

Mitchell v Jimenez
2018 NY Slip Op 34345(U)
June 12, 2018
Supreme Court, Orange County
Docket Number: Index No. EF000528-2017
Judge: Catherine M. Bartlett
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.

SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

JAMES MITCHELL,

Plaintiff,

-against-

JAVIER A. JIMENEZ,

Defendant.

To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. EF000528-2017
Motion Date: April 12, 2018

The following papers numbered 1 to 5 were read on Defendant's motion for summary judgment based upon the absence of a "serious injury" per Insurance Law §5102(d):

Notice of Motion - Affirmation / Exhibits - Physician Affirmation 1-3
Affirmation in Opposition / Exhibits - Physician Affirmation 4-5

Upon the foregoing papers it is ORDERED that the motion is disposed of as follows:

This is an action for personal injuries arising out of a motor vehicle accident that occurred on August 29, 2016, in the Town of Montgomery, New York, when a vehicle operated by plaintiff James Mitchell was rear ended while stopped for a red light by a vehicle operated by defendant Javier A. Jimenez.

Plaintiff's Verified Bill of Particulars asserts that as a result of the accident he sustained an aggravation of pre-existing injuries to the lumbar spine and the cervical spine, as well as injury to the thoracic spine and the right shoulder. The Bill of Particulars further alleges that

the accident caused “serious injury” as defined by Insurance Law §5102(d) in that Plaintiff has sustained (1) a permanent loss of use of a body organ, member, function or system, (2) a permanent consequential limitation of use of a body organ or member, (3) a significant limitation of use of a body function or system, and (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 90 days during the 180 days immediately following the occurrence of the injury or impairment.

Defendant moves for summary judgment, asserting that Plaintiff did not sustain a “serious injury” causally related to the August 29, 2016 motor vehicle accident, within the meaning of Insurance Law §5102(d).

A. Defendant’s Evidence

1. The *Two* Accidents And Their Sequellae

Plaintiff, then 54 years of age, was rear ended by a Honda Civic while stopped for a red light on August 29, 2016. Although Plaintiff testified that the impact was “heavy”, his contemporaneous photographs of the vehicles involved in the accident show little if any damage. He was employed at that time by the New York City Transit Authority. Employment records show that he missed a single day of work on October 27, 2016, two months after the accident, with a doctor certifying to a “diagnosis / objective findings” of low back pain.

On November 27, 2016, Plaintiff was involved in a subsequent motor vehicle accident which is not the subject of this action. Plaintiff was rear ended by a “very large Ford F-150 pickup” on the New York State Thruway. Employment records show that he missed two weeks of work immediately after this accident, from November 28 to December 14, 2016, with a doctor

certifying to a “diagnosis / objective findings” of severe neck and low back pain, as well as shoulder pain.

2. The Lumbar Spine

A June 30, 2016 pre-accident MRI revealed that Plaintiff had pre-existing disc herniations at L1-L2, L3-L4, L4-L5 and L5-S1. Similar findings were made on a post-accident MRI on November 9, 2016. Plaintiff received treatment for low back pain for a lengthy period of time before and after the August 29th accident. As noted above, he missed two weeks of work with complaints of severe low back pain immediately after the November 27th accident.

3. The Cervical Spine

Plaintiff acknowledged in his Bill of Particulars that he had sustained injury to his cervical spine in a prior accident in 1999. A September 1, 2016 x-ray revealed pre-existing degenerative joint disease and degenerative disc disease of the cervical spine. As noted above, Plaintiff missed two weeks of work after the November 27th accident with complaints of severe neck pain.¹

4. The Thoracic Spine

A November 9, 2016 MRI (post August 29th accident) revealed mild degenerative changes but no herniated disc.

5. The Right Shoulder

An October 26, 2016 x-ray of the right shoulder revealed arthritic change of the acromioclavicular joint.

¹A March 27, 2017 MRI report (post November 27th accident) produced by Plaintiff in opposition revealed cervical disc herniations at C4-C5, C5-C6 and C6-C7.

6. Defendant's Expert Orthopaedist

Robert C. Hendler, M.D. conducted an orthopaedic IME on November 6, 2017. Physical examination of the lower back, neck and right shoulder was essentially normal, with complaints of pain at the extremes of motion of the shoulder. Dr. Hendler opined that Plaintiff may have sustained cervical and lumbosacral sprain, with temporary exacerbation of a pre-existing lumbar spine condition, and a simple contusion of the right shoulder. He further opined that Plaintiff has no present disability, and will have no permanent findings that would be causally related to the August 29, 2016 motor vehicle accident.

