

Bhatti v Hayes

2011 NY Slip Op 32981(U)

November 3, 2011

Supreme Court, Nassau County

Docket Number: 17466-09

Judge: Vito M. DeStefano

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SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,
Justice

TRIAL/IAS, PART 19
NASSAU COUNTY

GHULAM BHATTI and KINZA BHATTI,

Decision and Order

Plaintiffs,

**MOTION SUBMITTED:
August 26, 2011
MOTION SEQUENCE:01
INDEX NO. 17466-09**

-against-

SHEILA R. HAYES and NALASIA Q. SPRUILL,

Defendants.

The following papers and the attachments and exhibits thereto have been read on this motion:

Notice of Motion	1
Affirmation in Opposition	2
Reply Affirmation	3

In an action to recover damages for personal injuries sustained in a motor vehicle accident on May 25, 2009, the Defendants move for an order pursuant to CPLR 3212 granting them partial summary judgment dismissing the first cause of action in the complaint on the ground that the Plaintiff Ghulam Bhatti ("Bhatti") did not sustain a serious injury as that term is defined under Insurance Law § 5102(d).

For the reasons that follow, the Defendants' motion for partial summary judgment is granted.

In support of their motion, the Defendants submitted, *inter alia*, the deposition testimony of Bhatti, the hospital record from Franklin Hospital, the affirmed medical report of Dr. Isaac

Cohen, a Board Certified orthopedist who performed an independent orthopedic evaluation of Bhatti on February 16, 2011, and four affirmations of radiologist Dr. Melissa Sapan Cohn.

Bhatti testified that he went to the emergency room at Franklin Hospital the day after the accident because he was in pain (Ex. "F" to Motion at p 45). While there, he underwent a physical examination as well as x-ray testing. The examination revealed normal range of motion testing in all four extremities as well as normal musculoskeletal reflexes, and a supple neck.¹ Moreover, x-ray testing indicated that there was "no evidence of fracture or dislocation", that Bhatti's vertebral bodies were "intact", the "disc spaces are not narrowed", there was "normal cervical lordosis"² and that there was "unremarkable radiographic examination of the cervical spine" (Ex. "E" to Motion).

Dr. Cohen indicated in his report that examination and testing of Bhatti's cervical and lumbar spines, right shoulder and right knee revealed normal ranges of motion and were "completely unremarkable with a completely normal functional capacity" and that Bhatti's complaints could not be corroborated by the examination (Ex. "G" to Motion). Dr. Cohen also reviewed MRI examinations taken of Bhatti's shoulder, knee, and lumbar and cervical spines.³ While the MRIs indicated herniated discs at L1-2, C3-4, and C6-7, Dr. Cohen opined that there was "no neural compromise" and "no clinical significance" to the herniations (Ex. "G" to Motion). Dr. Cohen concluded that Bhatti was:

[I]n good health with a completely normal functional capacity of the cervical and lumbosacral spine areas, as well as the upper and lower extremities without any evidence of active sequelae or permanency. The injuries documented in the medical records provided are consistent with soft tissue complaints. The prognosis of these soft tissue injuries is excellent with complete resolution of symptoms as occurred in this claimant. It is my opinion, based on today's examination that the claimant has reached pre-accident status, has no functional restrictions, disability or sequelae of any nature (Ex. "G" to Motion).

Dr. Cohn's review of the MRI taken of Bhatti's cervical spine revealed a disc herniation

¹ A supple neck is one that is mobile and not rigid.

² An x-ray finding of "normal cervical lordosis" is evidence that Bhatti did not have spasm in the neck.

³ The MRI of Bhatti's cervical spine and right knee were performed on July 11, 2009; the MRI of Bhatti's right shoulder was performed on August 4, 2009; and the MRI of Bhatti's lumbosacral spine was performed on September 12, 2009.

at C5-6 but this herniation, according to Cohn, “is associated with underlying degenerative changes suggesting that it is chronic in nature. There is no evidence of an acute traumatic injury on the submitted study” (Ex. “H” to Motion). In this regard, Cohn noted there was disc desiccation throughout the cervical spine, which is indicative of the commencement of degenerative disc disease.⁴ Dr. Cohn also found that there was straightening of the normal cervical lordosis which may be attributed to muscular spasm or, alternatively, may be the result of the positioning of Bhatti’s neck at the time the MRI was performed (Ex. “H”).

With respect to Dr. Cohn’s review of the MRI performed on Bhatti’s lumbar spine, Dr. Cohn opined that Bhatti had “degenerative changes at the L1-2 level” and that there was “no evidence for disc herniation or acute traumatic injury” (Ex. “I” to Motion).

After a review of the MRI taken of Bhatti’s shoulder, Dr. Cohn opined that Bhatti had mild degenerative changes in the right shoulder and that there was no evidence of acute traumatic injury (Ex. “J” to Motion). Dr. Cohn had a similar conclusion with respect to Bhatti’s right knee in addition to a finding that was no evidence of a meniscal tear (Ex. “K” to Motion).

