

Jackson v Ayala

2013 NY Slip Op 33990(U)

June 3, 2013

Supreme Court, Bronx County

Docket Number: 309200/10

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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IRVING JACKSON and ANDERSON A. KINSALE,

Plaintiffs,

DECISION and ORDER
Index No. 309200/10

-against-

Present: Hon. Mitchell Danziger
AJSC

LORENA AYALA, GRUSHENKA CASADO, JANE
DOE, CPS VALLEJO LIMOUSINE and KERELOUS
ABDALMASEH,

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
Memo of Law.....	2
Affirmation in Opposition	3
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Plaintiffs Irving Jackson and Anderson A. Kinsale commenced this action alleging that they sustained serious injuries as a result of an automobile accident caused by the defendants' negligence on June 9, 2010.

Defendants, CPS Vallejo Limousine and Kerelous Abdalmaseh move for summary judgment pursuant to CPLR 3212 on the ground that the plaintiffs did not sustain serious injuries within the meaning of Insurance Law 5102(d).

Irving Jackson

The defendants offer as proof of the absence of serious injury to plaintiff, Irving Jackson

the medical affirmation of Dr. Alan M. Crystal, an orthopedist. Dr. Crystal conducted an orthopedic examination of the plaintiff on February 29, 2012. Dr. Crystal's report lists the plaintiff's claimed injuries as including the following: "...right knee surgery and claims that he now gets occasional right knee pain. He also claims that he gets occasional lower back pain." Dr. Crystal's report contains a report by Dr. Mark Shapiro, radiologist which states that an MRI of the right knee dated June 22, 2010 indicated as follows: Partial tear of the ACL and tear of the posterior horn of the medical meniscus.

Range of motion testing of the cervical and lumbosacral spines, shoulders and right knee revealed normal ranges. The doctor's report indicates that the plaintiff's right knee and shoulder does not have any "objective findings." Further, Dr. Crystal's report concludes as follows: "...there is no basis to causally relate the alleged injuries of record of the right shoulder to the accident of 6/9/2010." Dr. Crystal's report also concludes as follows: "...it is my firm opinion and conclusion that there is no basis to causally relate the alleged injuries of record of the cervical and lumbar spine to the accident of 6/9/2010."

In support of the motion the defendants also submit a medical affirmation from Dr. A. Robert Tantleff, a radiologist. Dr. Tantleff reviewed a right knee MRI dated June 22, 2010. The doctor's report states as follows: "There is degenerative tearing of the medial and lateral menisci. The medial meniscus reveals evidence of a chronic complex tear." Dr. Tantleff's impression was as follows: "Longstanding degenerative changes of all three joint compartments with associated degenerative changes and degenerative tearing of the medial and lateral menisci as noted...The findings depicted are either congenital or degenerative age related findings without causal relationship to the date of incident..."

The doctor also reviewed the MRI of plaintiff's right shoulder dated July 2, 2010. Dr. Tantleff's report concludes as follows: "no evidence of acute or recent injury."

In opposition, plaintiff submits an affirmation from treating physician, Dr. Sanford R. Wert. Dr. Wert first treated the plaintiff on July 23, 2010. The doctor's examination of plaintiff's right knee and right shoulder revealed as follows: "...he suffers from an internal derangement of the right knee, along with a partial ACL tear, tear of the posterior horn of the medial meniscus, joint effusion and a Popliteal cyst. Concerning Mr. Jackson's right shoulder, my diagnosis was that Mr. Jackson suffers from a right-shoulder impingement syndrome, a partial tear of the supraspinatus tendon, and a signal abnormality of the humeral head.." Further, range of motion testing revealed as follows: "A manual Range of Motion test of Mr. Jackson's right shoulder revealed a maximum flexion at 145 degrees with pain (normal 180), maximum abduction of 150 degrees with pain (normal 180), and a maximum internal rotation of 80 degrees (normal 90)."

