Dismissed v T Basil Bailey

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IA 20
BASIL BAILEY and SONIA BAILEY,

Plaintiff,

-against-

SHARIFUL M.D. ISLAM and MOHAMMAD ZAHEER,

Defendants.

Index No. 306043/10

DECISION/ORDER

Present:
HON. KENNETH L. THOMPSON, Jr.

The following papers numbered 1 to ___ read on this motion, _____

No On Calendar of	PAPERS NUMBERED
Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed	_____
Answering Affidavit and Exhibits	_____
Replying Affidavit and Exhibits	_____
Affidavit	_____
Pleadings -- Exhibit	_____
Stipulation -- Referee's Report --Minutes	_____
Filed papers	_____

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Defendants' motion for an Order pursuant to CPLR § 3212 granting summary judgment and dismissing the Complaint on the grounds that Plaintiff BASIL BAILEY ~~sis~~ did not sustain a "serious injury" under the Insurance Law is GRANTED.

Plaintiff claims that as a result of a motor vehicle accident involving Defendants, he suffered, among other things: subchondral fractures of the C3 and C4 vertebra; herniated discs at C3-C4, C7-T1 and L5-S1; and a internal derangement of the right shoulder, with a tear of the anterior lip.

Serious Injury

> '[S]erious injury' means a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; 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.

N.Y. Ins. Law § 5102(d).

The purpose of the statute is "to weed out frivolous claims and limit recovery to significant injuries." *Dufel v. Green*, 84 NY2d 795, 798. As such, the Court has determined that the phrases "permanent loss of use," "permanent consequential limitation" and "significant limitation of use" must be interpreted in terms of "total loss." *Oberly v. Bangs Ambulance Inc.*, 96 NY2d 295, 299. Furthermore, the word "significant" as it relates to "limitation of use of a body function or system," refers to more than "a minor, mild or slight limitation of use." *Licari v. Elliott*, 57 NY2d 230, 236. Also, the phrase "substantially all" as it relates to the 90/180, should be "construed to mean that the person has been curtailed from performing his or her usual activities to a great extent rather than some slight curtailment." *Id.* Although no-fault insurance is meant to allow plaintiffs to recover for non-economic injuries in appropriate cases, the Legislature also "intended that the court first determine whether or not a prima facie case of serious injury has been established which would permit plaintiff to maintain a common-law cause of action in tort." *Id.* at 237.

Summary Judgment

> To obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor and he must do so by tender of evidentiary proof in admissible form... One opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require trial of material questions of fact on which he rests his claims . . .

Zuckerman v. City of NY, 49 NY2d 557, 562 (citations omitted).

Defendants' Proffer

Defendants have met their *prima facie* burden of showing that Plaintiff did not sustain a "serious injury" with the affirmed reports of their neurologist, Dr. Ravi Tikoo, M.D.; orthopedist, Dr. Robert Israel, M.D.; and radiologist Dr. Audrey Eisenstadt, M.D. *See Meric v. Cancela*, 275 AD2d 309 (affirmed reports of neurologist and orthopedist who examined plaintiff in automobile negligence action and found she had no disability established *prima facie* case that plaintiff had not sustained serious injury); *Barry v. Valerio*, 72 AD3d 996 (finding that defendant had met its *prima facie* burden where the neurologist "examined the plaintiff and concluded that he had a normal neurologic examination"); *Turner v Benycol Transp. Corp.*, 78 AD3d 506 (finding that defendant had met its *prima facie* burden where its orthopedic surgeon "reported normal ranges of motion in all tested body areas and concluded that plaintiff's injuries resolved without permanency"); *Kuperberg v Montalbano*, 72 AD3d 903, 904 (radiologist "reviewed the foregoing MRI and found that it revealed no evidence of acute traumatic injury to the plaintiff's right shoulder"); *see also Vidal v. Maldonado*, 23 Misc3d 186.

Although the Plaintiffs would bear the burden at trial of proving that they suffered a serious injury, in this motion for summary judgment the Defendant bears the initial burden of establishing that Plaintiff did not meet the serious injury threshold. Where defendant establishes a prima facie case that Plaintiff's injuries were not serious within the meaning of Insurance Law § 5102(d), the burden is then shifted to the Plaintiff to overcome defendant's motion by demonstrating that she sustained a serious injury. *Gaddy v. Eyler*, 79 NY2d 955. The Court finds, however, that Plaintiff has failed to raise a triable issue of fact as to whether he suffered a serious injury for a myriad of reasons.

No contemporaneous exam

Plaintiff has failed to submit competent medical evidence contemporaneous with the subject accident that revealed any limitations or injuries suffered as a result of his alleged injuries. *See, e.g., Christian v. Waite*, 61 AD3d 581; *with Posa v Guerrero*, 2010 NY Slip Op 7730, **2; *Srebnick v Quinn*, 75 AD3d 637; *Catalano v Kopmann*, 73 AD3d 963; *Sirma v. Beach*, 59 AD3d 611; *Valentin v. Pomilla*, 59 AD3d 184.

