

Andrade-Ortiz v Black
2011 NY Slip Op 34128(U)
June 30, 2011
Supreme Court, Bronx County
Docket Number: 303253/09
Judge: Sharon A.M. Aarons
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 24

-----X
CARLOS ANDRADE-ORTIZ,

Plaintiff,

-against-

GUILFORD J. BLACK, JR. and J&K
ENTERPRISES,

Defendants.
-----X

Index No. 303253/09
Submission Date 4/18/11

DECISION and ORDER

Present:
Hon. SHARON A.M. AARONS

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of motion, as indicated below:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion/Order to Show Cause and Exhibits Annexed-----	1
Answering Affidavit and Exhibits-----	2
Reply Affidavit and Exhibits-----	3

Upon the foregoing the Decision and Order on this motion is as follows:

Defendants' motion for summary judgment dismissing plaintiff's complaint on the grounds that plaintiff did not sustain a serious injury within the meaning of the no-fault law set forth in New York State Insurance Law § 5102(d) is decided in accordance with the annexed decision and order of same date.

Date: June 30, 2011



SHARON A.M. AARONS, J.S.C.

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Upon the foregoing papers, the Decision/Order on this motion is as follows:

Defendant Guildford J. Black, Jr. and J&K Enterprises motion for summary judgment dismissing the plaintiff's complaint on the ground that plaintiff, Carlos Andrade-Ortiz, did not sustain a serious injury within the meaning of the no-fault law set forth in Insurance Law § 5102 (d) is partially granted only to the extent indicated below.

Plaintiff commenced this action seeking compensation as a result of an automobile accident on May 3, 2007.

Under the no-fault law, in order to maintain an action for personal injury, a plaintiff must establish that a "serious injury" has been sustained. *Licari. v. Elliot*, 441 N.E.2d 1088, 57 N.Y.2d 230, 455 N.Y.S.2d 570 (1982). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issues of fact and the right to judgment as a matter of law. *Alvarez v. Prospect Hospital*, 501 N.E.2d 572, 68 N.Y.2d 320, 508 N.Y.S.2d

923 (1986) and *Winegrad v. New York University Medical Center*, 476 N.E.2d 642, 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985). In the present action, the burden rests on the defendant to establish, by the submission of evidentiary proof in admissible form, that plaintiff has not suffered a "serious injury" *Lowe v. Bennet*, 122 A.D.2d 728, 511 N.Y.S.2d 603 (1st Dept. 1986), aff'd 69 N.Y.2d 701, 512 N.Y.S.2d 364 (1986). 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, in opposition to a defendant's motion, to submit proof of serious injury in admissible form. *Alvarez*, 68 N.Y.2d at 326; *Licari*, 57 N.Y.2d at 235, *Lopez v. Senatore*, 484 N.E.2d 130, 65 N.Y.2d 1017, 494 N.Y.S.2d 101 (1985) and *Reid v. Wu*, 2003 WL 50816U, 2003 N.Y. Slip Op. 50816 (U), at 2 (N.Y. Sup. 2003).

In support of this motion, defendant submitted a copy of the pleadings, the affirmed and unaffirmed medical reports of Dr. Edward S. Crane, an orthopedic surgeon, and Dr. Adam N. Bender, a neurologist, and a verified bill of particulars.

Dr. Bender conducted an independent neurological examination of the plaintiff on August 5, 2010, quantifying his actual range of motion in numerical degrees for the cervical and lumbar spine and found that plaintiff had normal range in all aforementioned regions of the body. He found the neurological examination to be essentially normal. The HEENT, cranial nerve, muscle strength, reflexes, and sensation tests were all normal. Dr. Bender opined that plaintiff's injuries were minor; he found that there were no neurological problems causally related to the accident on March 3, 2007, and no further diagnostic testing or treatment was needed. He also found that the MRI images showed that plaintiff had degenerative changes in his cervical and lumbar spine that could not have resulted from the accident.