7. Conclusion

Dr. Hendler's examination and opinion, together with the evidence recited above, established *prima facie* that Plaintiff sustained no "serious injury" within the meaning of Insurance Law §5102(d) that was causally related to the August 29, 2016 motor vehicle accident at issue in this case. Accordingly, the burden shifted to Plaintiff to demonstrate with non-speculative evidence the existence of a triable issue of fact whether Plaintiff sustained "serious injury" causally related to the August 29th accident. (*See*, Points C, D, E below)

B. Plaintiff's Evidence

Plaintiff's orthopaedist, Gabriel L. Dassa, D.O., examined Plaintiff on December 19, 2017. His findings were as follows.

1. The Lumbar Spine

Dr. Dassa found diminished range of motion in flexion, extension, lateral bending and lateral rotation of the lumbar spine, as well as persistent lumbar nerve root irritation and inflammation, which findings he characterized as objective evidence of persistent orthopaedic

impairment to the back. He concluded that the August 29, 2016 motor vehicle accident had caused a significant and permanent exacerbation of Plaintiff's pre-existing low back condition. However, Dr. Dassa never mentioned Plaintiff's subsequent accident of November 27, 2016, or the resulting complaints of pain, including severe back pain, which had disabled him from working for two weeks in the immediate aftermath of the November 27th accident.

2. The Cervical Spine

Dr. Dassa found diminished range of motion in flexion, extension, lateral bending and lateral rotation of the cervical spine, as well as persistent cervical nerve root irritation and inflammation, which findings he characterized as objective evidence of persistent orthopaedic impairment to the neck. He noted that the March 24, 2017 MRI revealed multiple cervical disc herniations, and concluded that the August 29, 2016 motor vehicle accident caused significant and permanent injury to the cervical spine. However, Dr. Dassa never mentioned (1) Plaintiff's pre-existing cervical condition, or (2) his subsequent accident of November 27, 2016, or the resulting complaints of pain, including severe neck pain, which had disabled him from working for two weeks in the immediate aftermath of the November 27th accident, or (3) the fact that the cervical disc herniations were revealed upon MRI only after the November 27th accident.

3. The Thoracic Spine

Dr. Dassa acknowledged that the November 9, 2016 MRI of the thoracic spine showed only "age related changes" and made no finding of any thoracic injury.

4. Right Shoulder

Dr. Dassa acknowledged that there was no radiological evidence of injury to the right shoulder. Upon examination, he found only a mild (10 degrees) reduction in range of motion

coupled with a positive impingement sign. He nevertheless concluded that the August 29, 2016 motor vehicle accident caused significant and permanent injury to the right shoulder. However, Dr. Dassa never mentioned Plaintiff's subsequent accident of November 27, 2016, or the resulting complaints of pain, including shoulder pain, which had disabled him from working for two weeks in the immediate aftermath of the November 27th accident.

C. Summary Judgment Standard

While Plaintiff ultimately bears the burden of proving serious injury, Defendant, as the proponent of a summary judgment motion, must establish that Plaintiff's injuries were not "serious" within the meaning of Insurance Law §5102(d), via "a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). The defendant's failure to meet this burden of proof "requires denial of the motion, regardless of the sufficiency of the opposing papers." *Winegrad, supra*. See, *Pommells v. Perez*, 4 NY3d 566 (2005). If the defendant establishes *prima facie* entitlement to summary judgment, the plaintiff must overcome the defendant's showing with "evidentiary proof in admissible form sufficient to require a trial of material questions of fact." *Zuckerman v. City of New York*, 49 NY2d 557, 562 (1980). See, *Pommells v. Perez, supra*.

D. Serious Injury

The No-Fault Law precludes recovery by Plaintiff from Defendant for pain and suffering and other non-monetary detriment unless Plaintiff sustained a "serious injury" causally related to the motor vehicle accident at issue. Insurance Law §5104(a). There are three essential issues.

1. Objective Medical Evidence Of Injury

First, is there objective medical evidence of injury? Serious injury must be demonstrated by objective medical evidence. *Pommells v. Perez, supra*, 4 NY3d 566 (2005); *Toure v. Avis Rent A Car Systems, Inc.*, 98 NY2d 345 (2002). In the absence of objective medical evidence of injury, there is no “serious injury” as defined by Insurance Law §5102(d).

