

Jeantilus v Dharma Mgt. Corp.
2013 NY Slip Op 33806(U)
July 1, 2013
Supreme Court, Bronx County
Docket Number: 309901/10
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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MAXO JEANTILUS,

Plaintiff,

DECISION and ORDER
Index No. 309901/10

-against-

Present: Hon. Mitchell Danziger
AJSC

DHARMA MANAGEMENT CORP. and
AMADOU B. DIALLO,

Defendants.

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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
Affirmation in Opposition	2
Reply Affirmation.....	3

Plaintiff Maxo Jeantilus commenced this action alleging that he sustained serious injuries as a result of an automobile accident caused by the defendants' negligence on November 22, 2009.

Defendants move for summary judgment pursuant to CPLR 3212 on the ground that the plaintiff did not sustain serious injuries within the meaning of Insurance Law 5102(d).

The defendants offer as proof of the absence of serious injury to plaintiff, Maxo Jeantilus the medical affirmation of Dr. Gabriel Dassa, an orthopedist. Dr. Dassa conducted an orthopedic examination of the plaintiff on November 7, 2011. Dr. Dassa's report contains a review of plaintiff's medical records which indicates as follows: "Interpretation MRI right knee 3/15/2010 "Impression: Tear of the posterior horn of the medical meniscus. Partial tears of the anterior cruciate and medial

collateral ligaments. Joint effusion.” T. Kolb, M.D.”

Range of motion testing of the cervical and lumbosacral spine, shoulders and knees revealed normal ranges. The doctor’s report states as follows:

Right knee medial meniscal tear and tear of the posterior horn of the medial meniscus. Partial tear of the anterior cruciate and medial collateral ligaments based on the MRI of 3/15/10, no objective clinical orthopedic correlating findings and no current symptoms/complaint.

In support of the motion the defendants also submit a medical affirmation from Dr. Daniel Feuer, neurologist. Dr. Feuer performed a neurological examination of the plaintiff on October 27, 2011. Range of motion testing of plaintiff’s cervical and lumbosacral spine revealed normal ranges of motion. Dr. Feuer’s report concluded that the plaintiff underwent a normal neurological exam.

In opposition, plaintiff submits an Affirmation from Dr. Mark McMahon who examined the plaintiff on April 23, 2012. The doctor report stated as follows: “Right knee torn medial meniscus with partial tears of the anterior cruciate and medial collateral ligaments. Left shoulder tear of the anterior labrum and biceps-labral complex (SLAP tear). Articular side tear of supraspinatus tendon.” Dr. McMahon’s report concluded that the aforesaid diagnoses were causally related to the accident. Range of motion testing of plaintiff’s cervical and lumbar spines and right knee and left shoulder showed restrictions in contrast to defendants examining physicians. In opposition to the motion plaintiff also submits certified records by Dr. Joyce Goldenberg from Central Park Physical Medicine and Rehabilitation, P.C., from December, 2009 through May, 2010 which shows injuries to plaintiff’s right knee and left shoulder.

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].)

The aforesaid tear(s) raises a triable issue of fact (*See, Yuen v. Arka Memory Cab Corp.*, 80 AD 3d 481 (1st Dept., 2011); *Peluso v. Janice Taxi Co., Inc.*, 77 AD 3d 491 (1st Dept., 2010).

The medical reports are in conflict with respect to serious injury. The defendants' examining physician, Dr. Feuer concluded that the plaintiff underwent a normal examination. Dr. Feuer's report comments as follows on the plaintiff's present complaints: "I'm okay." Further, Dr. Feuer performs range of motion testing of plaintiff's cervical and lumbar spines only and makes no mention in his report of tears to plaintiff's right knee and left shoulder which are not in dispute. In contrast, the plaintiff's doctor asserts that the aforesaid tears are causally related to the accident in question. The aforesaid tears confirmed by MRI's raise issues of fact. (*See, Duran v. Kabir*, 93 AD 3d 566 (1st Dept., 2012); *Medley v. Lopez*, 7 AD 3d 470 [1st Dept., 2004].)

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 herein 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].)

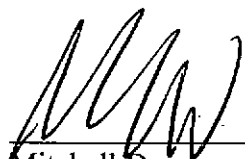
For the foregoing reasons, the motion by the defendants for summary judgment on threshold is denied.

This constitutes the Decision and Order of this Court.

Dated: ~~June 28~~, 2013

July 1

So ordered,



Mitchell Danziger, JCC