

Ahad v Romero

2011 NY Slip Op 30746(U)

March 16, 2011

Supreme Court, Nassau County

Docket Number: 006641-09

Judge: Arthur M. Diamond

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SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

-----x
ABDUL W. AHAD,

Plaintiff,

-against-

LIDIA E. ROMERO and MIGUEL A. BONILLA,
Defendants.

-----x

TRIAL PART: 14
NASSAU COUNTY

INDEX NO: 006641-09

MOTION SEQ. NO:1

SUBMIT DATE:02/14/11

The following papers having been read on this motion:

- Notice of Motion.....1**
- Opposition.....2**
- Reply.....3**

Motion by defendants for an order pursuant to CPLR §3212 granting them summary judgment dismissing the complaint on the grounds that plaintiff did not sustain a serious injury as defined by Insurance Law § 5102(d) is granted.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff in a motor vehicle accident on January 19, 2008 within a private parking lot on route 107, near its intersection with Lewis Street, in the town of Oyster Bay, Nassau County, New York.

In his bill of particulars, plaintiff alleges that he sustained the following injuries which are alleged to be permanent:

- Cervical muscle spasm
- cervical radiculopathy
- neck pain with upper extremity weakness
- lumbar radiculopathy
- right and left shoulder pains with numbness and tingling
- decreased range of motion of the cervical spine
- low back pain with lower extremity weakness
- subluxation of the cervical spine and lumbar spine
- headaches
- muscle spasm of the lumbar spine

decreased range of motion of the cervical and lumbar spine
mid back pain
dizziness
inability to sit or stand for prolonged periods of time
difficulty performing everyday activities such as bending, lifting, and
sitting
necessity for prescribed pain medications
necessity for physical therapy
sleep disturbances
cervical spine tenderness with restricted range of motion
lumbrosacral spine tenderness with restricted range of motion
necessity for extended physical therapy
unable to perform household chores
loss of enjoy of life

Plaintiff was involved in a prior motor vehicle accident in 2002 whereby he injured his neck, lower back, and shoulders. Defendant claims that the injuries plaintiff complains of in this accident of 2008 are not causally related to the 2008 motor vehicle accident, but rather are permanent injuries resulting from the 2002 accident.

Defendant has presented objective medical testing from 2002 in order to establish the preexisting injuries at the time of the 2008 accident. The MRI report dated February 25, 2002 of Dr. Richard J. Rizzuti indicated posterior disc bulge at L3-L4 and at L5-S1 impinging on the spinal canal. The report of August 29, 2002 indicated posterior disc bulges at C-5-6 and at C6-7 impinging on the anterior aspect of the spinal canal. (Notice of Motion, Exhibit H). Therefore, plaintiff had bulging discs with impingement six years prior to the subject accident. Further, The nerve conduction examination performed by Dr. Andre Spindler on November 4, 2002 revealed abnormal results. Dr. Spindler states that "any scores falling in the abnormal range recognize a possible entrapment of the nerves and indicate that a problem exists." (Notice of Motion, Exhibit I). The electromyogram exam performed by plaintiff's physician David B. Ross on November 20, 2002 after the prior accident was abnormal showing a mild right acute C6 radiculopathy. (Notice of Motion, Exhibit J). More recently, plaintiff's treating chiropractor, Ronda Bechenheimer, issued a report dated March 16, 2010 in which she opined that plaintiff suffered a permanent consequential disability with regard to his cervical and lumbar spine and is unable to perform his normal activities of daily living as a result of the accident on August 24, 2002. Defendant claims that the evidence

demonstrates that any permanent and consequential injuries and plaintiff's inability to perform activities of daily living were a result of the prior accident in August 2002 and not the subject accident on January 18, 2008.

As a result of the motor vehicle accident on January 19, 2008, plaintiff was taken to NUMC where x-rays were taken at the emergency room. The physician who interpreted the x-rays of his lumbar and thoracic spine reported no fractures, dislocation, or other significant bony abnormalities and reported that the intervertebral disc were normal in height.(Notice of Motion, Exhibit L). Defendants also submit plaintiff's deposition (Exhibit F) whereby plaintiff admitted that after the accident of 2008, plaintiff first sought treatment 2-3 days after the accident for physical therapy, and then received treatment for six to seven months thereafter. There is a gap in treatment by plaintiff's own admission. Finally, defendant submits an affirmed report from an orthopedic surgeon, Dr. Michael J. Katz, who examined plaintiff on April 9, 2010 and performed a range of motion tests using a goniometer as well as other clinical tests, and found that plaintiff's cervical strain with radiculitis, thoracolumbosacral strain, and bilateral shoulder contusion were all resolved. (Notice of Motion, Exhibit M).

Defendants conclude by stating that there is no medical evidence to support plaintiff's claim that he was unable to work for 8 months and was prevented from performing substantially all of his customary daily activities for at least 90 days of the last 180 days.

As a proponent of the summary judgment motion, defendants have the initial burden of establishing that plaintiff did not sustain a causally related serious injury under the permanent consequential limitation of use, significant limitation of use and 90/180-day categories. (*See Toure v Avis Rent a Car Sys.*, 98 NY2d 345, 352 [2002]). 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 plaintiff's range of motion, must compare any findings to those ranges of motion considered normal for the particular body part. (*Browdame v Candura*, 25 AD3d 747, 748 [2nd Dept. 2006]).

