Colon v Henmings
2011 NY Slip Op 32220(U)
August 5, 2011
Supreme Court, Suffolk County
Docket Number: 08-25459
Judge: Thomas F. Whelan
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SHORT FORM ORDER

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INDEX No. 08-25459
CAL. No. 10-02509MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 3-11-11
ADJ. DATE 5-16-11
Mot. Seq. # 002 - MG
003 - XMG; CASE DISP

JASON S. COLON,

Plaintiff,

- against -

ESTAFANIA P. HENMINGS, EDUARDO P. HENMINGS and DANNY GONZALEZ,

Defendants.

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Upon the following papers numbered 1 to 24 read on this motion and cross motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 10 ; Notice of Cross Motion and supporting papers 11 - 15 ; Answering Affidavits and supporting papers 16 - 22 ; Replying Affidavits and supporting papers 23 - 24 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Danny Gonzalez for summary judgment dismissing the complaint against him is granted; and it is further

ORDERED that the cross motion by defendants Estafania P. Henmings and Eduardo P. Henmings for summary judgment dismissing the complaint against them is granted.

In this action, the plaintiff seeks to recover damages for personal injuries arising from a three-car motor vehicle accident, which occurred in Kings County, New York on November 3, 2005. The accident purportedly occurred when a vehicle owned by defendant Eduardo P. Henmings and operated by defendant Estafania P. Henmings (hereinafter the Henmings defendants) collided with a vehicle

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owned and operated by defendant Danny Gonzalez and with the plaintiff's vehicle. At the time of the incident, the plaintiff was sitting inside of his vehicle, which was parked in a parking spot on the side of the roadway. By way of the bill of particulars, the plaintiff alleges that he sustained various serious and permanent injuries as a result of the accident, including cervical trauma; cervical pain; thoracic trauma; thoracic pain; lumbar trauma; lumbar pain; L5-S1 disc herniation; bilateral L5-S1 radiculopathy; decreased range of motion in the lumbar spine; left knee pain; left knee trauma; buttocks pain; buttocks trauma; and loss of quality of life. The plaintiff alleges that all of the aforementioned injuries are permanent in nature and duration, and were caused, and/or aggravated, by the subject accident. He alleges that, following the accident, he was confined to his home and bed for one day. The plaintiff alleges that these injuries are serious within the meaning of the Insurance Law in that he sustained a permanent loss of use of a body organ, member, function or system; a permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; and a medically determined injury or impairment of a non-permanent nature which prevented him from performing substantially all of the material acts which constituted his usual or customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment. The Henmings defendants and defendant Gonzalez each assert a cross claim for contribution and/or indemnification against the other.

Defendant Gonzalez now moves for summary judgment dismissing the complaint against him on the ground that the plaintiff did not sustain a serious injury as defined by Insurance Law § 5102 (d). The Henmings defendants cross-move for summary judgment dismissing the action against them on the same ground.

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 constitutes 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" (Insurance Law § 5102[d]). The Court of Appeals has held that the issue of whether a claimed injury falls within the statutory definition of a "serious injury" is a question of law for the courts in the first instance, which may properly be decided on a motion for summary judgment (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Charley v Goss***, 54 AD3d 569, 863 NYS2d 205 [1st Dept 2008] *affd* 12 NY3d 750, 876 NYS2d 700 [2009]).

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 925 [1980]). In a motor vehicle case, a defendant moving for summary judgment on the issue of whether the plaintiff sustained a serious injury has the initial burden of presenting competent evidence establishing that the injuries do not meet the threshold (*see* ***Pagano v Kingsbury***, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). A defendant may satisfy this

burden by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim (***Grossman v Wright***, 268 AD2d 79, 707 NYS2d 233 [2d Dept 2000]). Once this showing has been made the burden shifts to the plaintiff to produce evidentiary proof in admissible form sufficient 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 (*see* ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Grossman v Wright***, *supra*; ***Pagano v Kingsbury***, *supra*; *see also* ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, *supra*).

In support of his motion for summary judgment, defendant Gonzalez submits, *inter alia*, the affirmed report of Paul Miller, M.D., the affirmed reports of Sheldon Feit, M.D., and the plaintiff's deposition testimony. In support of their cross motion for summary judgment, the Henmings defendants incorporate by reference, and rely upon, the evidence and arguments made by defendant Gonzalez on his motion.

As is relevant to this motion, Dr. Miller performed an independent orthopedic medical evaluation on the plaintiff on January 4, 2010. He examined the plaintiff's cervical spine, thoracic spine, lumbar spine and knees, and concluded that there was no evidence of orthopedic disability. He measured the range of motion of the plaintiff's cervical spine, lumbar spine and knees, compared his findings to normal values, and found the plaintiff's range of motion to be either normal, or greater than normal, in all respects. He performed objective tests, including distraction, Soto-Hall, Fabere, Lachman, McMurray, patella tracking and Apley, and obtained negative results. Dr. Miller concluded that the plaintiff had sustained sprains/strains of the cervical spine, thoracic spine, lumbar spine, and left knee, and that all such injuries had resolved.

