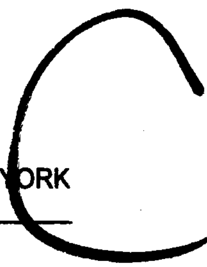
Baston v Romero
2017 NY Slip Op 31747(U)
December 17, 2015
Supreme Court, Bronx County
Docket Number: 21235/14
Judge: Elizabeth A. Taylor
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York 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.

[* 1]



JUL 2 5 2017

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 2
JONATHAN BASTON, MYRTA DEVALLE and
MARIA ELENA DEVALLE,

Plaintiffs,

Index No. 21235/14

DECISION/ORDER

- against -

Present:
HON. ELIZABETH A. TAYLOR

MILAGROS ROMERO and VICTOR E. PEREZ,

Defendants.

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----------------	1-2, 3-4
Answering Affidavit and Exhibits--	5-6
Replying Affidavit and Exhibits---	7
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:

Motion and cross-motion pursuant to CPLR 3212 for an order dismissing the complaint of plaintiff Jonathan Baston against defendants Victor Perez and Milagros Romero, on the ground that Mr. Baston has not suffered a serious injury within the meaning of Insurance Law §5102 (d), is granted.

Plaintiffs commenced this personal injury action to recover damages for injuries allegedly sustained, as a result of a motor vehicle accident that occurred on March 9, 2014. In the Bill of Particulars, dated November 6, 2014, Mr. Baston alleges to have suffered injuries only to his right ankle. In opposition, plaintiffs attached a Supplemental Bill of Particulars, dated and served on March 4, 2016. Plaintiff Baston alleges new injuries in the Supplemental Bill of Particulars. Specifically, Mr. Baston alleges, for the first time, injuries to his cervical and lumbar spine. As the Supplemental Bill of Particulars was served after the motion and cross-motion were filed, this court is not allowed to address the cervical and lumbar spine injuries as these are "new" claims (see Sanchez v Steele, 149 Ad3d 458,459 [1st Dept 2017]; Boone v Elizabeth Taxi, Inc. 120

AD3d 1143, 1144 [1st Dept 20140]; Christopher V. ex rel. Wanda R. v James A. Leasing, Inc., 115 AD3d 462 [1st Dept 2014].

In the bill of particulars, Mr. Baston alleges "serious injuries" in the following categories: 1) "permanent loss of use of a body organ, member, function, or system;" 2) "permanent consequential limitation of use of a body organ or member;" 3) "significant limitation of use of a body function or system;" 4) "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;" and 5) "a significant disfigurement."

To prevail on a motion for summary judgment, movants have the initial burden of presenting competent evidence establishing that plaintiff has not suffered a serious injury (*see Spencer v Golden Eagle, Inc.*, 82 AD3d 589 [1st Dept 2011]). Such evidence includes affirmations of medical experts who examined the plaintiff and have concluded that no objective medical findings support plaintiff's claim (*Id.*).

In support of the motion and cross-motion, movants submit the report of Dr. Harry Goldmark. On March 7, 2015, Dr. Goldmark conducted an orthopaedic examination of Mr. Baston, which included range of motion testing of his right ankle. Dr. Goldmark found that Mr. Baston did not have restrictions in the range of motion of his right ankle. Mr. Baston testified that he missed four days from work. Although he claims significant limitation, the bill of particulars does not allege facts that would qualify as a serious injury under the significant disfigurement category.

Based upon the foregoing, this court finds that movants have met their prima facie burden of demonstrating that Mr. Baston has not suffered a permanent consequential limitation of use of a body organ or member; a significant limitation of use of a body function or system; a significant disfigurement; or a medically determined injury or impairment of a non-permanent nature which prevented him from performing

substantially all of the material acts which constitute his 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.

In opposition, plaintiffs submit the affirmation of Dr. Marc Levinson, who first examined Mr. Baston approximately two weeks after the accident. On March 20, 2014, Dr. Levinson conducted range of motion testing of Mr. Baston's right ankle. Dr. Levinson found restricted range of motion of Mr. Baston's right ankle and that it was casually related to the accident. Dr. Levinson avers that he conducted follow-up examinations of Mr. Baston on May 14, 2014, June 13, 2014, July 28, 2014 and February 26, 2016. Dr. Levinson last examined Mr Baston on March 18, 2016, and did not address the right ankle.

Plaintiffs do not argue or explain the gap in treatment for Mr. Baston's right ankle. As plaintiffs fail to submit any medical evidence of the current condition of the alleged injury to Mr. Baston's right ankle, this claim must be dismissed. Movants fail to submit any expert medical evidence to support Mr. Baston's 90/10 and significant disfigurement claims.

The Clerk is directed to dismiss plaintiff Jonathan Baston's claim and amend the caption to reflect such dismissal as follows.

