

Pierre-Louis v Murray
2018 NY Slip Op 30645(U)
March 8, 2018
Supreme Court, Queens County
Docket Number: 708333/2015
Judge: Robert J. McDonald
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

Short Form Order

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

- - - - - x

EMMANUEL PIERRE-LOUIS AND MARIE NOEL
PIERRE,

Index No.: 708333/2015

Motion Date: 3/2/18

Plaintiffs,

Motion No.: 108

- against -

Motion Seq No.: 3

LATOYA A. MURRAY AND EDMOND F. MURRAY,

Defendants.

- - - - - x

The following electronically filed documents read on this motion by defendants for an order granting defendants leave to file a late summary judgment motion and for an order granting defendants summary judgment pursuant to CPLR 3212, dismissing any and all claims against them on the bases that plaintiff Emmanuel Pierre-Louis did not sustain a serious injury under Insurance Law § 5102(d) and plaintiff Marie Noel Pierre is precluded from offering any evidence at trial:

	<u>Papers</u> <u>Numbered</u>
Notice of Motion-Affirmation-Exhibits.....	EF 38 - 49
Affirmation in Opposition-Exhibits.....	EF 50 - 63
Reply Affirmation.....	EF 64

This is a personal injury action in which plaintiffs seek to recover damages for injuries allegedly sustained in a motor vehicle accident that occurred on July 6, 2013 on the eastbound Belt Parkway, near exit 17, in Queens County, New York. As a result of the accident, plaintiff Emmanuel Pierre-Louis alleges that he sustained serious injuries to his right shoulder, cervical spine, and lumbar spine. Plaintiff Marie Noel Pierre alleges that she sustained serious injuries to her lumbar spine and cervical spine.

Plaintiffs commenced this action by filing a summons and complaint on August 6, 2015. Defendants joined issue by service of an answer with counterclaims on September 17, 2015. Defendants now move for an order pursuant to CPLR 3212, dismissing the complaint on the grounds that the injuries claimed by plaintiff Emmanuel Pierre-Louis fail to satisfy the serious injury threshold requirement of Section 5102(d) of the Insurance Law and on the ground that plaintiff Marie Noel Pierre is precluded from offering any evidence at trial.

Plaintiffs do not oppose the branch of the motion that seeks dismissal of plaintiff Marie Noel Pierre's claims. Accordingly, and pursuant to the August 25, 2017 So Ordered Stipulation, plaintiff Marie Noel Pierre is precluded from offering evidence at trial due to her failure to appear for a deposition by October 20, 2017.

Regarding that branch of the motion seeking summary judgment, defendants contend that they have shown good cause for the delay in filing this summary judgment motion. Good cause for delay in filing a summary judgment motion is established when there is significant discovery outstanding at the time the Note of Issue is filed, and the movant had yet to receive the discovery by the deadline by which the motion was to be made (see Brill v City of New York, 2 NY3d 648 [2004]; Gonzalez v 98 Mag Leasing Corp., 95 NY2d 124 [2000]; Parker v LIJMC-Satellite Dialysis Facility, 92 AD3d 740 [2d Dept. 2012]). The April 10, 2017 So Ordered Stipulation extended the time to file motions for summary judgment to August 18, 2018. At the time of the deadline to move for summary judgment, plaintiff Marie Noel Pierre's deposition and independent medical examination were outstanding. Additionally, plaintiff Emmanuel Pierre-Louis' independent medical examination was not completed until August 18, 2017, the date of the summary judgment deadline. Based on the outstanding discovery and the circumstances of this matter, defendants have demonstrated good cause. The late summary judgment motion will be decided herein.

Plaintiff Emmanuel Pierre-Louis (hereinafter plaintiff) appeared for an examination before trial on June 7, 2017. He testified that he was involved in the subject accident. He is currently employed as a school bus driver. Since the accident occurred during the summer, he was not working. He did not lose time from work as result of the accident. When he returned to work in September 2013, he returned to his full work schedule and normal duties. There is nothing he is currently unable to do at work because of his back pain. He did not notice bleeding, bruising or cuts as result of the accident. He did not lose

consciousness as a result of the accident. He did not immediately feel pain. He exited his vehicle on his own. At the scene of the accident, he told police that he was not hurt and he refused medical attention. The night of the accident, he went to Forest Hills Hospital. A couple of days following the accident he went to Alexandra Health and Medicine. His treatment consisted of physical therapy, acupuncture, electrical stimulation, heat therapy, massage, and adjustments. He did not have any surgeries as a result of this accident. He treated at Alexandra Health and Medicine for less than one year. He stopped treatment because he was feeling better. He is able to rotate his neck fully without any pain. He was not confined to his bed as a result of the accident. He had a prior motor vehicle accident in 2009 or 2010 in which he injured his upper back. He went to physical therapy after the prior accident for approximately four or five months.