The affirmed report and addendum report of Sheldon Feit, M.D., aver that he performed an independent radiology review of an MRI examination performed on the plaintiff's lumbosacral spine on December 21, 2005, which was just under seven weeks following the date of the accident. According to Dr. Feit, review of the plaintiff's lumbosacral MRI scan revealed pre-existing degenerative changes. Dr. Feit stated that the MRI depicted findings which were not post-traumatic in nature, and were unrelated to the subject accident.

During his deposition, the plaintiff testified that he first started feeling pain and sought medical attention a few hours after the incident. He went to Brookhaven Hospital, was examined and released. The following day he went to see a chiropractor, Dr. Vincent Randazzo, and complained of pain in his middle and lower back, as well as numbness and tingling in both of his legs down to his feet. He treated with Dr. Randazzo for approximately three months. In his last week of treatment, he was feeling less stiffness and tingling in his back than during his first week of treatment. The plaintiff testified that he treated with a neurologist, Dr. Mendelsohn, on two occasions with respect to the injuries he sustained in the subject accident. Dr. Mendelsohn told him that he did not need surgery and recommended that, for the long term, he exercise and stretch his back. The plaintiff did not treat with any other doctors or chiropractors for his injuries. The plaintiff testified that he never experiences any pain in his buttocks as a result of the subject accident and never received any treatment to his knees. The plaintiff testified that he did not miss any work following the accident that is attributable to the injuries which he purportedly

sustained. According to the plaintiff, the tingling in his middle and lower back has ceased, but he continues to feel stiffness. The plaintiff admitted that there are no activities that he can no longer do because of the complained of injuries, but testified that he has difficulty lifting weights and playing golf.

The evidence submitted was sufficient to establish the defendants' *prima facie* entitlement to summary judgment dismissing the complaint by demonstrating that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) (*see* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]; ***Gaddy v Eyler***, *supra*; ***Kreimerman v Stunis***, 74 AD3d 753, 902 NYS2d 180 [2d Dept 2010]; ***Euvino v Rauchbauer***, 71 AD3d 820, 897 NYS2d 196 [2d Dept 2010]; ***Casella v New York City Transit Auth.***, 14 AD3d 585, 787 NYS2d 883 [2d Dept 2005]; ***Hodges v Jones***, 238 AD2d 962, 661 NYS2d 159 [2d Dept 1997]; ***Pagano v Kingsbury***, *supra*). In opposition to the defendants' *prima facie* showing, it was incumbent upon the plaintiff to demonstrate, by the submission of objective proof of the nature and degree of the injury, that he did sustain a "serious" injury as a result of the instant accident, or that there are questions of fact as to whether he sustained such an injury (*see* ***Toure v Avis Rent A Car Sys.***, *supra* at 350). The evidence submitted by the plaintiff failed to meet this burden.

In opposition to the motion and cross motion, the plaintiff relies on the affirmation of Dr. Frederic Mendelsohn, the chiropractic report of Paul Priolo, D.C., and his own affidavit. Dr. Mendelsohn's affirmed report was insufficient to raise a triable issue of fact as to whether the plaintiff sustained a serious injury as a result of the subject accident. Contrary to the plaintiff's contention, it is well settled that the mere existence of a herniated or bulging disc is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the injury and its duration (*see* ***Catalano v Kopmann***, 73 AD3d 963, 900 NYS2d 759 [2d Dept 2010]; ***Caraballo v Kim***, 63 AD3d 976, 882 NYS2d 211 [2d Dept 2009]; ***Sealy v Riteway-1, Inc.***, 54 AD3d 1018, 865 NYS2d 129 [2d Dept 2008]; ***Kilakos v Mascera***, 53 AD3d 527, 862 NYS2d 529 [2d Dept 2008]; ***Waring v Guirguis***, 39 AD3d 741, 834 NYS2d 290 [2d Dept 2007]). Dr. Mendelsohn fails to provide competent objective medical evidence revealing the existence of a limitation in the plaintiff's spine that is either contemporaneous with the subject accident (*see* ***Torchon v Oyezole***, 78 AD3d 929, 910 NYS2d 662 [2d Dept 2010]; ***Posa v Guerrero***, 77 AD3d 898, 911 NYS2d 82 [2d Dept 2010]; ***Mancini v Lali NY, Inc.***, 77 AD3d 797, 909 NYS2d 141 [2d Dept 2010]; ***Vickers v Francis***, 63 AD3d 1150, 883 NYS2d 77 [2d Dept 2009]) or based on a recent examination of the plaintiff (*see* ***Messina v Rohr***, 80 AD3d 676, 914 NYS2d 915 [2d Dept 2011]; ***Ciancio v Nolan***, 65 AD3d 1273, 885 NYS2d 767 [2d Dept 2009]). In this regard, Dr. Mendelsohn's report only provides that he performed an examination of the plaintiff on an unspecified date, which was more than ninety days after the subject accident. In any event, Dr. Mendelsohn's report was insufficient to raise an issue of fact as to whether the plaintiff sustained a permanent or significant injury to his lumbar spine as a result of the subject accident, because he fails to quantify the results of his range-of-motion tests or to provide any other objective testing to support his finding that the plaintiff had decreased ranges of motion in his lumbar spine (*see* ***Simanovskiy v Barbaro***, 72 AD3d 930, 899 NYS2d 324 [2d Dept 2010]). Moreover, Dr. Mendelsohn fails to address the findings of the defendant's expert radiologist, who opined that the plaintiff's lumbar spine injuries were degenerative and unrelated to the subject accident (*see* ***Singh v City of New York***, 71 AD3d 1121, 898 NYS2d 218 [2d Dept 2010]; ***Larson v Delgado***, 71 AD3d 739, 897 NYS2d 167 [2d Dept 2010]; ***Rodriguez v Grant***, 71 AD3d 659, 896 NYS2d 143 [2d Dept 2010];

