

Hightower v MTA Bus Co.

2011 NY Slip Op 33177(U)

December 2, 2011

Supreme Court, Nassau County

Docket Number: 17711/09

Judge: Thomas P. Phelan

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SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,
Justice

TRIAL/IAS PART 2
NASSAU COUNTY

JESSE HIGHTOWER and SABRINA BRATTON,

Plaintiff(s),

ORIGINAL RETURN DATE:07/27/11
SUBMISSION DATE: 10/12/11
INDEX No.: 17711/09

-against-

MTA BUS COMPANY, ALLAN L. LEWIS
and MARK CAMERON,

MOTION SEQUENCE #4, #5

Defendant(s).

The following papers read on this motion:

Notice of Motion.....	1, 2
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Defendants' motions for an order, pursuant to CPLR 3212, granting summary judgment dismissing plaintiffs' complaint based upon the ground that plaintiffs failed to sustain a serious injury as required under New York Insurance Law Section 5102(d) are granted.

This is an action to recover damages for personal injuries allegedly sustained by plaintiffs as a result of the negligence of defendants in the ownership and operation of their motor vehicles on or about December 12, 2008. Plaintiffs were passengers in the bus owned by defendant, MTA Bus Company ("MTA"), at the time of the accident.

Defendants, Allan J. Lewis and Mark A. Cameron, adopt and incorporate the facts and legal arguments set forth by defendant MTA. Defendants submit the affirmed reports of Daniel J. Feuer, M.D. and Alan J. Zimmerman, M.D., as well as the deposition testimony of plaintiffs, and contend that they do not disclose the presence of a serious injury arising out of the subject accident. It is submitted that plaintiffs do not suffer from permanent consequential limitations or significant limitations as a result of this accident.

To meet the threshold “significant limitation of use of a body function or system” or “permanent consequential limitation of a body organ or member” categories, 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 (*Gaddy v. Eyler*, 79 NY2d 955 [1992]; *Licari v. Elliot*, 57 NY2d 230 [1982]).

Plaintiffs sought treatment at St. Johns Hospital three to four days after the subject accident. According to plaintiffs’ testimony, approximately one month after the accident, they sought treatment from Dr. Tolat, upon the recommendation of their attorney (Ex. F, p. 57; Ex. G, p. 47).

In his report dated January 11, 2011, Dr. Feuer, a neurologist, notes that Jesse Hightower was involved in a prior accident in 1991 where he sustained injuries to his neck, back, arms and legs and, as a result, was disabled from work at the time of the instant accident. The court notes that contrary to Dr. Feuer’s comments, Mr. Hightower avers that he never injured his neck or back prior to this accident. Moreover, when asked at his deposition whether he “had any other accidents in which you injured your back or your right leg,” he answered “no” (p. 68).

Dr. Feuer’s neurological examination reveals normal range of motion of the cervical spine. Ranges of motion were tested by Goniometer. Range of motion testing of the lumbar spine was not performed due to complaints of pain.

Dr. Feuer opined that:

the “examination fails to demonstrate objective focal neurological deficits referable to the central or peripheral nervous system to support a diagnosis of radiculopathy. Motor, reflex and sensory function in a

right C7 and right L5 distribution is within normal limits and symmetrical to the left side. Sensory deficits are present at the right hand distal to his laceration site where he states he sustained injury as a result of being cut by a box cutter. The claimant is status post multiple trauma related to a previous motor vehicle accident in 1991” (Movant’s Ex. H).

Dr. Feuer commented that:

“Based on a reasonable degree of clinical certainty, I believe the claimant, Mr. Jesse Hightower, does not demonstrate any objective neurological disability or neurological permanency, which is causally related to the accident of December 12, 2008. He is neurologically stable to engage in full active employment as well as the full activities of daily living without restriction” (Id.)

Dr. Zimmerman, an orthopedic surgeon, performed an orthopedic examination of Jesse Hightower on April 28, 2011. Range of motion testing was aided by the use of a hand-held goniometer and revealed normal ranges of motion of the cervical and lumbar spines. Dr. Zimmerman related the following impression:

Cervical and lumbar sprain, resolved.
Left leg muscle hernia resolved.
There is no disability. There is no permanency.
(Exhibit I).