Dr. Wert's report concluded that the plaintiff's injuries were caused by the motor vehicle accident in question. In addition, "over the course of approximately four months of physical therapy, Mr. Jackson's right knee problems persisted, and on September 3, 2010, Mr. Jackson's symptoms forced him to submit to an arthroscopic surgery." Dr. Wert performed the surgery which revealed: "A large complex meniscal tear was found...-for which I performed a partial medial and lateral meniscectomy."

Dr. Wert recently examined the plaintiff on September 6, 2012 which revealed as follows: "I performed a Range of motion test on Mr. Jackson's right knee, which revealed a maximum flexion of 0-125 degrees with pain (normal 130)." The doctor's report concluded as follows: "My prognosis was that due to the automobile accident of June 9, 2010, Mr. Jackson sustained a permanent injury

to the right knee, necessitating a surgical procedure, leaving Mr. Jackson with significant pain on a permanent basis.” Further, “Mr. Jackson is considered permanently disabled with permanent consequential limitations of his right knee.”

In opposition, plaintiff submits an affirmation from treating physician, Dr. Ricardo Galdamez. Dr. Galdamez examined the plaintiff, Irving Jackson on June 29, 2010 which revealed as follows:

A computerized range of motion test of Mr. Jackson’s cervical spine, conducted on June 29, 2010 revealed a maximum flexion of 15 degrees (normal 50), and a maximum extension of 18 degrees (normal 60). A computerized range of motion test of Mr. Jackson’s thoracic spine, conducted on June 29, 2010, revealed a maximum flexion of 12 degrees (normal 50). A computerized range of motion test of Mr. Jackson’s lumbar spine, conducted on June 29, 2010, revealed a maximum flexion of 21 degrees (normal 60), a maximum extension of 12 degrees (normal 25), and maximum sacral hip extension of 0 degrees (normal 45).

The doctor’s report indicates that the plaintiff continued to treat at Gianna Medical P.C. for approximately six months. Further, “Mr. Jackson still did not demonstrate a full and complete recovery and would continue to be partially disabled from being able to perform many tasks at his previous capacity prior to the accident.” In addition, “Mr. Jackson’s treatment was stopped because No-Fault benefits were cut off, and he had reached maximum medical improvement--rendering any additional therapy as palliative.”

In opposition to the motion the plaintiffs submit an affirmation from Dr. Daniel Beyda, a radiologist. Dr. Beyda reviewed the MRI of the plaintiff's cervical spine taken on June 25, 2010. The aforesaid MRI indicated as follows: "At C3-4, a left paracentral disc bulge is noted." The plaintiffs also submit an affirmation from Dr. John S. Lyons, a radiologist. Dr. Lyons reviewed the MRI of the plaintiff's lumbosacral spine dated July 16, 2010. The lumbosacral MRI report stated as follows: "L2-3 disc bulge with thecal sac impingement.-L3-4 disc bulge with thecal sac impingement.- - L4-5 disc bulge with thecal sac impingement"

Anderson Kinsale

The defendants offer as proof of the absence of serious injury to plaintiff, Anderson Kinsale the medical affirmation of Dr. Alan M. Crystal, an orthopedist. Dr. Crystal conducted an orthopedic examination of the plaintiff on February 29, 2012. Dr. Crystal's report lists the plaintiff's claimed injuries to his neck and back. Range of motion testing of his lumbar and cervical spines revealed normal ranges.

Dr. Crystal's impression was as follows: 'The claimant is fully functional to perform all normal and usual daily activities, including work, without any restrictions.' In addition, "The claimant does not have any objective findings consistent with a symptomatic cervical disc impinging on a nerve root."