Elizabeth Morrison, M.D. performed an independent medical examination on plaintiff on August 18, 2017. Plaintiff reported current complaints of pain in his neck, right shoulder, and lower back. Dr. Morrison identifies the records reviewed prior to rendering the report. Dr. Morrison performed range of motion testing with a goniometer and found normal ranges of motion in plaintiff's cervical spine, right shoulder, and lumbar spine. All other objective tests were normal. Dr. Morrison opines that the alleged injuries are now resolved. Dr. Morrison further opines that there is no objective evidence of a disability based on the examination.

Marianna Golden, M.D. performed an independent neurologic examination on plaintiff on August 30, 2017. Plaintiff reported current complaints of pain in his neck, mid back, lower back, right shoulder, and right knee. Dr. Golden identifies the records reviewed prior to rendering her report. She performed range of motion testing with a goniometer and found normal ranges of motion in plaintiff's cervical spine and lumbar spine. All other objective tests were normal. Dr. Golden opines that there is no evidence of a neurologic disability. Plaintiff is able to perform activities of daily living and work without restrictions or limitations. There is no evidence of radiculopathy. Plaintiff is neurologically intact with normal reflex, motor and sensory examinations.

Steven M. Peyser, M.D. reviewed the MRI of plaintiff's cervical spine taken on July 31, 2013 which revealed straightening of the normal cervical lordosis. Dr. Peyser notes spondylitic changes with bulging at C4-5 and C5-6 which are most consistent with pre-existing degenerative disc disease. Dr. Peyser opines that no post traumatic-type etiologies related to

the subject accident can be determined. The described disc herniation at C3-4, C4-5, C5-6, and C6-7 by Dr. Imam cannot be appreciated on his review. Dr. Peyser reviewed the MRI of plaintiff's lumbar spine taken on August 14, 2013 which revealed spondylitic change at L5-S1 with a small associated posterior central disc herniation. Such findings appear most consistent with pre-existing degenerative disc disease. Dr. Peyser opines that no post traumatic-type etiologies related to the subject accident can be determined. The described bulging at L4-5 by Dr. Imam cannot be appreciated on his review. Lastly, Dr. Peyser reviewed the MRI of plaintiff's right shoulder taken on August 14, 2013 which revealed degenerative change of the acromioclavicular joint consistent with pre-existing degenerative joint disease. Dr. Peyser notes that tendinosis of the supraspinatus tendon with partial tearing appears most consistent with longstanding rotator cuff impingement. Dr. Peyser opines that no post traumatic-type etiologies related to the subject accident can be determined.

Defendants contend that the evidence submitted is sufficient to establish, prima facie, that plaintiff has not sustained an injury which resulted in a permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; or significant limitation of use of a body organ, member, function or system. Defendants also contend that plaintiff did not sustain a medically determined injury or impairment of a nonpermanent nature which prevented him for not less than 90 days during the immediate 180 days following the occurrence from performing substantially all of his usual daily activities.

In opposition, plaintiff submits an affidavit dated November 22, 2017. He affirms, inter alia, that he ceased treatment at the end of September 2013 because his doctor informed him not to come back. He further affirms that they told him that his no-fault benefits ended. He wanted to continue treatment, but his health insurance did not provide coverage and was not accepted by the treatment facility. Since the accident, he has stopped his gym membership, he can no longer lift, move or carry anything heavier than 50 pounds, he cannot move furniture, he has difficulty sitting for too long, he uses a back brace belt, he feels pain in his back when he goes up stairs, he has problems with walking long distances, he has difficulty shoveling snow, he continues to do exercises and to take painkillers, washing dishes causes pain, and he does not help around the house as much as he used to do to pain.

Certified records from Alignment Chiropractic PC and Alexandra Health Medical, P.C. are annexed to the opposition. The records indicate that plaintiff sought medical attention at the facility on July 16, 2013. Plaintiff was examined and treated by Alexandra Shereshevskaya, M.D. Range of motion testing revealed limited range of motion in plaintiff's cervical spine, lumbar spine, and right shoulder. Other objective tests were positive. Dr. Shereshevskaya opined that the injuries were caused by the subject accident and recommended that no heavy work should be performed. Plaintiff continued to treat at the facility through September 2013.