The defendants established their *prima facie* entitlement to judgment as a matter of law by submitting, *inter alia*, the affirmed medical report of Dr. Katz who examined the plaintiff in 2009 and found no significant limitations in the ranges of motion with respect to any of his claimed injuries, and no other new serious injuries within the meaning of Insurance Law § 5102(d) causally related to the collision in 2008. (*see Toure v Avis Rent a Car Sys.*, 98 NY2d 345, 352 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 956-957 [1992]). Defendant has shown the pre-existence of injuries claimed by plaintiff relating to the 2002 motor vehicle accident. Moreover, “[a] defendant who submits admissible proof that the plaintiff has a full range of motion, and that she or he suffers from no

disabilities causally related to the motor vehicle accident, has established a *prima facie* case that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d). (*Johnson v County of Suffolk*, 55 AD3d 875, 877 [2nd Dept. 2008], quoting from *Kearse v New York City Transit Authority*, 16 AD3d 45, 49-50 [2nd Dept. 2005])

The burden now shifts to plaintiff to demonstrate, by the submission of objective proof of the nature and degree of the injury, that he sustained a serious injury caused by the motor vehicle accident of 2008. (*Flores v Leslie*, 27 AD3d 220, 221 [1st Dept. 2006]).

In order to satisfy the statutory serious injury threshold, a plaintiff must have sustained an injury that is identifiable by objective proof; subjective complaints of pain do not qualify as serious injury within the meaning of Insurance Law § 5102(d). (*See Toure v Avis Rent A Car Sys., Inc.*, *supra*; *Scheer v Kioubek*, 70 NY2d 678, 679 [1987]; *Munoz v Hollingsworth*, 18 AD3d 278, 279 [1st Dept. 2005]).

Plaintiff must come forth with objective evidence of extent of alleged physical limitation resulting from injury and its duration. That objective evidence must be based upon a recent examination of the plaintiff (*Sham v B&P Chimney Cleaning*, 71 AD3d 978 [2nd Dept. 2010]; *Cornelius v Cintas Corp.*, 50 AD3d 1085 [2nd Dept. 2008]; *Moore v Edison*, 25 AD3d 672 [2nd Dept. 2008]; *Sharma v Diaz*, 48 AD3d 442 [2nd Dept. 2007]; *Amato v Fast Repair, Inc.*, 42 AD3d 477 [2nd Dept. 2007]) and upon medical proof contemporaneous with the subject accident. (*Perl v Meher*, 74 AD3d 930 [2nd Dept. 2010]; *Ferraro v Ridge Car Service*, 49 AD3d 498 [2nd Dept. 2008]; *Manning v Tejada*, 38 AD3d 622 [2nd Dept. 2007]; *Zinger v Zylberberg*, 35 AD3d 851 [2nd Dept. 2006]).

Where, as here, plaintiff sustained injury as a result of a prior accident, the plaintiff's expert must adequately address how plaintiff's current medical problems, in light of his past history, are causally related to the subject accident. (*Becerril v 501 Cab Corp.*, 50 AD3d 261, 262 [1st Dept. 2008]; *Style v Joseph*, 32 AD3d 212, 214 [1st Dept. 2006]).

Even where there is medical proof, when contributory factors interrupt the chain of causation between the accident and the claimed injury, summary dismissal of the complaint may be appropriate. (*Pommells v Perez*, 4 NY3d 566, 572 [2005]).

In opposition, plaintiff submitted an affidavit dated January 26, 2011 from her treating chiropractor, Ronda A. Bachenheimer which is deficient. The statements made by the chiropractor that the injuries are causally related to the 2008 accident are conclusory and purely speculative. In the absence of an explanation by the plaintiff's expert as to the significance of the degenerative findings and the prior accident, it would be sheer speculation to conclude that the accident of January 19, 2008 was the cause of plaintiff's injuries. (*Cardillo v Xenakis*, 31 AD3d 683, 684 [2nd Dept.

2006]; *Lorthe v Adeyeye*, 306 AD2d 252, 253 [2nd Dept. 2003]; *Lagois v Public Adminr. of Suffolk County*, 303 AD2d 644 [2nd Dept. 2003]; *Ginty v MacNamara*, 300 AD2d 624, 625 [2nd Dept. 2002]. She does not address the findings on the MRI's of plaintiff's cervical and lumbar spine, positive nerve conduction and EMG testing that were present six years before the 2008 accident. Further, the affidavit is not based upon a recent examination of plaintiff. There is also no explanation provided by the chiropractor as to why her affidavit of January 26, 2011 contradicts the statement made in her report of March 16, 2010 that plaintiff suffered a permanent consequential disability with regard to his cervical and lumbar spine and is unable to perform his normal activities of daily living as a result of the accident on August 24, 2002.

Finally, there is also no explanation provided as to plaintiff's gap in treatment after the 2008 accident. In order to survive summary judgment "a plaintiff who terminates therapeutic measures following the accident, while claiming 'serious injury,' must offer some reasonable explanation for having done so" (*Pommells v. Perez*, 4 NY3d 566, 574 [2005]).

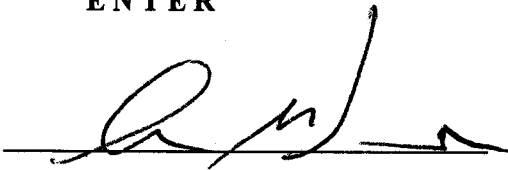
Plaintiff's submissions are insufficient to rebut the prima facie case established by defendants entitling them to summary judgment as a matter of law.

Settle Judgment on Notice.

This constitutes the decision and order of this Court.

DATED: March 16, 2011

ENTER



HON. ARTHUR M. DIAMOND

J. S.C.

ENTERED

MAR 21 2011

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**

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