

Lindor v JRM Mgt. Corp.

2012 NY Slip Op 30610(U)

February 23, 2012

Supreme Court, Nassau County

Docket Number: 7279-10

Judge: James P. McCormack

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. JAMES P. McCORMACK,
Acting Supreme Court Justice

VLADIMYR LINDOR,

Plaintiff,

-against-

JRM ANAGEMENT CORP., OSCAR RUBIO,
AVRIL A.J. BURGESS AND GABRIELLE
BURGESS,

Defendants.

TRIAL/IAS, PART 43
NASSAU COUNTY
INDEX NO.: 7279-10

MOTION SUBMISSION
DATE: 1-9-12

MOTION SEQUENCE
NO. 1

The following papers read on this motion:

- Notice of Motion, Affirmation, and Exhibits X
- Affirmation in Opposition and Exhibit X
- Reply Affirmation X

Defendants Avril A.J. Burgess and Gabrielle Burgess, move pursuant to CPLR §3212 seeking an order granting summary judgment in favor of defendants and dismissing plaintiff's complaint, alleging that plaintiff's injuries do not satisfy the "serious injury" threshold requirement of Insurance Law § 5102(d).

This action arises out of a motor vehicle accident that occurred on October 7, 2007 on Main Street at or about its intersection with Swalm Street, Westbury, County of Nassau. As a result of the accident, plaintiff allegedly sustained serious personal injuries, including but not limited to, C2-C7 posterior subligamentous disc bulges; cervical radiculitis; cervical sprain; C5-C6 nerve root irritation; subluxation at C-6; L1-L3

posterior disc bulges and L3-S1 herniation with impingement on the existing right L5 nerve root; lumbar sprain; and limitation of motion in the cervical and lumbar spine.

Defendants, Gabrielle Burgess and Avril Burgess (hereinafter Burgess'), were the operator and owner, respectively, of the vehicle that allegedly struck the vehicle that plaintiff was a passenger in on October 7, 2007. The Burgess' now move for summary judgment to dismiss the cause of action which alleges that their negligence caused plaintiff to sustain a "serious injury" as a result of the October 7, 2007 accident.

Plaintiff filed a summons and complaint dated October 28, 2009. Issue was joined by service of Burgess' verified answer and cross claim dated June 10, 2010. Defendants JRM Management Corp. and Oscar Rubio, appeared in this action by service of a verified answer dated August 31, 2010. Plaintiff served a verified bill of particulars on or about September 20, 2010. The Note of Issue was filed on or about July 26, 2011 and the within motion was filed prior to the certification order dated on or about January 9, 2012.

In a motion for summary judgment the moving party bears the burden of making a *prima facie* showing that he is entitled to summary judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of a material issue of fact. *Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2D 395 (1957); *Friends of Animals, Inc. v. Associates Fur Mfrs.*, 46 NY2d 1065 (1979); *Zuckerman v. City of New York*, 49 NY2d 557 (1980); *Alvarez V. Prospect Hospital*, 68 NY2d 320 (1986).

The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *Winegard v. New York University Medical*

Center, 64 NY2d 851 (1985). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. *Zuckerman*, 49 NY2d 557, *supra*. The primary purpose of a summary judgment motion is issue finding not issue determination, *Garcia v. J.C. Duggan, Inc.*, 180 AD2d 579 (1st Dept. 1992), and it should only be granted when there are no triable issues of fact. *Andre v. Pomeroy*, 35 NY2d 361 (1974).

Within the context of a summary judgment motion that seeks dismissal of a personal injury action resulting from a motor vehicle accident for the alleged failure of the plaintiff to sustain a "serious injury" within the meaning of Insurance Law § 5102(d), the defendant bears the burden of establishing a *prima facie* case that the plaintiff's injuries do not meet the threshold requirements of the statute. *Gaddy v. Eyer*, 79 NY2d 955 (1992). Upon such a showing, it becomes incumbent on the plaintiff to come forward with sufficient evidence, in admissible form, to demonstrate the existence of a question of fact on the issue. *Id.* The court must then decide whether the plaintiff has established a *prima facie* case of sustaining a "serious injury". *Licari v. Elliot*, 57 NY2d 230 (1983).

Insurance Law §5102(d) defines "serious injury" as a personal injury which results in: (1) death; (2) dismemberment; (3) significant disfigurement; (4) a fracture; (5) loss of fetus; (6) permanent loss of a body organ, member, function or system; (7) permanent consequential limitation of use of a body organ or member; (8) significant limitation of use of a body function or system; or (9) 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 constitute such person's usual and customary daily activities for not less than ninety (90) days during the one-hundred-eight (180) days immediately following the occurrence of the injury or impairment.