No Objective Evidence

The mere existence of a herniated disc is not evidence of a serious injury in the absence of objective evidence of the extent of physical limitations allegedly resulting from the injury and its duration. *See, e.g., Keith v Duval*, 71 AD3d 1093, 1095; *Yaroslav Shvartsman v. Vildman*, 47 AD3d 700, 701; *Yun v. Barber*, 63 A.D.3d 1140, 1142; *Casimir v. Bailey*, 70 AD3d 994; *Rivera v. Bushwick Ridgewood Props.*, 63 AD3d 712, 713; *Taylor v. American Radio Dispatcher*, 63 AD3d 407, 408; *Arjona v. Calcano*, 7 AD3d 279, 280. Plaintiff has also failed to present any objective evidence regarding the purported internal derangement and tear of the anterior lip of his right shoulder

Recent examination

Plaintiff failed to include a recent examination regarding any of his alleged ailments, which undercuts any claims of permanency. *See Bidetto v. Williams*, 276 AD2d 516, 517 (finding that "projections of permanent limitations have no probative value in the absence of a recent examination") (citations omitted); *see also Evans v. Ali Mohammad*, 243 AD2d 604, 605; *Mohamed v. Dhanasar*, 273 AD2d 451.

Inadmissible Records

The Court may not consider Dr. Orsuville Cabatu's September 4, 2009 and December 21, 2009 Correspondences nor Dr. Eric Jacobson's December 30, 2009 and February 5, 2010 Correspondences because they are neither affirmed, sworn to nor certified. *See Kramer v. Danalis*, 62 AD3d 583 (holding that a physician's report that was unsworn and unsigned was insufficient to defeat summary judgment); *Uribe-Zapata v. Capallan*, 54 AD3d 936, 937 (holding that "[t]he magnetic resonance imaging reports concerning the plaintiff's lumbar spine and right knee lacked probative value since they were unaffirmed").

Gap-in-treatment

"[E]ven where there is objective medical proof, when additional contributory factors interrupt the chain of causation between the accident and claimed injury–such as a gap in treatment, ... summary dismissal of the complaint may be appropriate." *Pommells v. Perez*, 4 NY3d 566, 572; *Arjona v. Calcano*, 7 AD3d 279, 280; *Bent v. Jackson*, 15 AD3d 46, 48; *see also Ayala v. Bassett*, 57 AD3d 387, 389 (stating that "the unexplained gap in treatment . . . for each plaintiff undermined their respective claims of serious injury based on allegations of permanent injury"); *Pitter v. Ceesay*, 2009 NY Slip Op 51488U, **1 (stating that "[t]he failure of plaintiff ... or her physicians to address or explain the gap in treatment is fatal to said plaintiff's serious injury claims under the 'significant limitation' and 'permanent consequential limitation' categories of Insurance Law § 5102(d)"). Plaintiff has not proffered any competent evidence showing that he underwent any treatment from the date of the accident on July 9, 2009 until the date of Defendants' application November 21, 2011.

Pre-existing condition

Plaintiff's expert failed to rebut the degenerative findings of Defendants' Radiologist regarding his C3-4, C5-6, C6-7 and C7-T1 vertebra. *Pommells v. Perez*, 4 NY3d 566, 574; *Montgomery v. Pena*, 19 AD3d 288, 290; *see also Lopez v American United Transp., Inc.*, 66 AD3d 407 (finding that "plaintiff's expert failed to satisfactorily rebut this conclusion, neglecting even to mention, let alone explain, why he ruled out degenerative changes, thus rendering his opinion speculative").

No causation

Plaintiff undoubtedly surmises that Dr. Jacob Lichy causally connects his purported findings of subchondral fractures of Plaintiff's C3 and C4 vertebra to the accident. The doctor qualifies this opinion, however, by suggesting that "appropriate clinical correlation" is needed to verify his conclusion. *See Daisernia v. Thomas*, 12 AD3d 998 (dismissing plaintiff's complaint because she "fail[ed] to causally connect her . . . injury to the accident"); *Foley v. Karvelis*, 276 AD2d 666, 667 (dismissing plaintiff's complaint because "[h]er doctor failed to causally connect that injury to the subject accident"); *Ray v. Ficchi*, 178 AD2d 988, 989 (dismissing plaintiff's Complaint because "the affidavit of plaintiff's chiropractor failed to connect causally plaintiff's alleged injury to the motor vehicle accident"). There is no basis to connect them to the motor vehicle accident absent evidence that Plaintiff suffered any limitations or underwent any treatment as a result of these alleged fractures.

90/180

On the issue of 90/180, there is no competent evidence in the record that a doctor or any other health care professional mandated that Plaintiff refrain from any

activities, including gainful employment, as a result of his alleged injuries. *See Glover v. Capres Contr. Corp.*, 61 AD3d 549, 550 (holding that "[p]laintiff's self-serving deposition testimony regarding her inability to work for a period of time is insufficient to establish that she was prevented from performing her usual and customary activities for at least 90 of the 180 days following the accident"); *Ryan v. Xuda*, 243 AD2d 457-58; *Traugott v. Konig*, 184 AD2d 765, 766.

The foregoing shall constitute the decision and order of this Court.

Dated: APR 04 2012

J.S.C.

KENNETH L. THOMPSON, JR.