Although the Defendants’ medical affirmations contain herniations,⁵ the existence of same is not evidence of a serious injury without objective evidence of the extent of physical limitation resulting therefrom and its duration (*Ferber v Madorran*, 60 AD3d 725 [2d Dept 2009]; *Pompey v Carney*, 59 AD3d 416 [2d Dept 2009]). Accordingly, the Defendants’ medical affirmations coupled with the hospital report, demonstrate that Bhatti did not suffer a significant limitation of use of a body function or system or a permanent consequential limitation or use of a body organ or member (*Walker v Greatheart*, 50 AD3d 893 [2d Dept 2008]).

Furthermore, Bhatti testified at his deposition that he attempted to go back to work a couple of weeks after the accident but his prior employer as well as other employers with whom he sought work were not hiring due to the economy (Ex. “F” to Motion at pp 21-24).⁶ Bhatti also testified that his reason for not going back to school was unrelated to the injuries he sustained from the accident (Ex. “F” to Motion at p 19). Bhatti’s testimony negates any suggestion that, as a result of the subject accident, he was unable to perform substantially all of his usual and

⁴ Disc desiccation indicates that the disc has dried out losing its normal water content.

⁵ Dr. Cohen observed herniations at L1-2, C3-4 and C6-7. Dr. Cohn noted disc herniation at C5-6 and found no herniation at L1-2.

⁶ Bhatti’s deposition testimony contradicts his bill of particulars wherein he indicated that he was “totally incapacitated from employment for 2 days and then returned but was forced to quit due to his injuries” (Ex. “D” to Motion at ¶ 6).

customary activities for not less than 90 days of the 180 following the accident.⁷

Based on the foregoing, the Defendants have demonstrated their *prima facie* entitlement to judgment as a matter of law that Bhatti did not sustain a serious injury.

Bhatti's Opposition

Contrary to Bhatti's contention, the Defendants' doctors addressed Bhatti's disc pathology and established that Bhatti's injuries were not causally related to the May 25, 2009 accident. Specifically, Dr. Cohen stated that, notwithstanding the herniations, there was "no neural compromise" and "no clinical significance." Also, Dr. Cohn stated in her reports that Bhatti had mild degenerative changes in his shoulder and knee and degenerative disc disease in his spine, none of which were caused by an "acute traumatic injury".

Bhatti's submissions in opposition are also insufficient to raise an issue of fact as to whether he sustained a serious injury. Bhatti's submissions include, *inter alia*, his own affidavit as well as the affirmations of Dr. Surendranath Reddy, Dr. Arden Kaisman, and Dr. Mark Shapiro.

Bhatti first presented himself to Dr. Reddy on June 29, 2009 (five weeks after the subject accident) for an orthopedic evaluation.⁸ Range of motion testing on that day revealed limited ranges of motion in Bhatti's right knee and lumbar and cervical spines and that such limitations were causally related to the May 25, 2009 accident (Ex. "B" to Opposition at ¶¶ 2-5).

Bhatti was reevaluated by Dr. Reddy on July 22, 2009, at which time Bhatti disclosed that he had been involved in another accident on June 7, 2009 - just two weeks after the subject accident - but that he had "only injured his right shoulder and did not injure any other parts of his

⁷ Bhatti stated in his bill of particulars that he was not confined to bed or home after the accident (Ex. "D" to motion at ¶ 6) and similarly testified at his deposition that he was not confined to his house as a result of the accident (Es. "F" at p 74).

⁸ Bhatti testified at his deposition that the day after the accident, someone "[f]rom the lawyer's office" took him to Total Medical Rehab at which time he was treated, and received therapy by, Dr. Reddy (Ex. "A" to Opposition at ¶ 7; Ex. "F" to Motion at p 53). However, Dr. Reddy indicated in his affirmation that the day after the accident it was not he but Dr. Hannanian who had treated Bhatti (Ex. "B" to Opposition at ¶ 2). Notably, there is no report or affirmation submitted by Dr. Hannanian in opposition to the Defendants' motion.

body” (Ex. “B” to Opposition at ¶ 6).⁹ Range of motion testing again revealed decreased ranges of motion in the right knee and cervical and lumbar spines which led to Dr. Reddy’s referral that Bhatti undergo MRI testing (Ex. “B” to Opposition at ¶ 7). According to Dr. Reddy, the MRIs indicated that Bhatti had, *inter alia*, herniated discs at C3-4, C5-6, and L1-2 (Ex. “B” to Opposition at ¶¶ 8-10). Dr. Reddy again evaluated Bhatti two years later, on June 15, 2011 at which time range of motion testing was performed. Following the examination, Reddy concluded that Bhatti’s injuries, including his limited range of motion and herniated discs, were significant and permanent in nature and were caused by the subject accident (Ex. “B” to Opposition at ¶ 18).