2. Proximate Cause

Second, is the injury causally related to the motor vehicle accident? Even if objective medical proof of injury exists, the chain of causation between the accident and the claimed injury may be broken by, e.g., “a gap in treatment, an intervening medical problem or a pre-existing condition.” *Pommells v. Perez, supra*, 4 NY3d at 572. Therefore, where there is persuasive, non-conclusory evidence that the plaintiff’s alleged pain and injuries were related to a pre-existing condition or to a prior or subsequent accident, the plaintiff must present competent, non-conclusory expert evidence that the claimed injury was proximately caused by the accident in issue, and not by a different accident or by a pre-existing condition. *See, Pommells v. Perez, supra*, 4 NY3d at 580; *Donoso v. MVAIC*, 118 AD3d 461 (1st Dept. 2014). In such circumstances, the plaintiff’s physician’s failure to address prior or subsequent accidents and/or pre-existing degenerative conditions affecting the same area of the body renders his conclusions regarding causation as speculative and insufficient to raise a triable issue of fact. *See, Varveris v. Franco*, 71 AD3d 1128, 1129 (2d Dept. 2010); *Maffei v. Santiago*, 63 AD3d 1011, 1012 (2d Dept. 2009); *Jules v. Calderon*, 62 AD3d 958 (2d Dept. 2009); *Joseph v. A and H Livery*, 58 AD3d 688, 688-689 (2d Dept. 2009); *Sapienza v. Ruggiero*, 57 AD3d 643, 644 (2d Dept. 2008); *Tudisco v. James*, 28 AD3d 536, 537 (2d Dept. 2006); *Barnes v. Cisneros*, 15 AD3d 514,

515 (2d Dept. 2005); *Allen v. Hanley*, 2 AD3d 470, 471 (2d Dept. 2003); *Finkelshteyn v. Harris*, 280 AD2d 579, 579-580 (2d Dept. 2001).

3. Insurance Law §5102(d) “Serious Injury”

Third, is the injury “serious”, i.e., has it resulted in a “permanent loss of use”, a “permanent consequential limitation of use”, a “significant limitation of use” or a “90 / 180 day” injury within the meaning of Insurance Law §5102(d)?

Only a total permanent loss of use is compensable as a “permanent loss of use of a body organ, member, function or system.” *Oberly v. Bangs Ambulance Inc.*, 96 NY2d 295 (2001).

The determination whether a limitation is “significant” or “consequential” relates to medical significance, and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part. *Pommells v. Perez, supra*; *Toure v. Avis Rent A Car Systems, Inc., supra*. To establish a claim under either of these categories, the plaintiff must submit medical proof containing objective, quantitative evidence with respect to diminished range of motion or a qualitative assessment comparing the plaintiff’s present limitation to the normal function, purpose and use of the affected body organ, member, function or system. *See, Perl v. Meher*, 18 NY3d 208 (2011); *Toure v. Avis Rent A Car Systems, Inc., supra*. Limitations which are minor, mild or slight are insignificant within the meaning of the No-Fault Law. *See, Gaddy v. Eyler*, 79 NY2d 955, 957 (1992); *Scheer v. Koubek*, 70 NY2d 678, 679 (1987); *Licari v. Elliott*, 57 NY2d 230, 236 (1982).

“Serious injury” also includes “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

90 days during the 180 days immediately following the occurrence of the injury or impairment.”

Insurance Law §5102(d). A plaintiff’s prompt return to his regular employment without any loss of earnings indicates that there was no substantial curtailment of his usual and customary daily activities, and hence no 90 / 180 “serious injury.” *See, e.g., Marin v. Ieni*, 108 AD3d 656 (2d Dept. 2013).

E. Defendant Established *Prima Facie* Entitlement To Summary Judgment

Defendant’s evidence established *prima facie* that the August 29, 2016 motor vehicle accident resulted in no permanent loss of use, permanent consequential limitation of use, significant limitation of use or “90 / 180 day” injury per Insurance Law §5102(d). Among other things:

- (1) Plaintiff acknowledged pre-existing lumbar and cervical conditions.
- (2) The photographic evidence reveals that the August 29, 2016 motor vehicle accident resulted in negligible damage to the vehicles involved.
- (3) Documentary evidence reveals that the August 29, 2016 accident caused Plaintiff to miss only a single day’s work some two months after the accident.
- (4) A post-accident MRI of Plaintiff’s lumbar spine resulted in findings similar to a June 30, 2016 pre-accident MRI reflecting his pre-existing lumbar condition.
- (5) Post-accident x-rays of the cervical spine, thoracic spine and right shoulder revealed only degenerative changes.
- (6) Three months after the accident at issue here, on November 27, 2016, Plaintiff was involved in a more serious motor vehicle accident resulting in immediate complaints of severe back pain, severe neck pain and shoulder pain which disabled him from working for two weeks in the aftermath of the November 27th accident.
- (7) Defendant’s orthopaedist upon examination on November 6, 2017 found that Plaintiff’s lower back, neck and right shoulder were essentially normal, with complaints of pain at the extremes of motion of the shoulder. He opined that

Plaintiff may have sustained cervical and lumbosacral sprain, with temporary exacerbation of a pre-existing lumbar spine condition, and a simple contusion of the right shoulder. He further opined that Plaintiff has no present disability, and will have no permanent findings that would be causally related to the August 29, 2016 motor vehicle accident.

