

**Aracena v Bennett**

2015 NY Slip Op 32570(U)

March 26, 2015

Supreme Court, Bronx County

Docket Number: 306696/09

Judge: Howard H. Sherman

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF THE BRONX

-----x  
ADOLFO ARACENA,

*Plaintiff.*

-against-

MARK BENNETT,

*Defendant.*  
-----x \

Index No.: 306696/09

**DECISION/ORDER**

Howard H. Sherman  
*J.S.C.*

Upon the foregoing papers, the motion by defendant for an order awarding summary judgment dismissing the complaint on the grounds that plaintiff did not sustain a serious injury is decided as set forth below.

**Facts and Procedural Background**

Plaintiff seeks damages for injuries allegedly to have been sustained on September 14, 2006 in a motor vehicle accident that occurred at the intersection of Bronx Park East and Boston Road, Bronx, New York.

This action was commenced in August 2009 and issue was joined in November 2009.

The Note of Issue was filed May 17, 2013.

**Motion**

Defendant moves for summary judgment dismissing the complaint on the grounds that the record demonstrates as a matter of law that plaintiff failed to sustain an accident-related serious injury as defined by Insurance Law 5102(d).

Plaintiff alleges that as a result of the accident he sustained the following injuries: herniated disc at C4 - 5 and bulging discs at C3-4 and C5-6; posterior bulging at L4-5 and bulging at L5-S1,

as well as fluid in the subacromial/subdeltoid bursa of the right shoulder [Verified Bill of Particulars ¶6].

All injuries are alleged to be permanent in nature, and as having caused plaintiff to be confined to bed and home on a “concurrent basis” for 90 out of 180 days post accident and periodically and intermittently thereafter [Id. ¶ 7/8].<sup>1</sup>

Plaintiff further alleges that the injuries qualify as serious in the following five categories: significant disfigurement; permanent loss of use of a body organ or member; a significant limitation of use of body function and system; a permanent consequential limitation of use of a body organ or member, as well as a non-permanent injury which incapacitated plaintiff for 90 of the 180 days immediately following the accident [Id. ¶24].

#### Defendant's Experts

The motion is supported by the reports of Sheldon Manspeizer, M.D., a board-certified orthopedic surgeon, and Michael J. Carciente, M.D., a board-certified neurologist, and that of Michael N. Berke, D.C. The motion is also supported by a copy of the transcript of plaintiff's 3/14/13 examination before trial testimony.

Michael N. Berke, D.C. examined plaintiff on December 13, 2006 with Mr. Aracena presenting with complaints of lower back pain/numbness, neck pain, right shoulder pain, right arm, forearm and hand numbness, as well as right thigh and leg numbness.

At the time of the examination, plaintiff was working full time and reported that he was able to perform his duties without restriction.

---

<sup>1</sup> The Verified Bill of Particulars is dated June 2, 2011.

Active and passive cervical ranges of motion were within normal limits and muscle strength appeared to be normal. No evidence of spasm was observed upon spinal percussion with a neurological hammer, and or manual palpation over the cervical, thoracic, and lumbar spinal regions. Plaintiff was observed to have moderate scoliosis and there were negative findings on SLR, Ely's, Soto-Hall, and Bechterew's.

Dr. Berke concluded that plaintiff was a 48- year old male three months post accident "whose examination fails to reveal any objective findings to substantiate a need for further treatment."

Upon examination on August 20, 2013 and a review of contemporaneous reports of diagnostic studies and contemporaneous care for the period 9/15/06 through 2/22/07, Dr. Manspeizer concluded that plaintiff had no objective findings to indicate a significant injury to the cervical, thoracic and/or lumbosacral spine, nor cord compression or nerve root impairment.

Both shoulders were found to have subjective decreased motion without objective findings to indicate significant injury. Dr. Manspeizer observed that plaintiff had pre-existing thoracolumbar scoliosis.

