

Cannon v Bravo

2011 NY Slip Op 31095(U)

April 8, 2011

Sup Ct, Nassau County

Docket Number: 15499/2009

Judge: Joel K. Asarch

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU: PART 17

-----X
CARISSMA CANNON,

Plaintiff,

- against -

BORTHA BRAVO,

Defendant.
-----X

DECISION AND ORDER

Index No. 15499/2009

Original Return Date: 11/17/10

Motion Seq. No.: 001

P R E S E N T :

HON. JOEL K. ASARCH,
Justice of the Supreme Court.

The following named papers numbered 1 to 6 were submitted on this Notice of Motion on January 29, 2011:

	<i><u>Papers numbered:</u></i>
Notice of Motion, Affirmation, and Affirmed Medical Reports:	1-3
Affirmation in Opposition and Affirmed Medical Reports:	4-5
Reply Affirmation:	6

The motion of the Defendant, BORTHA BRAVO, for summary judgment pursuant to C.P.L.R. 3212 dismissing the Complaint against him on the grounds that the Plaintiff CARISSMA CANNON has not met the "serious injury" threshold requirement of Insurance Law Section 5102(d) is decided as follows:

This action arises out of a motor vehicle that occurred on May 26, 2009 at approximately 7:30 p.m. at or near the intersection of Jerusalem Avenue and Uniondale Avenue, Hempstead, County of Nassau, State of New York. At the time of the accident, it is alleged that the Plaintiff CARISSMA CANNON was traveling eastbound in her motor vehicle on Jerusalem Avenue at or near the intersection with Uniondale Avenue when the motor vehicle operated by the Defendant and traveling in the same direction struck the Plaintiff's motor vehicle in the rear (Verified Bill of Particulars, ¶1-4).

As a result of the impact, the Plaintiff claims that she sustained serious injuries including lumbar and cervical radiculopathy; posterior disc bulges at L3/4 and L4/5 impinging on the anterior aspect of the spinal canal; posterior disc bulges at C4/5 and C5/6 impinging on the anterior aspect of the spinal canal; and left L5 radiculopathy (*Id.* at ¶9). The Plaintiff was transported from the accident scene *via* ambulance to the Emergency Room at Nassau University Medical Center, East Meadow, New York, where she was examined and discharged with Ibuprofen.

At the time of the accident, the 19-year old the Plaintiff was employed as a part-time sales associate at Walmart located in Uniondale, New York. The Plaintiff testified that she was out of work for “about two or three weeks” (Cannon Transcript, p. 68, 71), and further testified she has returned to all activities following the accident (*Id.* at 97); however, as a result of this accident, she claims to experience pain when she performs certain activities such as sitting for long periods of time, bending, and stretching (*Id.* at 105, 114).

In moving for summary judgment dismissal of the Complaint on the grounds that the Plaintiff has not sustained a serious injury within the meaning of the Insurance Law, the Defendant is not required to disprove any category of serious injury which has not been pled by the Plaintiff. Melino v. Lauster, 82 N.Y.2d 828 (1993). Moreover, even pled categories of serious injury may be disproved by the Defendant by means other than the submission of medical evidence, including the Plaintiff’s own testimony and her submitted exhibits. *See Michaelides v. Martone*, 186 A.D.2d 544 (2nd Dept. 1992); Covington v. Cinnirella, 146 A.D.2d 565, 566 (2nd Dept. 1989).

In this instance, the Plaintiff claims that her injuries fall within the following four (4) categories of the statute, to wit: (1) permanent loss of use of a body organ, member, function or system; (2) permanent consequential limitation of use of a body organ or member; (3) significant limitation of use of a body function or system; and (4) a medically determined injury or impairment

of a non-permanent nature which prevents her from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than ninety (90) days during the one hundred eighty (180) days immediately following the occurrence of the injury or impairment (Verified Bill of Particulars, ¶15).

Inasmuch as the Plaintiff has failed to allege and claim that she has sustained a “total loss of use” of a body organ, member, function or system, it is plain that her injuries do not satisfy the “permanent loss of use” category of Insurance Law Section 5102(d). *See Oberly v. Bangs Ambulance, Inc.*, 96 N.Y.2d 295 (2001).