F. Plaintiff Failed To Demonstrate The Existence Of Any Triable Issue Of Fact

1. The Lumbar Spine

Although Dr. Dassa purported to find objective evidence of persistent orthopaedic impairment to Plaintiff's back, his opinion that the August 29, 2016 motor vehicle accident caused a significant and permanent exacerbation of Plaintiff's pre-existing low back condition is entirely speculative, and insufficient to raise any triable issue of fact, because he failed to address in any way Plaintiff's subsequent accident of November 27, 2016, or the resulting complaints of pain, including severe back pain, which had disabled him from working for two weeks in the immediate aftermath of the November 27th accident. *See, Varveris v. Franco, supra; Maffei v. Santiago, supra; Jules v. Calderon, supra; Joseph v. A and H Livery, supra; Sapienza v. Ruggiero, supra; Tudisco v. James, supra; Barnes v. Cisneros, supra; Allen v. Hanley, supra; Finkelshteyn v. Harris, supra.*

2. The Cervical Spine

Although Dr. Dassa purported to find objective evidence of persistent orthopaedic impairment to Plaintiff's neck, his opinion that the August 29, 2016 motor vehicle accident caused significant and permanent injury to the cervical spine is entirely speculative, and insufficient to raise any triable issue of fact, because (1) he failed to address in any way Plaintiff's pre-existing cervical condition; (2) he failed to address in any way Plaintiff's subsequent accident of November 27, 2016, or the resulting complaints of pain, including severe neck pain, which had disabled him from working for two weeks in the immediate

aftermath of the November 27th accident; and (3) he relied on cervical disc herniations appearing in a March 24, 2017 MRI, without in any way acknowledging or addressing the fact that these cervical disc herniations were found for the first time only after the November 27th accident. *See, Varveris v. Franco, supra; Maffei v. Santiago, supra; Jules v. Calderon, supra; Joseph v. A and H Livery, supra; Sapienza v. Ruggiero, supra; Tudisco v. James, supra; Barnes v. Cisneros, supra; Allen v. Hanley, supra; Finkelshteyn v. Harris, supra.*

3. The Thoracic Spine

Dr. Dassa concedes that Plaintiff sustained no traumatic injury to the thoracic spine.

4. The Right Shoulder

Dr. Dassa acknowledged that there was no radiological evidence of injury to the right shoulder. Upon examination, he found only a mild (10 degrees) reduction in range of motion coupled with a positive impingement sign. Assuming *arguendo* that Dr. Dassa's findings nevertheless constitute some objective medical evidence of injury, the minor, mild or slight loss of range of motion is insignificant within the meaning of the No-Fault Law. *See, Gaddy v. Eycler, supra; Scheer v. Koubek, supra; Licari v. Elliott, supra.* Furthermore, Dr. Dassa's opinion that the August 29, 2016 motor vehicle accident caused significant and permanent injury to the right shoulder is entirely speculative, and insufficient to raise any triable issue of fact, because he failed to address Plaintiff's subsequent accident of November 27, 2016, or the resulting complaints of pain, including shoulder pain, which had disabled him from working for two weeks in the immediate aftermath of the November 27th accident. *See, Varveris v. Franco, supra; Maffei v. Santiago, supra; Jules v. Calderon, supra; Joseph v. A and H Livery, supra; Sapienza v. Ruggiero, supra; Tudisco v. James, supra; Barnes v. Cisneros, supra; Allen v. Hanley, supra; Finkelshteyn v. Harris, supra.*

5. "90 / 180" Day Injury

In the face of documentary evidence that he missed only one day's work in the wake of the August 29, 2016 motor vehicle accident, Plaintiff did not even attempt to demonstrate that any "medically determined injury or impairment" caused by the August 29th accident prevented him from performing "substantially all of the material acts which constitute [his] usual and customary daily activities" during 90 of the 180 days following that accident. Plaintiff's prompt return to his regular employment without loss of earnings indicates that there was no substantial curtailment of his usual and customary daily activities. *See, Marin v. Ieni, supra.*

G. Conclusion


Defendant established *prima facie* that Plaintiff did not sustain a "serious injury" causally related to the August 29, 2016 motor vehicle accident at issue in this case. In response, Plaintiff has failed to demonstrate the existence of any triable issue of fact precluding the issuance of judgment as a matter of law for the Defendant. Therefore, Defendant's motion for summary judgment is granted, and the complaint is dismissed.

It is therefore

ORDERED, that Defendant's motion for summary judgment is granted, and Plaintiff's complaint is dismissed.

The foregoing constitutes the decision and order of the Court.

Dated: June 12, 2018 ENTER
Goshen, New York



HON. CATHERINE M. BARTLETT, A.J.S.C.
HON. C. M. BARTLETT
JUDGE NY STATE COURT OF CLAIMS
ACTING SUPREME COURT JUSTICE