

**Lomard v Zapolsky**

2012 NY Slip Op 30956(U)

April 9, 2012

Supreme Court, Queens County

Docket Number: 33950/09

Judge: Robert J. McDonald

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

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JEFFREY LOMBARD AND NICOLE BROWN, Index No.: 33950/09
Plaintiffs, Motion Date: 09/01/11
- against - Motion No.: 24
DIMITRY ZAPOLSKY, Motion Seq.: 3
Defendant.

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The following papers numbered 1 to 13 were read on this motion by defendant DIMITRY ZAPOLSKY for an order pursuant to CPLR 3212 granting summary judgment and dismissing the plaintiffs' complaint with respect to plaintiff JEFFREY LOMBARD on the ground that said plaintiff has not sustained a serious injury within the meaning of Insurance Law §§ 5102 and 5104:

Papers Numbered
Notice of Motion-Affidavits-Exhibits.....1 - 4
Affirmation in Opposition-Affidavits-Exhibits.....5 - 9
Reply Affirmation.....10 - 13

This is a personal injury action in which the plaintiffs JEFFREY LOMBARD AND NICOLE BROWN seek to recover damages for injuries they each sustained as a result of a motor vehicle accident that occurred on January 10, 2009, on Shore Parkway at or near the intersection with Brighton Third Street, Kings County, New York.

At the time of the accident, plaintiff JEFFREY LOMBARD was a passenger in a vehicle traveling in the eastbound lanes of Shore Parkway when his vehicle was allegedly hit in the rear by the vehicle owned and operated by defendant Dimitry Zapolsky. Plaintiff NICOLE BROWN was the operator of the vehicle. The plaintiffs commenced an action against the defendant by filing a

Summons and Verified Complaint on December 18, 2009. Issue was joined by service of defendant's verified answer on February 12, 2009. The plaintiff filed a Note of Issue on November 10, 2010.

The defendant initially moved for an order pursuant to CPLR 3212(b), granting summary judgment to the defendant and dismissing the complaint filed by plaintiff Jeffrey Lombard on the ground that said plaintiff did not suffer a serious injury as defined by Insurance Law § 5102. That motion was filed with the Court on March 3, 2011 and submitted for decision on September 1, 2011. On September 19, 2011 this Court rendered a decision denying the motion without prejudice to renew on proper papers which included the IME report of Dr. Toriello which had not been submitted with the motion. The decision provided that the defendant had 30 days from the date of the order to renew the motion.

Defendant did not serve the instant motion until January 21, 2012 which was beyond the 30 days provided by the Court. However, the Court's decision of September 19, 2011 was not entered in the County Clerk's Office until January 20, 2012. Therefore, as the defendant did not have notice of the Court's decision until January 2012, this court will enlarge the time period for the filing of the instant motion for good cause shown and will consider the motion on the merits.

In support of the motion, the defendant submits an affidavit from counsel, Matthew J. Zizzamia, Esq.; a copy of the pleadings; plaintiff's verified bill of particulars; a copy of the transcript of Mr. Lombard's examination before trial; and the affirmed medical reports of Dr. Michael J. Carciente, a board certified neurologist and Dr. Edward A. Toriello a board certified orthopedic surgeon.

In his verified bill of particulars, the plaintiff states that as a result of the accident he sustained "straightening of the lumbar curvature; straightening of the cervical curvature; cervical spine sprain/strain; thoracic spine sprain/strain; restriction of range of motion of the cervical, thoracic and lumbar spine; restriction of range of movement of the cervical, thoracic and lumbar spine; and lumbar spine sprain/strain.

Plaintiff contends that he sustained a serious injury as defined in Insurance Law §5102(d) in that he sustained permanent loss of use of a body organ, member, function or system; permanent consequential limitation or use of a body organ or member; significant limitation of use of a body function or system; a medically determined injury or impairment of a

nonpermanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute his 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.