The defendant is not required to disprove any category of "serious injury" that has not been pled by the plaintiff. *Melino v. Lauster*, 82 NY2d 828 (1993). Whether the plaintiff can demonstrate the existence of a compensable "serious injury" depends upon the quality, quantity, and credibility of admissible evidence. *Manrique v. Warshaw Woolen Associates, Inc.*, 297 AD2d 519 (1st Dept. 2002).

In order to satisfy the statutory "serious injury" threshold, objective proof of the plaintiff's injury is required. In *Toure v. Avis Rent-A-Car Systems*, 98 NY2d 345 (2002), the Court of Appeals held that a plaintiff's proof of injury must be supported by objective medical evidence, in admissible form, such as sworn MRI and CT scan tests. However, these sworn tests must be paired with the doctor's observations during the physical examination of the plaintiff. Unsworn MRI reports can also constitute competent evidence if both the plaintiff and the defendant rely on those reports. *Gonzalez v. Vasquez*, 301 AD2d 438 (1st Dept. 2003).

Conversely, even where there is ample proof of a plaintiff's injury, certain factors may nonetheless override a plaintiff's objective medical proof of limitations and permit dismissal of a plaintiff's complaint. Specifically, additional contributing factors such as a gap in treatment, an intervening medical problem, or a pre-existing condition would interrupt the chain of causation between the accident and the claimed injury. *Pommels*

v. *Perez*, 4 NY3d 566 (2005).

While a herniated or bulging disc, or the presence of radiculitis may constitute a "serious injury" within the ambit of Insurance Law § 5102(d), a plaintiff is required to provide, *inter alia*, medical evidence contemporaneous with the subject accident, which demonstrates the extent and degree of the alleged physical limitation resulting from the disc injury and its duration. *Ifrach v. Neiman*, 306 AD2d 380 (2nd Dept. 2003); *Jason v. Danar*, 1 AD3d 398 (2nd Dept. 2003); *Felix v. New York City Tr. Auth.*, 32 AD3d 527 (2nd Dept. 2006); *Garcia v. Sobles*, 41 AD3d 426 (2nd Dept. 2007); *Bestman v. Seymour*, 41 AD3d 629 (2nd Dept. 2007). However, the contemporaneous medical evidence need not be based on quantitative measurements, but rather may be based on observing and recording the patients qualitative symptoms shortly after the accident and later doing more specific, quantitative measurements in preparation for litigation (*see Perl v. Meher*, 18 NY3d 208 [2011])

When examining medical evidence offered by a plaintiff on a threshold motion, the court must ensure that the evidence is objective in nature and that a plaintiff's subjective claims as to pain or limitation of motion are sustained by verified objective medical findings (*see Grossman v. Wright*, 268 AD2d 79 [2nd Dept. 2000]). Further, in addition to providing medical proof contemporaneous with the subject accident, the plaintiff must also provide competent medical evidence containing verified objective findings based upon a recent examination wherein the expert must provide an opinion as to the significance of the injury. (*Perl v. Meher*, 18 NY3d 208, *supra*; *Kauderer v. Penta*, 261 AD2d 365 [2nd Dept. 1999]; *Constantinou v. Surinder*, 8 AD3d 323 [2nd Dept.

2004]; *Brown v. Tairi Hacking Corp.*, 23 AD3d 325 [2nd Dept. 2005]).

To meet the threshold regarding significant limitation of use of a body function or system or permanent consequential limitation of a body function or system, 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 (see *Gaddy v. Eyler*, 79 NY2d 955 *supra*; *Licari v. Elliot*, 57 NY2d 230, *supra*). A minor, mild, or slight limitation will be deemed insignificant within the meaning of the statute. *Licari v. Elliot*, 57 NY2d 230, *supra*. A claim raised under the “permanent consequential limitation of use or a body organ or member” or “significant limitation of use of a body function or system” categories can be made by an expert’s designation of a numeric percentage of a plaintiff’s loss of motion in order to prove the extent or degree of the physical limitation. *Toure v. Avis*, *supra*. In addition, an expert’s qualitative assessment of a plaintiff’s condition is also probative, provided: (1) the evaluation has an objective basis; and (2) the evaluation compares the plaintiff’s limitation to the normal function, purpose, and use of the affected body organ, member, function, or system. *Id.*

In applying the foregoing standards and principles to the instant matter the court finds that defendants have met their initial burden establishing a *prima facie* case that plaintiff’s injuries do not satisfy the threshold requirements of Insurance Law § 5102(d). In response, plaintiff submitted sufficient evidence to raise a triable question of fact on the issue. As such, summary judgment in favor of defendants, Avril A.J. Burgess and Gabrielle Burgess, against plaintiff is not warranted.