In opposition, plaintiff submits an Affirmation from treating physician Dr. Ricardo Galdamez. Dr. Galdamez examined the plaintiff, Anderson Kinsale on June 15, 2010 and found the following:

A computerized range of motion test of Mr. Kinsale's cervical spine, conducted on June 15, 2010 revealed a maximum flexion of 16

degrees (normal 50), and a maximum extension of 17 degrees (normal 60). – A computerized range of motion test of Mr. Kinsale's lumbar spine, conducted on June 15, 2010 revealed a maximum flexion of 24 degrees (normal 60), a maximum extension of 13 degrees (normal 25), and maximum sacral hip extension of -1 degree (normal 45).

The doctor's report also indicated as follows: "My impression, resulting from my November 15, 2010 re-examination of Mr. Kinsale, was that due to the injuries he sustained in the June 9, 2010 car accident, he permanently suffered cervical radiculopathy, cervical strain and sprain, lumbar radiculopathy, lumbar sprain and strain, internal derangement of the left shoulder, and right wrist tendinitis of the ulnar area." The report indicates that the plaintiff received medical treatment at Gianna Medical, P.C., for approximately six months. Further, "Mr. Kinsale's treatment was stopped because No-Fault benefits were cut off, and he had reached maximum medical improvement rendering any additional therapy as palliative."

In opposition to the motion the plaintiff, Anderson Kinsale submits an affirmation from Dr. Sanford Wert, an orthopedist. Dr. Wert treated the plaintiff on September 10, 2010 and re-examined the plaintiff on September 27, 2012. The most recent examination of the plaintiff occurred on September 27, 2012 by Dr. Wert showed the following restrictions: "I performed a range of motion test on Mr. Kinsale's right wrist, which revealed a maximum volar flexion of 52 degrees (normal 60), maximum dorsiflexion 48 degrees (normal 60), maximum radial deviation of 11 degrees (normal 20), and maximum ulnar deviation of 17 degrees (normal 30). Furthermore, Mr. Kinsale had difficulty making a fist, complained of numbness and tingling over the 1st and 2nd digits, and

showed a positive Tinel sign.” Further, the doctor’s impression based on the September 10, 2010 treatment was as follows: “he suffers from tendinosis of the right wrist and hand, and the 3-4 millimeter borderline widening of the scapholunate distance—as confirmed by the radiograph tests of Mr. Kinsale’s right wrist and right hand performed on August 27, 2010 by Dr. Ajit Belliappa.” Dr. Wert’s report concluded that “the motor vehicle accident of June 9, 2010, was the competent producing cause of Mr. Kinsale’s injuries.”

In opposition to the motion, the plaintiff, Anderson Kinsale submits an affirmation from Dr. Ajit Belliappa, a radiologist. The doctor’s impression of multiple x-rays taken on August 27, 2010 was as follows: “Borderline widening of scapholunate distance 3-4 MM. This could be seen with ligament injury.”

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. (*Pommels 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 surgical report with regard to the plaintiff, Irving Jackson, by Dr. Wert dated September 3, 2010 states as follows “complete tear of posterior horn of medial meniscus, right knee.” Dr. Wert’s report concluded that the aforesaid injury occurred as a result of the accident in question. 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 concluded that the plaintiffs’ injuries are not causally related to the accident and/or degenerative in nature. In contrast, the plaintiff’s treating physicians found permanent injuries which included surgery. (*See, Duran v. Kabir*, 93 AD 3d 566 (1st Dept., 2012).

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 plaintiffs herein has provided a reasonable explanation for their 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 plaintiffs, this Court finds that the plaintiffs’ limitations of motion as stated above both in the months following plaintiffs’ accident and thereafter and/or surgery and/or tendinosis of the right wrist and hand 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

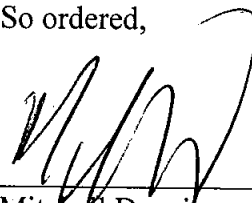
2000]; *DiLeo v Blumberg*, 250 AD 2d 364 [1st Dept 1998].)

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 3, 2013

So ordered,

A handwritten signature in black ink, appearing to read 'M. Danziger', written over a horizontal line.

Mitchell Danziger, AJSC