Lopez v Abdul-Wahab, 67 AD3d 598, 889 NYS2d 178 [1st Dept 2009]).

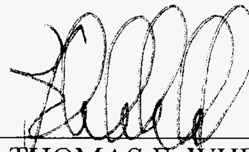
Dr. Priolo's chiropractic examination report is, likewise, insufficient to raise a triable issue of fact as to whether the plaintiff sustained a serious injury as a result of the subject accident. At the outset, this report does not constitute competent evidence, because it was not submitted in affidavit form (*see* ***Pierson v Edwards***,77 AD3d 642, 909 NYS2d 726 [2d Dept 2010]; ***McMullin v Walker***, 68 AD3d 943, 892 NYS2d 128 [2d Dept 2009]; ***Casco v Cocchiola***, 62 AD3d 640, 878 NYS2d 409 [2d Dept 2009]; ***Kunz v Gleeson***, 9 AD3d 480, 781 NYS2d 50 [2d Dept 2004]; ***Doumanis v Conzo***, 265 AD2d 296, 696 NYS2d 201 [2d Dept 1999]). In any event, this report is insufficient to raise a triable issue of fact as to whether the plaintiff sustained a serious injury to his lumbar spine as a result of the subject accident as it is not based on either a contemporaneous or recent examination of the plaintiff (*see* ***Messina v Rohr***, *supra*; ***Torchon v Oyezole***, *supra*; ***Posa v Guerrero***, *supra*; ***Mancini v Lali NY, Inc.***, *supra*; ***Ciancio v Nolan***, *supra*; ***Vickers v Francis***, *supra*). Dr. Priolo also fails to address the findings that the plaintiff had a pre-existing degenerative condition in his lumbar spine and states, "it is difficult to assess" the plaintiff's pre-motor vehicle condition because he did not examine him prior. In addition, Dr. Priolo's report notes that the plaintiff did not miss any time from work as a result of the accident, was currently working at the time of the examination, and had no disability. Although recommending that the plaintiff undergo chiropractic care twice a week for six weeks, Dr. Priolo concludes that the plaintiff was not in need of massage therapy, household help, or special transportation.

The affidavit of the plaintiff was insufficient to raise a triable issue of fact (*see* ***Villante v Miterko***, 73 AD3d 757, 901 NYS2d 311 [2d Dept 2010]; ***Singh v City of New York***, *supra*; ***Luna v Mann***, 58 AD3d 699, 872 NYS2d 467 [2d Dept 2009]).

Lastly, the plaintiff failed to submit any competent medical evidence to support a claim that he was unable to perform substantially all of his daily activities for not less than 90 of the 180 days immediately following the subject accident (*see* ***Collado v Abouzeid***, 68 AD3d 912, 890 NYS2d 326 [2d Dept 2009]; ***Vickers v Francis***, *supra*; ***Amato v Fast Repair Inc.***, 42 AD3d 477, 840 NYS2d 394 [2d Dept 2007]).

Accordingly, the motion by defendant Gonzalez and the cross motion by the Henmings defendants for summary judgment dismissing the complaint, is granted. In light of the foregoing determination, the cross claims for contribution and/or indemnification are dismissed as academic.

Dated: 8/5/11



THOMAS F. WHELAN, J.S.C.