Similarly, the Plaintiff’s claim that her injuries satisfy the 90/180 category of Insurance Law Section 5102(d) are both unsupported and, in fact, contradicted by her own testimony wherein she states that while she returned to work only three (3) weeks after the accident to perform different duties (*i.e.* from floor associate to phone operator), the working hours assigned by her employer actually *increased*. (Cannon Transcript, p. 21). Further, inasmuch as the Plaintiff has failed to claim or otherwise provide any evidence that she was “medically impaired” from doing any activities as a result of this accident for ninety (90) days within the first one hundred eighty (180) days following the accident, this Court determines that the Plaintiff has effectively abandoned her 90/180 claim for purposes of the initial burden of the Defendant for proof with regard to a threshold motion. *See Joseph v. Forman*, 16 Misc. 3d 743 (Sup. Ct. Nassau Co. 2007).

Based upon the foregoing, the Court will therefore restrict its analysis to the remaining two (2) categories as it pertains to the Plaintiff, to wit: permanent consequential limitation of use of a body organ or member and/or significant limitation of use of a body function or system.

In support of a claim that the Plaintiff has not sustained a serious injury, the Defendant may rely either upon the sworn statements of the Defendant’s examining physician or the unsworn reports

of the Plaintiff's examining physician. Pagano v. Kingsbury, 182 A.D.2d 268 (2nd Dept. 1992). It must be noted that a chiropractor is not one of the persons authorized by the C.P.L.R. to provide a statement by affirmation and thus, only a sworn statement by a chiropractor containing the requisite findings will suffice. C.P.L.R. 2106; *see also* Pichardo v. Blum, 267 A.D.2d 441 (2nd Dept. 1999).

When a Defendant's motion is sufficient to raise the issue of whether a "serious injury" has been sustained, the burden shifts and it is then incumbent upon the Plaintiff to oppose the relief sought by producing *prima facie* evidence in admissible form to support the claim for serious injury. Licari v. Elliot, 57 N.Y.2d 230 (1982). In order to be sufficient to establish a *prima facie* case of serious physical injury, the affirmation or affidavit must contain medical findings which are based on the physician's own examinations, tests, observations, and review of the record, rather than manifesting only the Plaintiff's subjective complaints. However, unlike the movant's proof, unsworn reports of the Plaintiff's examining doctor or chiropractor are insufficient to defeat a motion for summary judgment. Grasso v. Angerami, 79 N.Y.2d 813 (1991). Otherwise, a medical affirmation or affidavit which is based on a physician's personal examination and observations of the Plaintiff is an acceptable method to provide a doctor's opinion regarding the existence and extent of a Plaintiff's serious injury. *See* Reid v. Wu, 2003 WL 21087012, *citing* O'Sullivan v. Atrium Bus Co., 246 A.D.2d 418 (1st Dept. 1998).

Essentially, in order to satisfy the statutory serious injury threshold, the legislature requires objective proof of an injury to a Plaintiff. In Toure v. Avis Rent A Car Systems, Inc., the Court of Appeals stated that the Plaintiff's proof of injury must be supported by objective medical evidence, such as MRI and CT scan tests. Toure v. Avis Rent A Car Systems, Inc., 98 N.Y.2d 345, 353 (2002). Unsworn MRI reports are not competent evidence unless both sides rely on those reports. Gonzalez v. Vasquez, 301 A.D.2d 438 (1st Dept. 2003). However, even the MRI and CT scan tests

[* 5]
and reports must be paired with the doctor's observations during his physical examination of the Plaintiff. Toure v. Avis Rent A Car Systems, Inc., *supra*.

On the other hand, even where there is ample objective proof of the Plaintiff's injury, the Court of Appeals held in Pommells v. Perez, that certain factors may override a Plaintiff's objective medical proof of limitations and nonetheless permit dismissal of the Complaint. Pommells v. Perez, 4 N.Y.3d 566 (2005). Specifically, the Court of Appeals held that additional contributing factors, such as gap in treatment, an intervening medical problem, or a preexisting condition, would interrupt the chain of causation between the accident and the claimed injury. Pommells v. Perez, *supra*. While "the law surely does not require a record for needless treatment in order to survive summary judgment, where there has been a gap in treatment or cessation of treatment, a plaintiff must offer some reasonable explanation for the gap in treatment or cessation of treatment" *Id.*; *see also* Neugebauer v. Gill, 19 A.D.3d 567 (2nd Dept. 2005)).

Under the no-fault statute, to meet the threshold significant limitation of use of a body function or system or permanent consequential limitation, the law requires that the limitation be more than minor, mild, or slight, and that the claim be supported by medical proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition. Licari v. Elliot, *supra*; Gaddy v. Eyler, 79 N.Y.2d 955 (1992); Scheer v. Koubek, 70 N.Y.2d 678 (1987). A minor, mild or slight limitation shall be deemed "insignificant" within the meaning of the statute. Licari v. Elliot, *supra*; Grossman v. Wright, 268 A.D.2d 79, 83 (2nd Dept. 2000).