Dr. Crane conducted an independent orthopedic examination of the plaintiff on October 21, 2010 and revealed in numerical degrees plaintiff's actual range of motion for the cervical and lumbar spine and right knee. He found that plaintiff had a normal range of motion in the aforementioned region of the body. Additionally, Dr. Crane found plaintiff's gait, muscle strength and sensory tests normal and found no objective evidence of any orthopedic residuals in regards to plaintiff's neck or back. However, he was unable to give an opinion as to the causal connection between the accident and plaintiff's right knee arthroscopy and surgery that was performed on May 3, 2007, because he did not possess for review all of plaintiff's medical records related to the accident.

Dr. Crane's report is deficient because he did not specify for plaintiff's neck and back what is considered the normal range of motion and compare it to the plaintiff's actual range of motion, or mention what tests were performed. *Webb v. Johnson*, 13 A.D.3d 54, 786 N.Y.S.2d 22 (1st Dept. 2004); *Watt v. Francis* 16 A.D.3d 240, 791 N.Y.S.2d 240 (1st Dept. 2005). Dr. Crane also admitted to not having been supplied with all medical records, and he was unable to comment as to the causal connection between plaintiff's right knee injury and the accident.

Dr. Crane's unaffirmed report of December 3, 2010 is not considered by the court. *Grasso*, 79 N.Y.2d at 814, 580 N.Y.S.2d 178 (1991); *Copeland v. Kasalica*, 6 A.D.3d 253, 775 N.Y.S.2d 276 (1st Dept. 2004); *Shinn v. Catanzaro*, 1 A.D.3d 195, 767 N.Y.S.2d 88 (1st Dept. 2003).

Overall, Dr. Crane's reports are insufficient to raise the issue of whether plaintiff sustained a serious right knee injury as a result of the accident on May 3, 2007. As such, defendants have not met the burden required of them to establish that plaintiff has not sustained a serious injury, and their claim is subsequently denied in regards to plaintiff's knee injury.

However, Dr. Bender's report is sufficient, and is considered by the Court, but only as to plaintiff's cervical and lumbar spine injuries, not for injuries to the right knee. In regards to the 90/180 claim, the Court does not have to address it since it was not plead in plaintiff's verified bill of particulars.

In opposition, plaintiff submitted copies of the pleading, a verified and supplementary bill of particulars, plaintiff's deposition testimony, photos of plaintiff's vehicle, and the affirmations of Dr. Ranga Krishna, plaintiff's treating physician-neurologist; Dr. Randall Ehrlich, plaintiff's orthopedic surgeon; Dr. Naraya Paruchuri and Harold Tice, radiologists; unaffirmed medical records from Westchester Medical accounts receivable, Westchester Medical Chiropractic, and Health Bay Medical, a verified and supplementary bill of particulars, and plaintiff's deposition testimony.

Plaintiff's verified bill of particulars states that plaintiff had been intermittently confined to home and bed and incapacitated from work partially and wholly. He reports being limited to light/restricted duties from the date of the accident to date.

The medical records from various medical facilities which are unaffirmed/sworn or otherwise in an inadmissible form and cannot be considered by the Court. *Grasso*, 79 N.Y.2d at 814; *Copeland* 6 AD.3d at 253; *Shinn*, 1 A.D.3d at 195.

Dr. Krishna conducted a neurological examination of plaintiff for the first time on July 18, 2007, and again on March 2, 2011. Dr. Krishna states in his report that on the initial examination, he found the HEENT, cranial nerves, muscle and reflexes and sensory were within normal limits. There were spasms in the cervical and lumbar spine region and a positive straight leg raising test bilaterally at 30 degrees. Also there was 4/5 weakness on the left deltoid and

supraspinatus muscle. A range of motion test on the cervical and thoracolumbar spine revealed limitations in flexion, extension and rotation of 5 to 15 degrees as compared to the normal limits. Dr. Krishna diagnosed the plaintiff as having cervical and lumbar neuropathic pain syndrome and recommended MRI testing for the neck and back along with therapy. The plan was for plaintiff to return at which time there would be an assessment for the need of electrodiagnostic studies.