[* 4]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 2

MYRTA DEVALLE and MARIA ELENA DEVALLE,
Plaintiffs,

- against -

MILAGROS ROMERO and VICTOR E. PEREZ,
Defendants.

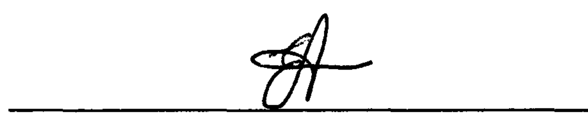
Index No. 21235/14

DECISION/ORDER

Present:
HON. ELIZABETH A. TAYLOR

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

Dated: JUL 1 8 2017



A.J.S.C.

[* 5]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

---x

JONATHAN BASTON, MYRTA DELVALLE and
MARIA ELENA DEVLALLE,

Plaintiffs,

- against -

Index No. 21235/2014E

MILAGROS ROMERO and VICTOR E. PEREZ,

Defendants.

---x

MEMORANDUM OF LAW
OF THE DEFENDANT
VICTOR PEREZ

KAY & GRAY
ATTORNEYS FOR THE DEFENDANT
Theresa P. Mariano
875 Merrick Avenue
Westbury, New York 11590
516-229-4429

THE PLAINTIFF, JONATHAN BASTON, CANNOT ESTABLISH A PRIMA-FACIE CASE OF SUSTAINING A SERIOUS INJURY

The plaintiff, Jonathan Baston, failed to satisfy his burden of establishing her claim that he sustained "a serious injury" as required by Article 51 of the Insurance Law.

Section 5104(a) of the Insurance Law of the State of New York provides,

> "Notwithstanding any other law, in any action by or on behalf of a covered person for personal injuries arising out of negligence in this State, there shall be no right of recovery for non-economic loss, except in the case of serious injury or for basic economic loss."

Serious injuries are defined in Section 5102(d) of the Insurance Law as follows, pertinent part:

> Serious injury means a personal injury which results in permanent consequential limitation of use of a body organ or member, or member, function or system; 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 party 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.

It is well settled that summary judgment is the proper procedure for determining whether a plaintiff has met the threshold requirement of "serious

injury" as defined in § 5102(d) of the Insurance Law of the State of New York. In JOthat "It is incumbent upon the court to decide in the first instance whether the plaintiff has established a prima facie case of sustaining serious injury."

Licari, (supra) is the benchmark for utilization of summary judgment to dismiss a cause of action for failure to meet the threshold requirement of "serious injury." In Diorio v. Brancoccio, 115 A.D.2d 634, 496 N.Y.S.2d 293, the Appellate Division of this Department reversed a Supreme Court order denying a motion for summary judgment on the ground that the plaintiff failed to meet the threshold requirement for "serious injury" pursuant to Insurance Law §5102(d), reaffirming the power of the courts to decide such preliminary issue. The Appellate Division has consistently made use of the summary judgment procedure in dismissing a plaintiff's cause of action for failure to meet the threshold requirement of "serious injury" within the meaning of the Insurance Law. See DeFilippo v. White, 101 A.D.2d 801, Palmeri v. Newson, 118 A.D.2d 633, 499 N.Y.S.2d 785.

THE DEFENDANT HAS ESTABLISHED BY PHYSICIAN'S SWORN REPORT THAT THE PLAINTIFF HASNOT MET THE THRESHOLD REQUIREMENT

The independent examinations of the plaintiff, Jonathan Baston, establish he only sustained soft tissue injuries as a result of this accident. Therefore, he cannot make a prima facie showing that he sustained a "serious injury" under the Insurance Law.

Dr. Goldmark who conducted an independent examination of the plaintiff, Jonathan Baston concluded that upon physical examination plaintiff exhibits full range of motion in his right and left ankle, additionally he has full range of motion

in his cervical spine and minor losses in motion in his thoracic and lumbar spine. Any alleged injury or sprain to the right ankle has been resolved. Upon examination Dr. Goldmark concluded that there is no indication for surgery and no casually related disability from an orthopedic standpoint.

Evidence that plaintiff suffered from a lumbosacral sprain and some limitations of movement is insufficient when plaintiff fails to quantify either the pain suffered or the limitation of movement, Duvivier v. Bruso, 221 AD2d 411, 633 NYS2d 544 (1995). The courts have held that a "minor or slight limitation of use is insignificant within the meaning of the No-Fault statute", Gaddy v. Eyler, 79 N.Y.2d 955, 582 N.Y.S.2d 990 (1992). In this case, the plaintiff, failed to quantify the pain he has allegedly suffered or any limitation of motion. The Court must make a preliminary determination as to whether a limitation is significant, (Gaddy v. Eyler, 79 N.Y.S.2d 955, 582 N.Y.S.2d 990; the limitation must be more than minor, mild or slight).