When a claim is raised under the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, an expert's designation of a numeric percentage of the Plaintiff's loss of range of motion is acceptable in order to prove the extent or degree of the physical limitation. Toure v. Avis Rent A Car Systems, Inc.,

supra. In addition, an expert's qualitative assessment of a Plaintiff's condition is also probative, provided that: (1) the evaluation has an objective basis; and (2) the evaluation compares the Plaintiff's limitations to the normal function, purpose, and use of the affected body organ, member, function or system. *Id.*

The Court will examine the merits of the pending motion of the Defendant within these guidelines.

The Defendant submits, *inter alia*, the affirmed report of Dr. Robert Israel, M.D., Board Certified Orthopedic Surgeon, who performed an independent orthopedic examination of the Plaintiff on August 6, 2010; the affirmed report of Dr. Maria Audrie DeJesus, M.D., Diplomate American Board of Neurology and Psychiatry, who performed an independent neurologic examination of the Plaintiff on August 19, 2010; and the affirmed reports of Dr. Stephen W. Lastig, M.D., Diplomate, American Board of Radiology, who reviewed the MRI studies of the Plaintiff's lumbar and cervical spine on June 12, 2009.

Dr. Lastig avers that he personally reviewed the actual MRI films of the Plaintiff's lumbar and cervical spine both dated June 12, 2009 (*see Dioguardi v. Weiner*, 288 A.D.2d 253 (2nd Dept. 2001); *Beyel v. Console*, 25 A.D.3d 636 (2nd Dept. 2006)), and reports an opinion as to the causality of his findings (*see Collins v. Stone*, 8 A.D.3d 321 (2nd Dept. 2004)] *Betheil-Spitz v. Linares*, 276 A.D.2d 732 (2nd Dept. 2000)). Such reports therefore constitute competent medical evidence in support of the Defendant's motion for summary judgment. In that regard, Dr. Lastig notes the following with regard to the MRI study of the Plaintiff's lumbar spine:

IMPRESSION:

Normal MRI study of the lumbar spine.

SUMMARY:

In my opinion, this is a normal MRI study of the lumbar spine. Therefore, in my opinion, there are no findings on this study which are casually related to the reported accident of 5/26/2009.

Similarly, Dr. Lastig notes the following with regard to the MRI study of the Plaintiff's cervical spine:

IMPRESSION:

There is disc desiccation consistent with degenerative disc disease at C4-C5. No focal disc herniations or annular bulges are identified. There is no evidence of cord compression or foraminal stenosis.

SUMMARY:

The study was performed adequately and is technically satisfactory.

The study demonstrates evidence of degenerative disc disease with disc desiccation at the C4-C5 level. Otherwise, in my opinion, this MRI study for the cervical spine is unremarkable. Therefore, in my opinion, there are no findings on this study which are casually related to the reported accident of 5/26/2009. I see no evidence of fracture, subluxation or focal disc herniation.

Taken together with Dr. Israel's and Dr. DeJesus's reports, both of whom essentially conclude that based upon their examinations of the Plaintiff that: "the claimant has no disability as a result of the accident of record", this Court finds that the Defendant has satisfied his *prima facie* burden of judgment as a matter of law. See Franchini v. Palmieri, 1 N.Y.3d 536 (2003); Luciano v. Luchsinger, 46 A.D.3d 634 (2nd Dept. 2007). Having made a *prima facie* showing that the injured Plaintiff did not sustain a "serious injury" within the meaning of the statute, the burden shifts to the Plaintiff to produce evidence to overcome the Defendant's submissions by demonstrating a triable issue of fact that a "serious injury" was sustained. Pommells v. Perez, *supra*; see also Grossman v. Wright, *supra* at 84.

In opposition, the Plaintiff submits, *inter alia*, the affirmed reports of Dr. Richard L. Parker, M.D. who examined the Plaintiff on June 2, 2009 (a week after the accident) and again on November 1, 2010, a year and a half after the accident; the affirmed MRI reports of Dr. Richard Rizzutti, M.D.,

who affirms to the accuracy of the MRI reports of Plaintiff's cervical spine and lumbosacral spine; the sworn affidavit of Walter E. Mendoza, D.C., a chiropractor who annexes his unsworn, unaffirmed EMG report of the Plaintiff dated July 2, 2009; the affirmed report of Dr. James M. Liguori, D.O. who examined the Plaintiff on October 7, 2009 and again on November 4, 2010; and a letter by Dr. James M. Liguori, D.O., dated December 16, 2010, explaining the gap in treatment.