Upon Dr. Krishna's second examination of plaintiff on March 2, 2011, he found similar results as in his initial examination. The HEENT, cranial nerves, muscle reflexes and sensory, were all within normal limits. The straight leg-raising test was now 60 degrees bilaterally as opposed to his initial findings of 30 degrees. There was a cervical and lumbar range of motion test that indicated a decrease in range of motion from the initial examination. Dr. Krishna quantified in numerical degrees what the actual range of motion was for the initial and current examination and compared it to the normal range, finding a 10-40 degree decrease in certain regions of the body. Although for October 18, 2008, he indicated an interim finding for the range of motion test of the cervical and lumbar spine, he does not state if these findings were based on his own examination or otherwise. He found positive, on the left side, the foraminal maximal compression test, as well as the Yeoman and Kemp test bilaterally. Dr. Krishna opined that plaintiff's clinical features were consistent with cervical and lumbar multiple disc syndrome resulting in a cervical and lumbar radiculopathic and a neuropathic pain syndrome. Also, he stated that plaintiff had discontinued his physical therapy because he had reached maximum medical improvement.

Dr. Paruchuri's reports of the diagnostic MRI tests of plaintiff's cervical and lumbar spine conducted on July 13 and 16 of 2007 respectively, revealed straightening of the cervical

spine lordosis, consistent with muscle spasm. A mild posterior bulge at C5-C6 and C7 with central cervical stenosis and disc bulge and protrusion at C5-S1, C4-5 and C3-4 was also found.

The findings of both Dr. Tice and Dr. Ehrlich addressing plaintiff's knee injury do not need to be addressed by the court due to defendant's failure to meet their burden of proof as to that region of the body.

Plaintiff's deposition testimony indicated that he had physical therapy for his entire back region; he missed three weeks of work after surgery to his right knee, and was on crutches and did physical therapy. He continued to have difficulty at work, particularly in bending.

In order to prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion can be used to substantiate a claim of serious injury. *See Dufel v. Green*, 647 N.E.2d 105, 84 N.Y.2d 795, 798 (1995); *Lopez*, 67 N.Y.2d at 1020). An expert's *qualitative* assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system. *See Dufel*, 84 N.Y.2d at 798); *Toure v. Avis Rent A Car*, 774 N.E.2d 1197, 98 N.Y.2d 345, 746 N.Y.S.2d 865 (2002). To raise a triable issue of fact plaintiff's physician must delineate a specific percentage of the loss of range of motion or a sufficient description of the quantitative nature of plaintiff's limitations based on the normal function, purpose and use of the body part. *Vasquez v. Reluzco*, 28 A.D.3d 365, 814 N.Y.S.2d 117 (1st Dept. 2006); *Bent v. Jackson*, 15 A.D.3d 46, 49, 788 N.Y.S.2d 56 (1st Dept. 2005). Furthermore, bulging and herniated disks are not facially a serious injury and it is the plaintiff's duty to provide evidence of both the extent of a physical injury and the duration. *Noble v. Ackerman*, 252 A.D.2d 392, 675 N.Y.S.2d 86 (1st Dept. 1998). Here, the report of Dr. Krishna, plaintiff's physician, indicated in numerical degrees

limitations in the range of motion examination for plaintiff's cervical and lumbar spine. However, his findings of permanency as to those limitations are contrary to plaintiff's own testimony at deposition. Plaintiff's deposition states that he has not lost any ability to perform actions he performed before, aside from experiencing subjective pain. Also, all claims of inability to perform activities stem from plaintiff's knee injury, with no loss of activity due to cervical and lumbar problems being firmly established by the plaintiff at his deposition. Furthermore, plaintiff's subjective claims of cervical and lumbar pain are not facially recognizable as a serious injury under Insurance Law. *Noble*, 252 A.D.2d at 395. Plaintiff has also been in other accidents, in which he complained of back pain, and plaintiff's experts' claims of causation do not address this.