Dr. Zimmerman further commented that:

“There are no objective evidences that would preclude this claimant from pursuing gainful employment or activities of daily living without restriction. Further treatment is not medically necessary from an orthopedic perspective. Regarding the muscle hernia this represents a minor cosmetic issue and has no functional effect upon the claimant. Regarding the cervical and lumbar MRI findings, all the findings are degenerative, preexisting and not causally related as evidenced by the multiplicity of levels involved. The electrodiagnostic studies demonstrate a carpal tunnel syndrome which was precluded by the

mechanism of injury since this is a repetitive motion disorder” (Id.).

With regard to plaintiff Sabrina Bratton, Dr. Feuer noted in his report dated January 11, 2011, that his neurological examination reveals normal range of motion of the cervical and lumbar spines. Ranges of motion were tested by Goniometer.

Dr. Feuer opined that:

“Motor, reflex and sensory findings are normal. There are no clinical findings to support a diagnosis of right C7 or right L5-S1 dysfunction. Motor, reflex and sensory function in a right C7, L5 and S1 distribution is within normal limits and symmetrical to the left side” (Movant’s Ex. J).

Dr. Feuer commented that:

“Based on a reasonable degree of clinical certainty, I believe the claimant, Ms. Sabrina Bratton, does not demonstrate any objective neurological disability or neurological permanency, which is causally related to the accident of December 12, 2008. She is neurologically stable to engage in full active employment as well as the full activities of daily living without restriction” (Id.).

Dr. Zimmerman also performed an orthopedic examination of Sabrina Bratton on April 28, 2011. Range of motion testing was aided by the use of a hand-held goniometer and revealed normal ranges of motion of the cervical and lumbar spines. Dr. Zimmerman related the following impression:

Cervical and lumbar sprain, resolved.
Right knee contusion, resolved.
There is no disability. There is no permanency.
(Exhibit K).

Dr. Zimmerman further commented that:

“There are no objective evidences that would preclude this claimant from pursuing gainful employment or activities of daily living without

restriction at this time. Further treatment is not medically necessary from an orthopedic perspective. Regarding the MRI of the cervical spine, the multiplicity of levels involved indicate that all of these findings are degenerative, preexisting and not causally related. Likewise in the lumbar MRI, the findings are again degenerative. The claimant has no clinical support for either a cervical or lumbar disc herniation. The MRI reports a lumbar disc herniation on the left side. The electrodiagnostic studies purport to show a radiculopathy on the right side” (Id.).

“[T]here was no competent medical evidence which would support a claim that the plaintiff[s were] unable to perform substantially all of [their] daily activities for not less than 90 of the first 180 days as a result of the subject accident (citation omitted)” (*Boyle v. Gundogan*, 19 AD3d 351 [2d Dept. 2005]). Defendants, therefore, conclude that plaintiffs were not prevented from performing all of their usual and customary activities for 90 out of the first 180 days following the accident.

Where, as here, defendants have provided evidence demonstrating the lack of serious injury, the burden shifts to plaintiffs to present sufficient evidence to defeat the motion (*see, Gaddy v. Eyler*, 79 NY2d 955 [1992]; *Tabacco v. Kaster*, 229 AD2d 526 [2d Dept. 1996]). “To defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial and must make his showing by producing evidentiary proof in admissible form (citation omitted)” (*Seyfeid v. Greenspan*, 92 AD2d 563, 564 [2d Dept. 1983]; *see, Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]).

In opposition, plaintiffs submit their affidavits, as well as the affirmed reports of Raj Tolat, M.D. and affirmations of Mark Shapiro, M.D., a Board Certified Radiologist. The record reveals that plaintiffs last presented to Dr. Tolat on September 3, 2009, and did not appear for medical re-evaluation until July 28, 2011, after this motion was made. Plaintiffs first presented themselves to Dr. Tolat on January 5, 2009, when physical therapy was recommended. Plaintiffs aver that they continued with physical therapy until they reached maximal medical benefits and thereafter continued with home therapy. In Dr. Tolat’s reports of July 28, 2011, he states that when he last saw plaintiffs on September 3, 2009, he felt they had plateaued and reached maximal medical benefit from formal physical therapy. With regard to Sabrina Bratten, Dr. Tolat states that the “patient states she is no

longer [sic] Dr. Lattuga, spine surgeon, or Dr. Millman, pain management specialist" (Ex. B). With regard to Jesse Hightower, Dr. Tolat states that the "patient is no longer seeing Dr. Berkowitz, orthopedic surgeon, or Dr. Lattuga, spine surgeon" (Ex. E). Glaringly absent from the submissions, are any affirmed reports from those doctors.

