

Klushin v Lakhaney

2012 NY Slip Op 31533(U)

May 31, 2012

Supreme Court, Nassau County

Docket Number: 019510/10

Judge: Jeffrey S. Brown

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

-----X TRIAL/IAS PART 17

HENRY R. KLUSHIN, JR.,
Plaintiff,

-against-

Index No. 019510/10
Mot. Seq. # 1
Motion Date 2.24.12
Submit Date 5.11.12

ALY LAKHANEY and AHMED LAKHANEY,

Defendants.

-----X

The following papers were read on this motion:	Papers Numbered
Notice of Motion, Affidavits (Affirmations), Exhibits Annexed.....	1
Answering Affidavit	2
Reply Affidavit.....	3

Upon the foregoing papers, the defendant's motion seeking an order granting summary judgment pursuant to CPLR § 3212 and dismissal of the complaint of the plaintiff, on the grounds that the plaintiff's injuries do not satisfy the "serious injury" threshold requirement of Insurance Law § 5102 (d) is determined as hereinafter provided.

The plaintiff commenced this lawsuit by filing a summons and complaint wherein the plaintiff claimed personal injuries resulting from a motor vehicle accident, which occurred on January 10, 2009. Issue was then joined by service of the defendant's answer.

The incident occurred at the intersection of Herricks Road and Jericho Turnpike, Garden City, New York when the vehicle in which plaintiff was driving was struck in the rear by the vehicle in which defendant was driving.

In a personal injury action, a summary judgment motion seeking to dismiss the complaint requires that a defendant establish a prima facie case that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) (*Gaddy v. Eycler*, 79 N.Y.2d 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 N.Y.2d 230 [1983]).

In support of a claim that the plaintiff has not sustained a serious injury, the defendant may rely either on the sworn statements of the defendant's examining physicians or the unsworn reports of the plaintiff's examining physicians (*see, Pagano v. Kingsbury*, 182 A.D.2d 268 [2nd Dept. 1992]). However, unlike the movant's proof, unsworn reports of the plaintiff's examining doctors or chiropractors are not sufficient to defeat a motion for summary judgment (*Grasso v. Angerami*, 79 N.Y.2d 813 [1991]).

Essentially, in order to satisfy the statutory serious injury threshold requirement, the legislature requires objective proof of a plaintiff's injury. The Court of Appeals in *Toure v. Avis Rent-a-Car Systems*, 98 N.Y.2d 345 (2002), stated that a plaintiff's proof of injury must be supported by objective medical evidence, 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 (*see, Gonzalez v. Vasquez*, 301 A.D.2d 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 N.Y.3d 566 [2005]).

Insurance Law §5102(d) defines serious injury to mean a personal injury which results in: (1) death; (2) dismemberment; (3) significant disfigurement; (4) a fracture; (5) loss of a fetus; (6) permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or 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 days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

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 (*Gaddy v. Eycler*, supra; *Licari v. Elliot*, 67 N.Y.2d 230 [1982]). A minor, mild or

slight limitation will be deemed insignificant within the meaning of the statute (*Licari v. Elliot, supra*). A claim raised under the "permanent consequential limitation of use of 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 (*see, 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).

Finally, to prevail under the "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 days during the one hundred eighty days immediately following the occurrence of the injury or impairment" category, a plaintiff must demonstrate through competent, objective proof, a "medically determined injury or impairment of a non-permanent nature which would have caused the alleged limitations on the plaintiff's daily activities" (*Monk v. Dupuis, 287 A.D.2d 187 [3rd Dept. 2001]*). A curtailment of the plaintiff's usual activities must be "to a great extent rather than some slight curtailment" (*Licari v. Elliott, supra* at 236). Under this category specifically, a gap or cessation in treatment is irrelevant in determining whether the plaintiff qualifies (*Gomez v. Ford Motor Credit Co., 10 Misc.3d 900 [Sup. Ct., NY Cty., 2005]*).

With these guidelines in mind, the court will turn to the merits of the defendant's motion. In support of their motion, the defendants submit the following: the summons and verified complaint; verified answer with demands; verified bill of particulars; deposition testimony of plaintiff; and independent medical examination report of Dr. Richard Weiss.

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*see, Zuckerman v City of New York, 49 NY2d 557, 562; Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, 404*). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Matter of Redemption Church of Christ v Williams, 84 AD2d 648, 649; Greenberg v Manlon Realty, 43 AD2d 968, 969*)."
Winegrad v. N.Y. Univ. Med. Ctr., 64 N.Y.2d 851, 853 (N.Y. 1985)

As a result of the accident plaintiff alleges to have sustained the following injuries as per his verified bill of particulars: neck pain; small central disc herniations at the C-4-C5 and C5-C6, with mild impingement on the ventral subarachnoid space; foraminal narrowing at the C3-C4 through C5-C6 levels. He also sustained injuries to his skin, muscle, tissue, fascia, nerves and musculature in and about the affected areas and parts, as well as mental anguish, loss of enjoyment of life and severe shock to his nerves and nervous system.

Furthermore, as per the bill of particulars, plaintiff was not confined to bed for any period of time and was confined to the home for a period of approximately two (2) weeks.

Plaintiff claims that she sustained a serious injury as defined in the Insurance Law Section 5102(d) in that she was disabled for a period in excess of 90 out of the first 180 days following the occurrence; that she sustained a permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body organ or member; significant limitation of use of a body function or system.