Bhatti also proffered the July 11, 2011 affirmation of Dr. Arden Kaisman, who evaluated and conducted range of motion testing on Bhatti’s lumbar spine on October 26, 2009 and June 9, 2011.¹⁰ Dr. Kaisman concluded that Bhatti had a herniated disc at L1-2, limited range of motion in his lumbar spine, and that such injuries, which were permanent, were causally related to the subject accident (Ex. “C” to Opposition).

Dr. Mark Shapiro provided an affirmation as to the MRIs performed by his office at Total Medical Rehab (Ex. “D” to Opposition).¹¹ Dr. Shapiro indicated in his affirmation that Bhatti had herniated discs at C3-4, C5-6, and L1-2, with each herniation creating impingement on the neural canal (Ex. “D” to Opposition at ¶¶ 3-6). Dr. Shapiro’s impression of the right knee was joint effusion and increased signal in medial meniscus without articular extension (Ex. “D” to Opposition at ¶ 7). Dr. Shapiro’s affirmation failed to take into account Bhatti’s subsequent accident of June 7, 2009 and gave no indication whatsoever as to the cause of Bhatti’s injuries to his spine and knee (*Collins v Stone*, 8 AD3d 321 [2d Dept 2004]).

Moreover, the affirmations of Drs. Reddy and Kaisman, which concluded that Bhatti’s injuries were the result of the subject accident, were rendered speculative insofar as neither physician addressed the findings contained in the reports of Dr. Cohen and Dr. Cohn, namely, that the injuries associated with Bhatti’s spine, knee and shoulder were the result of chronic degenerative changes and not the subject accident (*Casmir v Bailey*, 70 AD3d 994 [2d Dept 2010]; *Rodriquez v Grant*, 71 AD3d 659 [2d Dept 2010]; *Ali v Torrella*, 69 AD3d 772 [2d Dept

⁹ Bhatti indicated in his affidavit that as a result of the second accident, he again sustained injuries to his right shoulder but did not injure any other part of his body (Ex. “A” to Opposition at ¶ 8).

¹⁰ Bhatti received steroid injections by Dr. Kaisman on December 2, 2009, December 16, 2009, and January 6, 2010 (Affidavit in Opposition a ¶ 11).

¹¹ Notably, Dr. Reddy, Dr. Shapiro and Dr. Hannanian, *see* fn 4, *supra*, are all physicians with Total Medical Rehab.

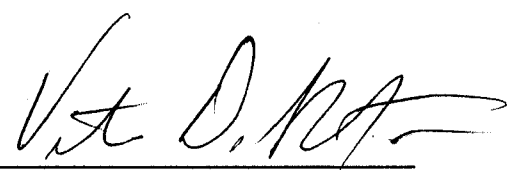
2010)). The affirmations of Dr. Reddy and Dr. Kaisman were also rendered speculative insofar as both of these physicians merely noted that Bhatti was involved in a subsequent accident yet failed to account for the possibility that the subsequent accident could have caused Bhatti's injuries (*Geliga v Karibian, Inc.*, 56 AD3d 518 [2d Dept 2008]; *Penaloza v Chavez*, 48 AD3d 654 [2d Dept 2008]). In this regard, the court rejects Bhatti's representation, as well as Dr. Reddy and Dr. Kaisman's acceptance of Bhatti's representation, that he only injured his right shoulder in the subsequent accident (*Penaloza v Chavez*, 48 AD3d at 655, *supra*). Dr. Reddy and Dr. Kaisman's reliance on Bhatti's subjective belief that he only injured his right shoulder in the subsequent accident renders their affirmations insufficient as a matter of law to defeat summary judgment.¹²

Last, Bhatti's submissions are insufficient to establish that he sustained a medically-determined injury of a nonpermanent nature which prevented him from performing his usual and customary activities for 90 of the 180 days following the subject accident (*Casas v Montero*, 48 AD3d 728 [2d Dept 2008]). Bhatti's affidavit fails to indicate that he was confined or in any way restricted from performing his usual and customary activities following the accident (Affidavit in Opposition).¹³ Accordingly, Bhatti's submissions are insufficient to satisfy the serious injury threshold under this test.

Bhatti has therefore provided insufficient evidence to raise a triable issue of fact to establish a *prima facie* showing of serious injury. Accordingly, Defendants' motion for partial summary judgment is granted and the first cause of action is dismissed.

This constitutes the decision and order of the court.

Dated: November 3, 2011



Hon. Vito M. DeStefano, J.S.C.

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¹² With respect to the second accident, Bhatti testified at his deposition that the impact of the Kia he was driving with the other car was not light but medium (Ex. "F" to Motion at 59).

¹³ In his affidavit, Bhatti indicated that in the six months following the accident, he felt severe pain "all over" his back, that he had "difficulty in walking long distances" and "bending and lifting heavy items" (Affidavit in Opposition at ¶ 13).