In evaluating plaintiff's allegations contained in his verified bill of particulars it is apparent that plaintiff is not claiming that his injuries fall within categories "1", "2", "3", "4", "5", or "6" of Insurance law §5102(d) as outlined above. Plaintiff's claim of a "serious injury" falls within categories "7", "8" and "9", 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 prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety (90) days during the one-hundred-eight (180) days immediately following the occurrence of the injury or impairment. . As such, the court will only address these three categories.

Upon the submission of the affirmed report of Isaac Cohen, M.D., an orthopedic surgeon, defendants have met their initial burden of establishing a prima facie case that plaintiff has failed to meet the statutory threshold of a "serious injury". According to Dr. Cohen's report, after reviewing plaintiff's medical records, he conducted a physical examination of plaintiff on July 6, 2011 that included the use of a goniometer, a bubble inclinometer and visual inspection to perform range of motion testing and comparison the American Medical Association Guidelines to the Evaluation of Permanent Impairment, 5th Edition.

Dr. Cohen's testing found plaintiff's range of motion to be normal in his upper extremities, lower extremities, cervical spine, and lumbosacral spine. He also found Plaintiff's gait to be normal and sensation was intact. There was no muscle atrophy

with motor strength a 5 out of 5 in all muscle groups and no sensory deficits were present. Dr. Cohen concluded that as a result of the accidents, plaintiff sustained cervical and lumbosacral strains that resolved uneventfully without any evidence of functional limitation present. He further concluded that plaintiff had a completely normal functional capacity of the musculoskeletal system and upper and lower extremities.

Plaintiff counters with the affidavit of his treating chiropractor, Dr. Jonathan Tepper with whom he obtained treatment for four months after the accident until he had reached maximum recovery at which time the doctor determined any further treatment would be palliative. Dr. Tepper conducted three orthopedic examinations which occurred on October 9, 2007, March 23, 2009 and September 16, 2011. During the most recent examination of the plaintiff, computerized range of motion testing revealed significant permanent limitations in plaintiff's range of motion of his cervical and lumbar spine using quantitative comparisons between a normal range of motion and plaintiff's. Using a goniometer, the most significant loss of range of motion was found in the left and right rotation of the lumbar spine where plaintiff's range of motion was measured at 42° and 44° respectively compared to the normal 80°, representing a 47% loss of rotation to the left and a 45% loss of rotation to the right. Dr. Tepper attested to the fact that plaintiff still had post traumatic cervical segmental dysfunctional subluxation; cervical strain/sprain; cervical disc bulges; post traumatic lumbar segmental dysfunction and subluxation and lumbar disc herniation and bulges. He felt there was no full recovery and that the plaintiff continued to demonstrate signs and symptoms of residual

inflammatory pathology to the musculature and supportive structures to the cervical and lumbar spine.

Additionally, while an unexplained cessation of medical treatment may be fatal to a plaintiff's claim of a significant or consequential limitation (*Baez v. Rahamatelli*, 24 AD3d 256 [1st Dept. 2005]), Dr. Tepper offers a bonafide and reasonable explanation for the cessation of treatment, in that he discharged the plaintiff because he had reached maximum recovery and any further treatment would be palliative.

The loss of nearly 50% of plaintiff's range of motion of his lumbar spine rotation in both directions found by Dr. Tepper would be significant enough to raise a triable issue of fact (see *Nelms v. Khokhar*, 12 AD3d 426 [2nd Dept. 2004]). Additionally, plaintiff's affidavit and testimony at the deposition indicated he was not able to resume his normal activities for approximately seven months and needed to wear a lumbar back brace in order to fulfill his duties as work once he returned to work after nearly two months. As such, plaintiff has met his burden of raising a triable issue of fact as to whether his injuries fall within categories "7"; "8" or "9" of Insurance Law § 5102(d), and thus whether he sustained a "serious injury".

Accordingly, defendant's motion for summary judgment is DENIED.

This constitutes the Decision and Order of the Court.

Dated: February 23, 2011



JAMES P. McCORMACK, A.J.S.C.

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