The movant relies on the orthopedic medical evaluation of Dr. Richard Weiss dated September 22, 2011 in support of the application for summary judgment. With respect to the cervical spine, Dr. Weiss found the following: no spasm in the trapezil or paracervical muscles. Range of motion tests performed by a goniometer were all found to be in the normal range and the testing elicited no complaint of pain. No tenderness was elicited on palpation of the paracervical muscles. Spurling's maneuver failed to elicit any sign of radiculopathy to the shoulders bilaterally. Motor strength was 5/5 in the upper extremities. Sensation was normal. Reflexes were 2+.

Dr. Weiss' impression after performing the physical examination upon plaintiff and the history as reported by plaintiff, if correct, was a resolved cervical sprain/strain. Futhermore, he concluded that there was no objective evidence of any disability.

Based on the admissible evidence, the court finds that the defendant has established a *prima facie* case that the plaintiff has not sustained a serious injury within the meaning of Insurance Law § 5102 (d), specifically, a permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body organ or member; significant limitation of use of a body function or system; or 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 days during the one hundred eighty days immediately following the occurrence of the injury or impairment. The burden now shifts to the plaintiff to raise an issue of fact with respect to whether she meets the serious injury threshold requirement.

In opposition to the application, the plaintiff submitted the following documentary evidence: affidavit of plaintiff dated April 16, 2012; affirmation of Philip Burns, D.O., dated April 11, 2012; affirmation of Adam Silvers, M.D., dated April 18, 2012; report of Central Island Physical Medicine and Rehabilitation, PC; dated January 15, 2009; unsworn report of Central Island Physical Medicine and Rehabilitation PC, dated March 10, 2009; MRI report of Next Generation Radiology, dated February 13, 2009.

The court notes that the report of Central Island Physical Medicine and Rehabilitation PC, dated March 10, 2009 was not sworn, therefore, any reference to it by a physician for plaintiff is disregarded (see, *Mahoney v Zerillo*, 6 AD3d 403; *Friedman v U-Haul Truck Rental*, 216 AD2d 266; *Bycinthe v. Kombos*, 29 A.D.3d 845, 815 N.Y.S.2d 693).

An MRI was conducted by Dr. Silvers at Next Generation MRI on February 13, 2009. At the time the MRI was conducted, Dr. Silvers did not duly affirm the accuracy of the test. However, on April 18, 2012, Dr. Silvers signed an affirmation attesting to the accuracy of the information inscribed on the MRI report. Pursuant to the report, plaintiff stated she sustained a "whiplash injury." The report concludes that the plaintiff suffers from the following: a very small central disc herniation at the C4-C5 level with mild impingement on the ventral subarachnoid space; and a foraminal narrowing at the C3-C4 through C5-C6 levels. The court notes that there is no causal link referenced between the accident and the injuries contained in this report.

Dr. Philip Burns claims to have treated plaintiff for injuries sustained as a result of the accident until plaintiff reached maximum medical benefit from conservative treatment of his permanent cervical spine injuries as per the doctor's affirmation dated April 11, 2012. He states that he continues to see him on an intermittent basis to help him deal with his neck pain. In reaching his conclusions, he relied on diagnostic films, reports and records of his contemporaneous medical treatment, diagnostic testing, including MRI films and reports dated February 13, 2009.

Dr. Burns also conducted cervical range of motion tests at the time of the incident and recently, in anticipation of litigation, with the use of a goniometer. As a result of this testing he found a decreased range of motion in all planes, including flexion, extension, right side bending, left side bending, and right rotation, left rotation. Dr. Burns concluded that the limitations in plaintiff's spinal range of motion were causally related to the accident herein. He further concludes, based upon review of the MRI, that the herniated discs were traumatically induced and caused by the accident herein.

To explain the gap in treatment, plaintiff submits an affidavit which states that he had to stop treating because, *inter alia*, his no-fault benefits ran out. Thus, he was unable to afford continued treatment (see, *Jules v Barbecho*, 55 AD3d 548, 549; *Francovig v Senekis Cab Corp.*, 41 AD3d 643; *Black v Robinson*, 305 AD2d 438).

However, despite the fact that the movants did succeed in making a *prima facie* showing that the plaintiff did not sustain a serious injury pursuant to the Insurance Law, the plaintiff successfully countered this showing with sufficient medical evidence demonstrating the existence of material issues of fact that she has in fact sustained a "serious injury" pursuant to the aforementioned insurance law. The sworn MRI report of the cervical spine constituted sufficient objective evidence to establish the existence of a bulge or herniation (see, *Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d 345). The range of motion tests performed by Dr. Burns on plaintiff's

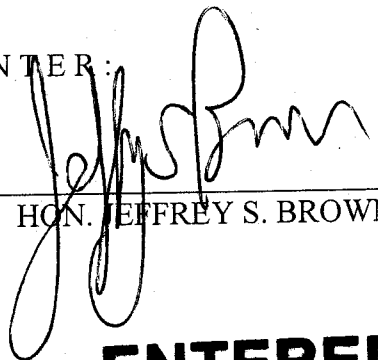
cervical spine proved positive for a limitation of range of motion. The doctor's observations as to actual limitations of movement qualifies as objective evidence (*see, Grossman v. Wright*, 268 A.D.2d 79). Dr. Burns concludes, in his expert opinion, that the injuries are causally related to the accident and that they are permanent in nature. Based on conflicting medical affidavits, the motion must be denied (*see, Ocasio v. Zorbas*, 14 A.D.3d 499).

Accordingly, it is

ORDERED, that the application for summary judgment is **DENIED**.

The foregoing constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
May 31, 2012

ENTER:


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