

Clemente v Williams

2013 NY Slip Op 33790(U)

July 2, 2013

Supreme Court, Bronx County

Docket Number: 305671/2009

Judge: Mitchell J. Danziger

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART IA-2

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MICHAEL CLEMENTE and GLENFORD
GREY,

Plaintiff,

DECISION and ORDER
Index No. 305671/2009

-against-

Present: Hon. Mitchell Danziger
AJSC

JEVAUGHN R. WILLIAMS and JAMES B.
JACKSON,

Defendants.

-----X
Recitation, as required by CPLR §2219(a), of the papers considered in reviewing the underlying motion for summary judgment:

Notice of Motion and annexed Exhibits and Affirmation.....	1
Cross motion.....	2
Affirmation in Opposition	3
Reply Affirmation.....	4

Plaintiffs Michael Clemente and Glenford Grey commenced this action alleging that they sustained serious injuries as a result of an automobile accident caused by the defendants' negligence on November 25, 2008. Plaintiff, Michael Clemente was approximately eighteen years old and Glenford Grey was twenty years old on the date of the accident.

Defendant, Jevaughn Williams moves for summary judgment pursuant to CPLR 3212 on the ground that the plaintiffs, Michael Clemente and Glenford Grey did not sustain serious injuries within the meaning of Insurance Law 5102(d). The defendant, James Jackson also seeks summary judgment on threshold.

Michael Clemente

The defendants offer as proof of the absence of serious injury to plaintiff, Michael Clemente

the medical affirmation of Dr. Arnold T. Berman, an orthopedist. Dr. Berman conducted an orthopedic examination of the plaintiff on March 31, 2011. Dr. Berman's report concluded that the plaintiff's examination showed no signs of permanency or disability. The doctor's report contains the following medical history: "Mr. Clemente states that he sustained injuries to the shoulder, back and hip due to this accident." Further, the plaintiff received the following medical treatment: "He did go to the Jacobi Medical emergency room via ambulance on 11/25/08...Other treatment received included physical therapy 3 times a week from 2008 to June 2009, chiropractic treatment from 2008 to June 2009, pain medication, x-rays and MRI testing." Range of motion testing of the cervical spine, thoracolumbar spine and right and left shoulders and right and left hips revealed normal ranges of motion. Dr. Berman's impression was as follows: "Lumbar strain, resolved; right shoulder strain, resolved and left hip contusion, resolved."

In opposition to the motion plaintiff, Michael Clemente submits medical records from Jacobi Medical Center, Emergency room for January 25, 2008 and from Medalliance Medical Health Services for the period from February, 2009 through August, 2009.

In opposition, plaintiff submits medical records from Medalliance Medical Health Services which includes a report by Dr. Ali Guy dated September 29, 2011. The aforesaid report is affirmed. The attached records consist mostly of physical therapy progress notes dated December, 2008 through June, 2009. Dr. Guy examined the plaintiff on September 29, 2011 and his report stated as follows:

Range of motion is normal except for lateral flexion, which is 35 degrees/45 degrees...Extension is 15 degrees/30 degrees. Other range of motion is normal.

Dr. Guy diagnosed the plaintiff's condition as consisting of cervical and lumbar sprains and strains as well as traumatic myofascial pain syndrome. The doctor's report concluded that the plaintiff sustained "a permanent partial disability causally related to the motor vehicle accident of November 25, 2008."

Glenford Grey

The defendants offer as proof of the absence of serious injury to plaintiff, Glenford Grey the medical affirmation of Dr. Arnold T. Berman, an orthopedist. Dr. Berman conducted an orthopedic examination of the plaintiff on March 31, 2011. The doctors report concluded that the plaintiff shows no signs of permanency or disability. The plaintiff's history was as follows: "Mr. Grey states that he sustained injury to his neck, back and right arm due to the accident. He did go to the emergency room...Treatment for his injuries included physical therapy." Range of motion testing of the cervical spine, thoracolumbar spine, and right and left shoulder revealed normal ranges of motion. Dr. Berman's impression was as follows: "Left shoulder strain, resolved; lumbar strain, resolved and cervical strain, resolved."

In opposition to the motion, the plaintiff, Glenford Grey submits an affirmation from Dr. Randall V. Ehrlich who examined the plaintiff on September 21, 2011. The doctor's report showed that he reviewed the following records: "right shoulder arthroscopy operative report dated June 3, 2010; MRI report of the right shoulder dated March 16, 2009 reveals subacromial impingement." Dr. Ehrlich's examination of the right shoulder revealed as follows:

Active range of motion reveals forward elevation to 165 degrees (normal to 180), external rotation to 65 degrees (normal to 70), internal rotation to T11 (normal to T8), and active abduction to 135

degrees (normal to 150). Passive range of motion is forward elevation to 175 degrees (normal to 180), external rotation to 65 degrees (normal to 70) and abduction to 140 degrees (normal to 150) limited to pain and spasm.