Mr. Lombard, age 23, was examined by Dr. Michael J. Carciente, a board certified neurologist, who was retained by the defendant. In his examination of November 5, 2010, Dr. Carciente performed quantified and comparative range of motion tests. At the time of the examination plaintiff had complaints of lower back pain. Upon examination, Dr. Carciente stated that "there were no objective neurological findings. The claimant has a normal neurological without objective evidence of either a central or a peripheral nervous system condition. There was no evidence of radiculopathy. Based on today's evaluation and review of available information, I find no evidence of a neurological injury, disability or permanency."

Dr. Toriello, a board certified orthopedic surgeon examined the plaintiff on January 24, 2011. At the time of the examination plaintiff presented with complained of low back pain. Dr. Toriello performed quantified and comparative range of motion tests and of the plaintiff's lumbosacral spine and found no limitations of range of motion. Dr. Toriello concludes that, "the claimant reveals no evidence of disability from any orthopedic injury sustained in the accident."

In his examination before trial, taken on September 10, 2010, plaintiff age 25, testified that one week after the accident he sought treatment at Advance Medical in Elmont. He continued physical therapy and chiropractic care at Advance for five months. Since that time he has received no further treatments. He stated that he still experiences pain in his back, "on and off" about three days a week.

Defendant's counsel contends that the plaintiff's deposition testimony as well as the affirmed medical reports of Drs. Carciente and Toriello are sufficient to establish, prima facie, that the defendant has not sustained a permanent loss of a body organ, member, function or system; that he has not sustained a permanent consequential limitation of a body organ or member or a significant limitation of use of a body function or system. Counsel also contends that there is no proof in the record that the plaintiff has sustained a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff, for not less than 90 days during the immediate one hundred days following the occurrence, from performing

substantially all of his usual daily activities.

In opposition, plaintiff's counsel, Angela A. Capri, Esq., submits her own affirmation as well as the affidavit of plaintiff Jeffrey Lombard and chiropractor Mark Snyder. In his affidavit dated March 9, 2012, Dr. Snyder states that he reviewed certain records which indicated that the plaintiff first presented to Dr. Tapper at Advanced Medical P.C. on January 22, 2009, 12 days after the accident. He states that based upon his review of the records, the plaintiff first presented with pain in his neck, middle back and lower back. He states that Dr. Tapper conducted range of motion tests which revealed significant limitations of range of motion of the plaintiff's cervical spine and lumbar spine. Dr. Snyder states that the plaintiff underwent treatment at Advance for three months at which time he stopped treating because his no fault benefits were cut off and he could not afford to pay for treatments himself. Dr. Snyder states that he personally examined the plaintiff on July 15, 2011 for re-evaluation. At that time plaintiff exhibited limitations of range of motion of the cervical and lumbar spine. He concludes that the plaintiff suffers from cervical and lumbar intervertebral disc disorder with myelopathy; as well as straightening of the lumbar and cervical curvature. Dr. Snyder concludes that the plaintiff's injuries are directly and causally related to the motor vehicle accident of January 10, 2009 and that the plaintiff is permanently partially disabled.

On a motion for summary judgment, where the issue is whether the plaintiff has sustained a serious injury under the no-fault law, the defendant bears the initial burden of presenting competent evidence that there is no cause of action (see Wadford v Gruz, 35 AD3d 258 [1st Dept. 2006]). "A defendant can establish that a plaintiff's injuries are not serious within the meaning of Insurance Law § 5102(d) 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 [1st Dept. 2000]). Whether a plaintiff has sustained a serious injury is initially a question of law for the Court (Licari v Elliott, 57 NY2d 230 [1982]).

Initially, it is defendant's obligation to demonstrate that the plaintiff has not sustained a "serious injury" by submitting affidavits or affirmations of its medical experts who have examined the litigant and have found no objective medical findings which support the plaintiff's claim (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]). Where defendant's motion for summary judgment properly

raises an issue as to whether a serious injury has been sustained, it is incumbent upon the plaintiff to produce evidentiary proof in admissible form in support of his or her allegations. The burden, in other words, shifts to the plaintiff to come forward with sufficient evidence to demonstrate the existence of an issue of fact as to whether he or she suffered a serious injury (see Gaddy v. Eyler, 79 NY2d 955 [1992]; Zuckerman v. City of New York, 49 NY2d 557 [1980]; Grossman v. Wright, 268 AD2d 79 [2d Dept 2000]).