Initially, it is noted that Dr. Rizzutti neither reports an opinion as the causality of his findings, nor pairs his findings with a physical examination. Collins v. Stone, supra; Betheil-Spitz v. Linares, supra. Therefore, his MRI reports do not constitute competent medical evidence in opposition to the motion.

The report of Dr. Mendoza is equally insufficient to raise a triable issue of fact. Specifically, Dr. Mendoza claims to have performed a neurological examination and appears to have read nerve conduction studies performed on the Plaintiff; however, the papers fail to demonstrate how a chiropractor (unlike a neurologist) can perform and/or interpret the studies of a neurological exam. Therefore, Dr. Mendoza's findings will not be considered by this Court.

With respect to Dr. Parker's examination of the Plaintiff on June 2, 2009, while this Court is mindful that Dr. Parker's examination revealed limitations in the Plaintiff's cervical and lumbar spine, his assessment is:

ASSESSMENT: Cervical Spine Herniated Nucleus Pulposus.
 Cervical Spine Myofascial Strain/CS Disorder
 Lumbar Spine Herniated Nucleus Pulposus
 Lumbar Spine Myofascial Strain

Similarly, while his examination of the Plaintiff on November 1, 2010, again reveals limitations in the Plaintiff's cervical and lumbar spine, his assessment is:

ASSESSMENT: Cervical Spine Cervicalgia
 Cervical Spine Herniated Nucleus Pulposus

Lumbar Spine Lumbago
Lumbar Spine Herniated Nucleus Pulposus.

Based upon these assessments, this Court is not convinced that the limitations found by Dr. Parker are nothing more than mild, minor or slight limitations. See Licari v. Elliott, *supra*. Furthermore, taken in conjunction with the fact that a review of Dr. Parker's reports fails to set forth what objective testing was used to determine his range of motion measurements, his opinions cannot be considered. Failure to indicate the objective test performed to measure the loss of range of motion is contrary to the requirements of Toure v. Avis Rent a Car Systems, Inc., *supra*, as it devalues the expert's opinion as to any purported loss and prevents consideration by the Court. *Id*; Powell v. Alade, 31 A.D.3d 523 (2nd Dept. 2006). Finally, this Court cannot overlook the fact that there is also an unexplained gap between the June 2, 2009 examination and November 1, 2010 examination.

Dr. Liguori's October 7, 2009 report fails to include any numerical range of motion findings. Both the Defendant, who seeks to make a *prima facie* showing, and the Plaintiff, who attempts to raise a triable issue, must provide quantitative or numerical range of motion findings, and compare those findings to "normal". Knopf v. Sinetar, 69 A.D.3d 809, 810 (2nd Dept. 2010); Wallace v. Adam Rental Transp., Inc., 68 A.D.3d 857, 858 (2nd Dept. 2009). "Absent such a comparative quantification ... of findings, it cannot be concluded that the range of motion in the plaintiff's cervical and lumbar spine was normal, or that any limitations were mild, minor or slight as to be considered insignificant within the meaning of the no-fault statute." McKenzie v. Redl, 47 A.D.3d 775, 777 (2nd Dept. 2008).

While Dr. Liguori's report based upon an examination of the Plaintiff on November 13, 2009 does note comparative range of motion testing, it nevertheless fails to set forth what objective testing was used to determine such measurements. See Toure v. Avis Rent a Car Systems, Inc., *supra*;

Powell v. Alade, supra.

Therefore, in light of the Plaintiff's failure to raise any triable issue of fact, the Defendant is entitled to summary judgment dismissal of the Complaint.

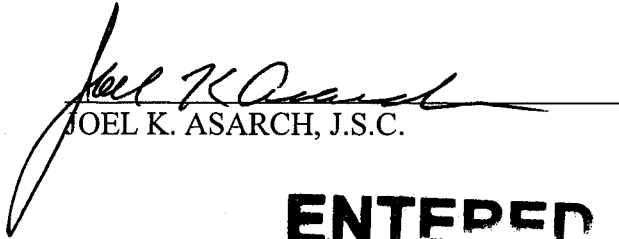
Accordingly, after due deliberation, it is

ORDERED, that the motion of the Defendant pursuant to C.P.L.R. 3212 seeking summary judgment relief as against the Plaintiff CARISSMA CANNON based upon said Plaintiff failure to prove a serious injury within the meaning of Insurance Law Section 5102(d) regarding a significant limitation of use of a body function or system or permanent consequential limitation of a body function or system is hereby **granted**, and the Complaint is dismissed.

The foregoing constitutes the Decision and Order of this Court.

Dated: Mineola, New York
April 8, 2011

ENTER :


JOEL K. ASARCH, J.S.C.

Copies mailed to:
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