Mark Gladstein, M.D. submits an affirmation dated November 22, 2017 with reports and records attached. Dr. Gladstein affirms that plaintiff first appeared in his office on September 12, 2013. He performed a physical and neurological examination on plaintiff that revealed a lumbar disc herniation, lumbar radiculopathy, and fibromyositis. Dr. Gladstein recommended lumbar epidural steroid injections which were performed on September 12, 2013 and September 26, 2013. He opines that the injuries are caused by the subject accident. Most recently, Dr. Gladstein evaluated plaintiff on January 8, 2018. Dr. Gladstein performed range of motion testing and found limited range of motion regarding plaintiff's lumbar spine. Dr. Gladstein identifies the records reviewed prior to rendering his report and diagnosed plaintiff with lumbar sprain/strain, lumbar spine disc bulging/herniation, lumbar radiculopathy, myofascial pain, deficits in range of motion of the lumbar spine, and multiple functional deficits secondary to above. Dr. Gladstein opines that plaintiff will need treatment as symptoms dictate. Dr. Gladstein also noted that plaintiff reported that he did not have pain in his neck, lower back, and right shoulder prior to the subject accident and that he had completely recovered from the prior motor vehicle accident. Dr. Gladstein opines that there is a direct causal relationship between plaintiff's current condition, internal pathology, and the subject accident.

Plaintiff also submits an affirmation from Naiyer Imam, M.D. who reviewed the MRI of plaintiff's cervical spine performed on June 31, 2013 and the MRI of plaintiff's lumbar spine performed on August 15, 2014 which revealed, inter alia, disc herniations at C3-C4, C4-C5, C5-C6, C6-C7, and L5-S1 and a disc bulge at L4-L5.

On a motion for summary judgment, where the issue is whether the plaintiff has sustained a serious injury under the no-fault law, the defendant bears the initial burden of presenting competent evidence that there is no cause of action (Wadford v

Gruz, 35 AD3d 258 [1st Dept. 2006]). "[A] defendant can establish that a plaintiff's injuries are not serious within the meaning of Insurance Law § 5102 (d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (Grossman v Wright, 268 AD2d 79 [1st Dept. 2000]). Whether a plaintiff has sustained a serious injury is initially a question of law for the Court (Licari v Elliott, 57 NY2d 230 [1982]).

Here, the competent proof submitted by defendants, including the affirmed medical reports of Drs. Morrison, Golden and Peyser and plaintiff's own testimony that he was not confined to his bed for any period of time following the accident and that he did not lose any time from work as a result of the subject accident, is sufficient to meet defendants' prima facie burden by demonstrating that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]; Carballo v Pacheco, 85 AD3d 703 [2d Dept. 2011]; Ranford v Tim's Tree & Lawn Serv., Inc., 71 AD3d 973 [2d Dept. 2010]).

In opposition, this Court finds that plaintiff raised triable issues of fact as to whether he sustained a serious injury to his lumbar spine by submitting the records from Alexandra Health Medical, P.C. and Dr. Gladstein's affirmation attesting to the fact that plaintiff sustained injuries as a result of the subject accident, finding that plaintiff had significant limitations in ranges of motion in his lumbar spine both contemporaneous to the accident and in a recent examination, and concluding that the limitations are permanent and causally related to the accident (see Perl v Meher, 18 NY3d 208 [2011]; David v Caceres, 96 AD3d 990 [2d Dept. 2012]; Martin v Portexit Corp., 98 AD3d 63 [1st Dept. 2012]; Ortiz v Zorbas, 62 AD3d 770 [2d Dept. 2009]; Azor v Torado, 59 AD2d 367 [2d Dept. 2009]).

Additionally, this Court finds that plaintiff adequately explained the gap in treatment by affirming that his no-fault benefits stopped (see Abdelaziz v Fazel, 78 AD3d 1086 [2d Dept. 2010]; Tai Ho Kang v Young Sun Cho, 74 AD3d 1328 [2d Dept. 2010]; Domanas v Delgado Travel Agency, Inc., 56 AD3d 717 [2d Dept. 2008]; Black v Robinson, 305 AD2d 438 [2d Dept. 2003]).

As such, plaintiff demonstrated issues of fact as to whether he sustained a serious injury to his lumbar spine under the permanent consequential and/or the significant limitation of use categories of Insurance Law § 5102(d) as a result of the subject accident (see Khavosov v Castillo, 81 AD3d 903 [2d Dept. 2011]; Mahmood v Vicks, 81 AD3d 606 [2d Dept. 2011]; Compass v GAE

Transp., Inc., 79 AD3d 1091 [2d Dept. 2010]; Evans v Pitt, 77 AD3d 611 [2d Dept. 2010]).

Accordingly, for the reasons set forth above, it is hereby,

ORDERED, that the branch of defendants' motion seeking summary judgment on the ground that plaintiff Emmanuel Pierre-Louis did not sustain a serious injury under Insurance Law § 5102(d) is denied; and it is further

ORDERED, that the branch of defendants' motion seeking dismissal of plaintiff Marie Noel Pierre's complaint on the ground that plaintiff Marie Noel Pierre is precluded from offering any evidence at trial is granted, and the complaint of plaintiff Marie Noel Pierre is dismissed.

Dated: March 8, 2018
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.