Additionally, testing done by Dr. Krishna on plaintiff's neck and back yielded irrational results, which refute his own opinion of permanence. The September 2007 report for an examination of plaintiff on July 18, 2007, by Dr. Krishna showed a 5-15 degree lack in range of motion in plaintiff's cervical spine. This was accompanied by a lack of 10-20 degrees in range of motion for the lumbo-sacral spine. All other ranges of motion during this test period were normal. Although there is no indication that Dr. Krishna conducted an examination of the plaintiff on September 18, 2008, his incorporation of the range of motion for plaintiff's cervical and lumbar spine further establishes that plaintiff sustained no serious injury to those regions of his body. Interim measurements of the plaintiff's cervical spine showed improvement in the areas of extension (50 degrees instead of 45 degrees), and a major loss of motion in both right rotation and left rotation (from a normal 80 degrees to 60 degrees). In regards to plaintiff's lumbo-sacral spine during this same time period, right and left rotation of the spine suffered a 10-degree loss, from a previously normal rating of 30 degrees. Dr. Krishna's final examination

in March of 2011 yielded odd results; ratings that were originally normal two months after the accident shifted drastically for the worse. For example, extension of the cervical spine, which had improved to 50 degrees, fell to 20 degrees upon final examination. Left lateral flexion, which was initially normal but deteriorated to 25 degrees out of a normal 45 at interim examination, rose to 60 degrees at final examination. Furthermore, ratings for right and left rotation, which were initially normal at 80 degrees, dropped to 40 degrees upon final examination. These inconsistencies exist within the examination of the lumbo-sacral spine as well, with left and right rotation degrading to 20 degrees out of a normal 30 upon final examination, despite the fact that such ratings were normal two months after the accident. As a result of these findings, Dr. Krishna's report is insufficient to defeat defendant's claim of no serious injury to plaintiff's neck and back. This finding is directly supported by plaintiff's gap in treatment of two years.

The First Department has held that an unexplained gap in treatment renders the medical proof by the plaintiff insufficient. *Moussa Diallo and Maria*, at NYLJ, 3/12/08, p. 36, col 2 (App. Term, 1st Dept.); *Yagi v. Corbin*, 44 A.D.3d 440, 843 N.Y.S.2d 276 (1st Dept. 2007); *Baez v. Rahamatali*, 24 A.D.3d 256, 808 N.Y.S.2d 171 (1st Dept. 2005); *Melendez v. Feinberg*, 306 A.D.2d 98, 759 N.Y.S.2d 869 (1st Dept. 2003). Recently, the Court of Appeals held that "the law surely does not require a record of needless treatment in order to survive summary judgment... a plaintiff who terminates therapeutic measures... must offer some reasonable explanation for having done so." *Pommells v. Perez*, 830 N.E.2d 278, 4 N.Y.3d 566, 797 N.Y.S.2d 380 (2005).

Here, plaintiff's own deposition testimony demonstrates at least a two year gap in treatment that he has not accounted for aside from vague statements made by the plaintiff that his condition improved, and by Dr. Krishna that he reached maximum benefit from his physical

therapy. Dr. Krishna's statement in his March 27, 2011, report is contrary to his report dated September 18, 2007. He stated that he had examined plaintiff on July 18, 2007 and recommended diagnostic testing, therapy to the neck and back, and a follow up in two to three weeks. This explanation for the cessation of treatment is not sufficient to defeat defendant's motion for summary judgment since plaintiff offers no excuse for gap in treatment, and Dr. Krishna's own final report refutes a finding of maximum benefit. *Gomez v. Ford Motor Credit Co.*, 10 Misc. 3d 900, 810 N.Y.S.2d 838 (Sup. Ct., Bx. County 2005). *See Also Ortiz v. Ash Leasing, Inc.*, 21 Misc. 3d 1124A, 873 N.Y.S.2d 513 (1st Dept. 2008) (court found that testimony by a doctor to a plaintiff's improvement as an excuse for a gap in therapy goes to admissibility and not to weight). All injuries to plaintiff's neck and back appear to be minor, mild or slight, with a lack of permanency destroying the ability of plaintiff to claim permanent loss of use. It is hereby

ORDERED, that partial summary judgment is granted only to the extent that plaintiff, CARLOS ANDRADE-ORTIZ's claim of serious injury to his cervical and lumbar spine is dismissed; and it is further

ORDERED, that the defendant is to serve upon the plaintiff a copy of this order with notice of entry within thirty (30) days of the date of this decision and order.

Dated: June 30, 2011



Sharon A.M. Aarons, J.S.C.