Although Dr. Tolat's examinations of plaintiffs revealed limitations of the cervical and lumbar spines, he failed to proffer "competent objective medical evidence that showed range of motion limitations in those regions of his spine that were roughly contemporaneous with the subject accident (citations omitted)" (*Sealy v. Riteway-1, Inc.*, 54 AD3d 1018 [2d Dept. 2008] (1-½ months after the subject accident). Dr. Tolat failed to explain the 24-day gap "between the accident and the commencement of treatment, which 'interrupt[s] the chain of causation between the accident and claimed injury' (*Pommells v. Perez*, 4 N.Y.3d 566, 572, 797 N.Y.S.2d 380, 830 N.E.2d 278 [2005])" (*Henry v. Peguero*, 72 AD3d 600, 603 [1st Dept. 2010]).

Moreover, "plaintiff's expert failed to indicate his awareness that [plaintiffs were] suffering from chronic degenerative disc disease, and therefore, his finding that the plaintiff[s'] current restriction of motion was causally related to the subject accident was mere speculation (citations omitted)" (*Ginty v MacNamara*, 300 AD2d 624, 625 [2d Dept. 2002]).

The court notes there is almost a two-year gap in the cessation of treatment in September 2009 and Dr. Tolat's examination of July 28, 2011. Here, as in *Pommells*, "the so-called gap in treatment was, in reality, a cessation of all treatment. Plaintiff ended his physical therapy [nine] months after the accident and sought no other treatment until years later, when he visited Dr. [Tolat] in connection with this case. . . . [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]).

Although plaintiffs and Dr. Tolat allege that the gap in treatment was due to the fact that plaintiffs had reached maximal medical benefits, the failure to submit any records from Drs. Berkowitz, Lattuga and Millman, to whom plaintiffs purportedly sought treatment, raises doubt.

The affirmations of Dr. Shapiro reveals the following impressions from the MRIs performed on January 8, 2009, at Magnetic Resonance Imaging Scan:

Jesse Hightower MRI of the Cervical Spine:

- “1. STRAIGHTENING OF THE CERVICAL LORDOSIS.
2. LOSS OF SIGNAL AND CENTRAL HERNIATIONS AT C4-5 AND C5-6, CREATING CORD IMPINGEMENT” (Exhibit F).

Jesse Hightower MRI of the Lumbar Spine:

- “1. BROAD BASED DISC BULGE AT L4-5, CREATING IMPINGEMENT ON THE NEURAL CANAL.
2. CENTRAL HERNIATION AT L5-S1 WITH EXTENSION OF DISC INTO THE NEURAL FORAMEN BILATERALLY” (Id.)

Sabrina Bratton MRI of the Lumbar Spine:

- “1. LEVOSCOLIOSIS,
2. LOSS OF SIGNAL AND BROAD BASED DISC BULGE AT L3-4, CREATING IMPINGEMENT ON THE NEURAL CANAL.
3. LOSS OF SIGNAL AND FOCAL LEFT FORAMINAL HERNIATION AT L4-5, CREATING IMPINGEMENT ON THE NEURAL CANAL” (Exhibit C).

Sabrina Bratton MRI of the Cervical Spine:

- “1. STRAIGHTENING OF THE CERVICAL LORDOSIS.
2. FOCAL BULGES AT C2-3 AND C3-4, CREATING IMPINGEMENT ON THE NEURAL CANAL.
3. RIGHT PARACENTRAL HERNIATION AT C4-5, CREATING IMPINGEMENT” (Id.).

Defendants submit that Dr. Shapiro failed to causally relate his findings to the subject accident. Moreover, “[t]he mere existence of a herniated or bulging disc is not evidence of a serious injury in the absence of objective evidence of the extent

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of the alleged physical limitations resulting from the disc injury and its duration (citations omitted)” (*Catalano v. Kopmann*, 73 AD3d 963 [2d Dept. 2010]).

Plaintiff’s submissions failed to raise a triable issue of fact. Moreover, plaintiffs “failed to proffer competent medical evidence showing that [they were] unable to perform substantially all of [their] daily activities for not less than 90 of the first 180 days subsequent to the subject accident (citations omitted)” (*Sealy v. Riteway-1, Inc.*, 54 AD3d 1018 [2d Dept. 2008]).

Based upon all of the foregoing, defendants’ motions for summary judgment are granted, and the complaint is dismissed.

This decision constitutes the order and judgment of the court.

Dated: 12-2-11

HON THOMAS P. PHELAN

THOMAS P. PHELAN, J.S.C.

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