Dr. Ehrlich's impression was as follows: "The patient incurred traumatic injuries to his right shoulder as a result of the motor vehicle accident that occurred November 25, 2008." Further, the aforesaid injuries are permanent.

Dr. Ehrlich's report indicates that he first treated the plaintiff on April 14, 2010. Dr. Randall Ehrlich is listed as the attending physician on the operative report.

In opposition, plaintiff submits the emergency room records from Jacobi Medical Center for November 25, 2008 which shows as follows: "Cervical muscle strain and right shoulder pain."

In opposition, plaintiff submits the operative report for plaintiff, Glenford Grey for surgery to right shoulder on June 3, 2010. The aforesaid report indicated that surgery was performed as follows: "After failing a course of nonoperative therapy..." The postoperative diagnoses were as follows: "right shoulder traumatic subacromial impingement, anterior labral fraying, mid glenoid grade 2-3 chondrosis with multiple loose chondral flaps..."

DISCUSSION

The proponent of a motion for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." (*JMD Holding Corp v Congress Financial Corporation*, 4 NY 3d 373 [2005], quoting *Alvarez v Prospect Hospital*, 68 NY 2d 320

[1986]; *Lesane v Tejada*, 15 AD 3d 358 [2nd Dept 2005].) In the present action, the burden rests on the defendants to establish, by the submission of evidentiary proof in admissible form, that the plaintiff did not suffer a serious injury as a result of the accident. The burden thereafter shifts to the plaintiff to demonstrate the existence of a triable issue of fact. (*Seminara v Grossman*, 253 AD 2d 420 [2d Dept 1998].)

The Court of Appeals emphasized in *Pommells v Perez* that litigation can be commenced against a car owner or driver for damages caused by an accident only in the event of serious injury. (*Pommells v Perez*, 4 NY 3d 566 [2005]; Insurance Law §5104[a].) Insurance Law § 5102(d) defines serious injury as:

a personal injury which results in.....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 nonpermanent 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 90 days during the 180 days immediately following the occurrence of the injury or impairment.

A claim of serious injury can be substantiated by an expert's designation of a numeric percentage of a plaintiff's loss of range of motion. (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY 2d 345 [2002].) In the case of *Lopez v Senatore* (65 NY 2d 1017 [1985]), the Court held that where a treating physician, in an affidavit supported by exhibits, set forth the injuries and course of

treatment, identified a limitation of movement of the neck of only 10 degrees to the right or left, and on that predicate expressed the opinion that there was a significant limitation of use of a described body function or system, such evidence was sufficient for the denial of summary judgment.

A bulging or herniated disc may constitute serious injury if objective evidence exists as to the extent of the alleged physical limitation resulting from the disc injury and its duration. (*Espinal v Galicia*, 290 AD 2d 528 [2nd Dept 2002].)

Michael Clemente

The medical records submitted in opposition to defendants motion indicates that the plaintiff sustained minor sprains and strains which do not meet threshold.

Glenford Grey

The medical reports are in conflict with respect to serious injury. Dr. Berman, the defendants' orthopedist concluded that the plaintiff's examination was normal. In contrast, Dr. Ehrlich's report concluded that the plaintiff sustained permanent injuries to the right shoulder which included surgery.

In *Pommels v Perez* (4 NY 3d 566, *supra*), the Court of Appeals required a plaintiff who stops medical treatment to "offer some reasonable explanation for having done so." This Court finds that the plaintiff, Glenford Grey has provided a reasonable explanation for his treatment gap. (*See Brown v Achy*, 9 AD 3d 30 [1st Dept 2004]; *Turner-Brewster v Arce*, 17 AD 3d 189 [1st Dept 2005].)

Viewing the objective medical evidence in a light most favorable to the plaintiff, Glenford Grey this Court finds that the plaintiff's limitations of motion and surgery to his left shoulder both in the months following plaintiff's accident and thereafter describe a serious injury and raise a triable issue of fact. (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY 2d 345, *supra*; *Brown v Achy*, 9 AD 3d

30 [1st Dept 2004]; *Vitale v Lev Express Cab Corp*, 273 AD2d 225 [2nd Dept 2000]; *DiLeo v Blumberg*, 250 AD 2d 364 [1st Dept 1998].) In contrast, plaintiff, Michael Clemente's injuries are described as sprains and strains which fail to meet threshold.

For the foregoing reasons, the motion and cross-motion by the defendants for summary judgment on threshold are denied with respect to the plaintiff, Glenford Grey and granted with respect to the plaintiff, Michael Clemente thereby dismissing the complaint of the plaintiff, Michael Clemente.

Upon service of a copy of this Order with notice of entry on plaintiff's counsel and the clerk the caption herein shall be amended to have Michael Clemente removed from the caption as a plaintiff.

This constitutes the Decision and Order of this Court.

Dated: July 2, 2013

So ordered,



Mitchell Danziger, AJSC