Here, the proof submitted by the defendant, including the affirmed medical reports of Drs. Carciente and Dr. Toriello was sufficient to meet its prima facie burden by demonstrating that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]).

In opposition, plaintiff failed to raise a triable issue of fact (see Zuckerman v City of New York, 49 NY2d 557, [1980]; Cohen v A One Prods., Inc., 34 AD3d 517 006]) Dr. Snyder did not examine the plaintiff until July 15, 2011, two years post-accident, at which time he did find significant limitations of range of motion. However, his opinion as to the plaintiff's contemporaneous injuries is based solely upon his review of the medical records of Dr. Tapper. Said records were not submitted to the Court with the affirmation in opposition. In any event, by relying on the reports of Dr. Tapper, Dr. Snyder's opinion as to plaintiff's contemporaneous injuries is inadmissible and renders that portion of his affidavit without probative value in opposing the motion (see Casiano v Zedan, 66 AD3d 730 [2d Dept. 2009]; Gonzales v Fiallo, 47 AD3d 760 [2d Dept. 2008]; Marziotto v Striano, 38 AD3d 623 [2d Dept. 2007]; Iusmen v Konopka, 38 AD3d 608 [2d Dept. 2007]; Sammuto v Davis, 16 AD3d 658 [2d Dept. 2005]; Mahoney v Zerillo, 6 AD3d 403 [2d Dept. 2004] [plaintiff's physician impermissibly relied upon unsworn reports of other doctors]).

Thus, the plaintiff failed to proffer competent objective medical evidence regarding any injuries sustained in the accident that were contemporaneous with the subject accident (see Bleszcz v Hiscock, 69 AD3d 890 [2d Dept. 2010]; Taylor v Flaherty, 65 AD3d 1328 [2d Dept. 2009]; Fung v Uddin, 60 AD3d 992 [2d Dept. 2009]; Gould v Ombrellino, 57 AD3d 608 [2d Dept. 2008]). The affirmation of Dr. Snyder regarding contemporaneous findings was insufficient to raise a triable issue of fact because Dr. Snyder relied on the findings of the report of another physician (see Giannini v Cruz, 67 AD3d 638 [2d Dept. 2009]; Sorto v Morales, 55

AD3d 718 [2d Dept. 2008]; Malave v Basikov, 45 AD3d 539 [2d Dept. 2007]; Codrington v. Ahmad, 40 AD3d 799 [2d Dept. 2007]). Without such contemporaneous findings, the plaintiff did not establish the duration of the injuries required to raise a triable issue of fact as to whether the plaintiff sustained a serious injury under the permanent consequential limitation or significant limitation of use categories of the no-fault law as a result of the subject accident (see Jack v Acapulco Car Service, Inc., 72 AD3d 646 [2d Dept. 2010]; Bleszcz v Hiscock, 69 AD3d at 891 [2d Dept. 2010]; Simanovskiy v Barbaro, 72 AD3d 930 [2d Dept. 2010]).

Lastly, the plaintiff failed to raise a triable issue of fact as to whether his injury prevented him from performing substantially all of his usual and customary daily activities during at least 90 of the first 180 days following the subject accident. The self-serving affidavit of the plaintiff submitted in opposition to the motion is insufficient to raise a triable issue of fact as there is no competent medical evidence to support it (see Washington v Mendoza, 57 AD3d 972 [2d Dept. 2008]; Sealy v Riteway-1, Inc., 54 AD3d 1018 [2d Dept. 2008]).

Accordingly, because the evidence relied upon by plaintiff is insufficient to create a triable issue of fact with respect to any of the statutory categories of serious injury alleged by the plaintiff, it is hereby,

ORDERED, that the defendant's motion for summary judgment is granted and the complaint is dismissed with respect to plaintiff JEFFREY LOMBARD only.

Dated: Long Island City, N.Y.  
April 9, 2012

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**ROBERT J. MCDONALD**  
J.S.C.