sustained by the Plaintiff in 2001, stating that there was some limitation in the evaluation due to the metallic artifact and noted mild scoliosis. However, both doctors attributed the Plaintiff's current complaints and injuries to the accident of January 9, 2008, without adequately addressing the prior accident. Indeed, it is significant that the bullet which remains in the Plaintiff's body is lodged directly adjacent to his left L5-S1 neuroforamen. Notwithstanding, Dr. Liguori's diagnosis included lumbosacral radiculopathy secondary to disc disease at L5-S1 which he directly attributed to the accident of January 9, 2008. Dr. Liguori's conclusion that the Plaintiff's injuries were directly related to the motor vehicle accident is speculative, at best. The prior accident, which was not adequately explained by the Plaintiff's doctors, interrupts the chain of causation between the accident and the claimed injury. *See Pommels v. Perez*, 4 N.Y.3d 566 (2005).

The Plaintiff's testimony that the location of the bullet which remained in his back was not checked for approximately two and one half years preceding the Plaintiff's deposition and that the pain from the gunshot wounds only lasted for two months after the prior accident, is insufficient on its own to raise an issue of fact. *See Roman v. Fast Lane Car*

Service, Inc., 46 A.D.3d 535 (2nd Dept. 2007).

Finally, to prevail under the “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” category, a plaintiff must demonstrate through competent, objective proof, a “medically determined injury or impairment of a non-permanent nature” (Insurance Law § 5102[d]) “which would have caused the alleged limitations on the plaintiff’s daily activities”. *Monk v. Dupuis*, 287 A.D.2d 187, 191 (3rd Dept. 2001). A curtailment of the plaintiff’s usual activities must be “to a great extent rather than some slight curtailment”. *Licari v Elliott, supra* at 236.

The Defendant established her prima facie case that the Plaintiff’s usual and customary activities were not significantly curtailed for the first ninety out of one hundred eighty days following the accident by proffering evidence that the Plaintiff only missed two days of work as a result of the accident. The Plaintiff has failed to produce any proof in opposition that he sustained a medically determined injury or impairment of a non-permanent nature which prevented him from performing substantially all of the material acts which constitute his 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.

Based upon the foregoing, the Defendant’s motion for summary judgment

dismissing the complaint, is **GRANTED**.

This decision constitutes the decision and order of the court.

DATED: Mineola, New York
March 7, 2011



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