The courts have also held that simple spinal sprains aren't "significant" within the meaning of the No-Fault statute, See, Cannizzaro v. King, 187 AD2d 842, 589 N.Y.S.2d 698 (1992); Rhind v. Naylor, 187 A.D.2d 498, 589 N.Y.S.2d 605 (1992); Delfino v. Davey, 159 A.D.2d 604, 552 N.Y.S.2d 658 (1992). Sprains and contusions do not establish a serious injury, Sciarrino v. Ambrius, 58 A.D.2d 741, 395 N.Y.S.2d 857 (1977). Cervical and lumbar strains are not serious injuries, Figueroa v. Turgerson, 147 A.D.2d 883, 538 N.Y.S.2d 108 (3d Dept, 1989); Hexekiah v. Williams, 81 A.D.2d 261, 440 N.Y.S.2d 274 (2d Dept 1981).

The medical reports of the plaintiff, , don't show that objective tests were performed and resulted in objective or medically verifiable proof of a serious injury. Under these circumstances, the serious injury threshold is not met, Scheer v. Koubek, 70 N.Y.2d 678, 518 N.Y.S.2d 788 (1987); Georgia v. Ramautar, 180 A.D.2d 713, 714, 579 N.Y.S.2d 743 (1992). Without any objectively diagnosed injury, the plaintiff's subjective complaints are insufficient to support a finding of a serious injury, Delaney v. Rafferty, 241 A.D.2d 537, 663 N.Y.S.2d 834 (1997). Subjective pain alone will not satisfy the plaintiff's burden of establishing a "serious injury" Scheer v. Koubek, 70 N.Y.2d 678, 518 N.Y.S.2d 788 (1987) Marshall v. Albano , 582 N.Y.S.2d 220; Lashway v. Groshans, 1997 N.Y. App. Div. 80986)

PLAINTIFF'S INJURIES FROM THIS ACCIDENT ARE MILD, MINOR AND SLIGHT AND AS SUCH THE PLAINTIFF HAS FAILED TO PROVE THAT HE SUFFERED A "PERMANENT CONSEQUENTIAL LIMITATION OF USE OF A BODY ORGAN OR MEMBER, OR MEMBER, FUNCTION OR SYSTEM" OR A "SIGNIFICANT LIMITATION OF USE OF A BODY FUNCTION OR ORGAN"

As to Plaintiff's, BASTON, contention that he suffered a "permanent consequential limitation" or a "significant limitation of use of a body function or system" even taken in its most favorable light, the evidence in the plaintiff's deposition transcript as well as the defendant's examining report as noted above, show that plaintiff, sprains that have been resolved. See Dr. Goldmark's report, annexed hereto as Exhibit "D".

Plaintiff, BASTON, makes no contention of being confined to his home for any period of time. Plaintiff, BASTON, missed four (4) days of work and returned to the same position, same hours and the same duties. He was paid for his

missed days through vacation days offered to him. Plaintiff states that he cannot play sports like basketball or footballl. He cannot lift at the gym, run as he used to. However, there is no medical directive for him to curtail any of these activities. Accordingly, plaintiff does not make a serious injury threshold under 90/180 provision of the no-fault.

In essence, plaintiff has complained of no significant or consequential limitations of a body organ, member, function or system. As such, it is respectfully submitted that the plaintiff has failed to meet this particular section of the serious injury threshold.

The term "permanent" is defined as "enduring; without change" (*Taber's Cyclopedic Medical Dictionary* 1371 (16th ed. 1989)). In order for the plaintiff to qualify his injuries as "permanent" within the meaning of the sixth category of "serious injury" described in Section 5102(d) of the No-Fault Law, he must submit competent, objective medical evidence to establish that the purported loss of use of a body organ, member, function or system, has endured, without improvement and will continue without recovery, or with intermittent total disability, for the duration of the plaintiff's life. *Holder v. Brown*, 18 A.D.2d 815 (2nd Dept. 2005); *Kearse v. N.Y. Transit Auth.*, 16 A.D.3d 45 (2nd Dept. 2005); *Oberly v. Bangs Ambulance, Inc.*, 96 N.Y.2d 295 (2001); *Vaughn v. Baez*, 305 A.D.2d 101(2nd Dept. 2003).

In making this determination, the medical opinion of "permanency" should be offered in a recent report which is based on a new and recent examination of

the plaintiff. *Bandoian v. Bernstein*, 254 A.D.2d 205, 679 N.Y.S.2d 123 (1st Dept 1998).

The Courts consistently have held that "conclusory allegations that the plaintiff's injuries are permanent are insufficient to make out a *prima facie* claim of serious injury". *Licari v. Elliot,* 57 N.Y.2d at 236 (1982); *Toure v. Avis Rent a Car Systems,* 98 N.Y.2d 345; *Ingram v. Doe*, 292 A.D.2d 530 (2nd Dept. 2002).