Upon neurological examination on 6/12/13, Dr. Michael J. Carciente opined to a reasonable degree of medical certainty that there were no findings of any neurological injury or evidence of deficits. The findings included the absence of tenderness or spasm in the spinal areas and SLR negative to 80° in the sitting position. Motor strength was found to be 5/5 in all proximal and distal major muscle groups of the upper and lower extremities.

### Deposition

Plaintiff testified that his vehicle was traveling at around five or ten miles an hour at the time of impact with defendant's vehicle [ARACENA EBT 60-65]. His seat belt restrained him while he hit the brakes so he sustained injury to his right shoulder, knee, leg, and neck, and he "felt again the problem in his back." [EBT: 65].<sup>2</sup>

A day after the accident, plaintiff sought medical treatment at a medical facility on Boston Road and Pelham Parkway [Id. 71]. The treatment consisting of acupuncture, massage therapy, chiropractor and psychological counseling<sup>3</sup> continued for almost a year [Id. 73]. He also received a few injections for back pain from an orthopedist [Id. 81]. The last time he received medical treatment for his injuries was sometime in 2007 [Id. 86].

Plaintiff testified that after the accident he was confined to home for almost a year [Id. 84]. He became employed again about a year after the accident [Id. 85], and could not recall if he was working at the time of the accident [Id. 15]. At the time of the deposition, plaintiff was employed.

### Discussion and Conclusions

Upon review of the probative medical proof upon recent examinations in support of the motion and upon consideration thereof, and of plaintiff's cessation of treatment for accident-related injuries in 2007, it is the finding of this court that defendant has sustained his initial burden on the motion to prove as a matter of law the lack of any accident-related significant disfigurement, and/or a permanent loss of use of a body organ, member, function or system (see, Oberly v Bangs

---

<sup>2</sup> Plaintiff sustained lower back injury in a work-related accident in 2002 for which he received a litigation settlement. He applied for SSI benefits in connection with this accident [Id. 28-30], but his claim was denied.

<sup>3</sup> The counseling continued for two or three months [Id.].

Ambulance, Inc., 96 NY2d 295) or significant limitation of use of body function and system, and/or permanent consequential limitation of use of a body organ or member. Moreover, upon review of the report of defendant's chiropractor with respect to his findings upon examination in December 2006, evidencing resolution of the spinal injuries asserted, it is the further finding of this court that defendant has sustained its burden with respect to the 90/180 category asserted.

Upon this showing it is incumbent upon plaintiff to come forward with probative medical proof to raise an issue of fact that plaintiff sustained a serious injury.

Upon review of the submissions in opposition there is no issue of fact raised that plaintiff sustained a "total" loss of use of a body organ, member, function or system,<sup>4</sup> and failing to tender any objective medical evidence of permanent limitations based on a recent examination, plaintiff fails to raise an issue of fact of a permanent consequential limitation of use of a body organ or member (see, Zambrana v Timothy, 95 AD 3d 422 [1<sup>st</sup> Dept. 2012]).

Nor upon review of the contemporaneous records does plaintiff come forward with any probative medical evidence to raise an issue of fact to support any 90/180 claim as no language recommending a "significant" curtailment of plaintiff's usual daily activities is incorporated therein.

However, as afforded all favorable inferences and despite a diminishment in probative value resulting from the failure of the treating physicians to address issues of causality of the lumbar restrictions assessed of pre-existing disease (scoliosis) and the significant trauma of the 2000 work-related accident, it is the finding of this court that plaintiff has raised an at least arguable issue of fact that he sustained significant limitations of use of the cervical and lumbar spine in the subject motor

---

<sup>4</sup> In opposition plaintiff does not argue that any significant disfigurement was occasioned as a result of the accident.

vehicle accident.

Accordingly, it is

ORDERED that the motion be and hereby is granted to the extent of dismissing plaintiff's claims of serious injury in all categories with the exception of the "significant limitation of use" category.

This constitutes the decision and order of this court.

Dated: March 26, 2015  
Bronx, New York



---

Howard H. Sherman  
J.S.C.