As the Court of Appeals stated in *Gaddy v. Eyler,* 79 N.Y.2d 955 (1992):

> "(T)he mere repetition of the word "permanent" in the affidavit of plaintiff's treating physician – prepared two years after his last examination and consisting of conclusory assertions tailored to meet the statutory requirements – is insufficient to establish 'serious injury'."

PLAINTIFF'S INJURIES HAVE FAILED TO PROVE COMPLIANCE WITH THE "NINETY OUT OF ONE HUNDRED AND EIGHTY DAY" REQUIREMENT OF THE SERIOUS INJURY THRESHOLD

Plaintiff, BASTON, did not sustain a "serious injury" because he was not prevented from performing "substantially all" of the "material acts" that constituted his daily and customary activities for 90 out of the first 180 days following the accident.

It is clear from the plaintiff's testimony that he is able to perform all of the material acts that constitute his daily activities following the accident. Case law finds that "objective medical evidence" or "diagnostic tests" are required to support a ninety our of one hundred eight days claim. *[See Bennett v. Reed* 263 AD2d 800 (3rd Dept. 2000). There is no "objective medical evidence" submitted by the plaintiff to support a claim for injury under the ninety our of one hundred

eight day portion of the serious injury requirement of the statute. Moreover, plaintiff's mere complaints of pain while performing such activities as playing with his children do not rise to the level of meeting the threshold requirement as these subjective complaints of pain unsupported by credible, medical evidence are insufficient to support a serious injury claim. *[Georgia v. Ramautar,* 180 AD2d, 713 [2nd Dept. 1992]. Respectfully, plaintiff has likewise failed to meet this portion of the threshold requirement.

In the instant case, the medical evidence and testimony show that the plaintiff, BASTON, has suffered from <u>nothing</u> that constitutes a serious injury under the law. Plaintiff fails to show that he suffered from a medically determined injury or impairment of a non-permanent nature which prevents him from performing substantially all of the material acts which constitute his 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. Moreover, his claimed limitations are only minor in nature. Thus, he cannot show a permanent loss of use or permanent consequential limitation.

The plaintiff has, simply put, failed to come forward with any objective evidence to support this claim of serious injury under Section 5102(d) of the No-Fault law. Upon making a sufficient showing, the burden then shifts to the plaintiff to demonstrate the existence of a triable issue of fact as to whether a Serious Injury was suffered. Failure of the plaintiff to produce such evidence of serious injury requires the Courts to dismiss the claim and grant summary judgment. As such, this matter must be dismissed in its entirety.

PLAINTIFF EXHIBITS A CLEAR AND DISTINCT "GAP IN TREATMENT" AND HAS TREATED FOR A SHORT PERIOD OF TIME AS DEFINED BY THE CASE OF POMMELS V. PEREZ, 4 N.Y. 3D 566 (2005).

Plaintiff, BASTON, testified that he went to the hospital the day following the accident. Plaintiff admits that he attended physical therapy for five (5) months and then stopped treatment. He currently has no scheduled appointments with any doctors regarding the injuries allegedly sustained in this accident.

The Court should also be cognizant that the Court of Appeals ruled that if plaintiff treats for a short period of time, it is plaintiff's burden to prove why the treatment ceased. *Pommells v. Perez*, 4 N.Y.3d 566. The Court of Appeals has held "even 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*", an intervening medical problem or a preexisting condition--summary dismissal of the complaint may be appropriate." *Pommells v. Perez*, 4 N.Y.3d 566. See also, *Mohamed v Siffrain*, 19 A.D.3d 561, 797 N.Y.S.2d 532 [2d Dept 2005]; *Brown v Achy*, 9 AD3d 30, 776 NYS2d 56 [1st Dept 2004].

In the present case, the gap in treatment is, in reality, a cessation of all treatment. Plaintiff, BOSTON, treated for approximately five (5) months following the accident. While a cessation of treatment is not dispositive, the law surely does not require a record of needless treatment in order to survive summary judgment. A plaintiff who terminates therapeutic measures following the accident, while claiming "serious injury," must offer some reasonable explanation for having done so. Here, plaintiff provides no explanation whatever as to why she

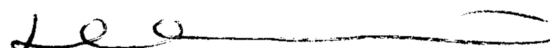
[* 14]

failed to pursue any treatment for her injuries after the initial time after the accident, nor do his doctors. (see *Franchini v. Palmieri*, 1 N.Y.3d 536, [2003]).

And so, based on the plaintiff's medical reports, this case doesn't meet the requirements of the Insurance Law. Thus, this case should be dismissed.

Dated: Westbury, New York
December 17, 2015

Respectfully submitted,



Theresa P. Mariano, Esq.
KAY & GRAY
875 Merrick Ave.
Westbury, New York 11590
516-229-4429