

Parker v Johns

2020 NY Slip Op 35233(U)

April 17, 2020

Supreme Court, Nassau County

Docket Number: Index No. 607679/2016

Judge: Jeffrey S. Brown

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SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

**P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE**

CLIVE A. PARKER AND CLOVER GHANY,

Plaintiff(s),

-against-

**JOSEPH JOHNS, LEE C. JONES, RACHEL K. WARREN,
And RICHARD J. WARREN,**

Defendant(s).
-----X

TRIAL/IAS PART 9

INDEX # 607679/2016

Mot. Seq. 06

Submit Date: 2.11.20

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Defendants Richard J. Warren and Rachel K. Warren move by notice of motion pursuant to CPLR 3212 for summary judgment on the question of whether plaintiff Clive Parker sustained a “serious injury” as contemplated by New York Insurance Law § 5102(d) as a result of the motor vehicle accident giving rise to this action. Additionally, movants seek dismissal of Clover Ghany’s case for her failure to appear and participate in discovery.

This negligence action stems from a four-car motor vehicle accident (hereafter “the accident”) that is alleged to have taken place on February 13, 2015. Clive Parker and Clover Ghany (hereafter “Parker” or “Ghany”) commenced this action against Joseph Johns, Lee Johns, Richard Warren and Rachel Warren and later commenced a separate action in the Bronx County Supreme Court against Kayla Rakower. The two actions were joined so that both actions could proceed together in this court. On July 22, 2019, this court granted summary judgment to dismiss the action and any cross-claims submitted against the Johns.

At the outset, the court notes counsel for Ms. Ghany was relieved by order dated October 12, 2018, at which time the case was stayed for 30 days to allow time for her to obtain new counsel or appear pro se. Since that time, Ms. Ghany has never appeared at conference, has not responded to any notice, and has failed to appear for deposition.

CPLR 3126 states that

[i]f any party, or a person who at the time a deposition is taken or an examination or inspection is made is an officer, director, member, employee or agent of a party or otherwise under a party’s control, refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them: [. . .] 3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

“The Supreme Court has broad discretion in making determinations concerning matters of disclosure, including the nature and degree of the penalty to be imposed under CPLR 3126 (*Arpino v. F.J.F. & Sons Elec. Co., Inc.*, 102A.D.3d 201,209 [2012] [citation omitted]). ‘Before a court invokes the drastic remedy of striking a pleading, or even of precluding evidence, there must be a

clear showing that the failure to comply with court-ordered discovery was willful and contumacious’ (*Zakhidov v. Boulevard Tenants Corp.*, 96 A.D.3d 737,739; see *Arpino v F.J.F. & Sons Elec. Co., Inc.*, 102 A.D.3d at 210; *Commisso v. Orshan*, 85 A.D.3d 845).” (*Neenan v. Quinton*, 110 AD3d 967 [2dDept 2013]). “[L]itigants’ willful and contumacious conduct can be inferred from their repeated failures to comply with court orders directing disclosure (see *Espinal v. City of New York*, 264 AD2d 806 [1999]) and the inadequate excuses offered to justify the defaults (see *Porreco v. Selway*, 225 AD2d 752,753 [1996]; *DeGennaro v. Robinson Textiles*, 224 AD2d 574 [1996]).” (*Edwards v. Prescott Cab Corp.*, 110 AD3d 671 [2d Dept 2013]).

Here, the affidavit of service of the instant motion indicates that it was not served on plaintiff Ghany. (See NYSCEF Doc. ID. 112). Nor do defendants supply the disclosure notices that were allegedly served on this plaintiff. Accordingly, the appropriate course of action is to issue a conditional order directing plaintiff Ghany to provide responses to written disclosure demands and to appear for deposition. (See *Hughes v. Brooklyn Skating, LLC*, 120 AD3d 758 [2d Dept 2014] [“A conditional order of preclusion requires a party to provide certain discovery by a date certain, or face the sanctions specified in the order.”]).

By his bill of particulars, plaintiff Parker alleges injury to his neck, left shoulder, cervical spine, lumbar spine, right hand, and left foot, including exacerbation of pre-existing conditions. He also alleges permanent effects of pain, loss of function, loss of strength, pain on motion and weakness. Plaintiff Parker indicates that he was not confined to hospital, bed, or home for any length of time.

At deposition,¹ plaintiff Parker testified that he felt a single impact to the rear of his vehicle while it was still in motion. His body hit the back of his seat and his right knee struck the steering wheel. He did not report to the hospital following the accident and did not request an ambulance. Instead, a day or two after the accident, plaintiff started to experience pain in his neck, back, and right knee and his attorney referred him to physical therapy. He began treating at Interventional Physical Medicine & Rehabilitation until May 2016. Plaintiff testified that he was confined to home for two or three days following the accident. He also testified that there are no activities that he cannot perform as a result of the accident but has difficulty working with a floor sander, which was his occupation. Additionally, plaintiff testified that he was involved in three prior accidents

¹ Plaintiffs assert that Parker’s deposition cannot be used in support of defendants’ motion pursuant to CPLR 3116. CPLR 3116 allows that “[i]f the witness fails to sign and return the deposition within sixty days, it may be used as fully as though signed.” (CPLR 3116, [McKinney]). As demonstrated by a letter sent from defendants’ counsel to plaintiffs’ (Exhibit A, in defendants’ reply affirmation), defendants sent Parker’s deposition transcript on Nov. 01, 2018. In the letter, defendants remind plaintiffs of the terms of CPLR 3116. This instant summary judgment motion was filed and submitted on Oct. 29, 2019. Since almost an entire year has passed since the transcript of the deposition was sent to plaintiffs, the transcript is admissible. Additionally, plaintiff’s deposition transcript was submitted in connection with the Johns defendants’ motion for summary judgment. (See NYSCEF DOC ID. 48).

(1990s, 2006, and 2013) and one subsequent motor vehicle accident (July 2016). He had left shoulder surgery before the subject accident and again following the later 2016 accident.

Pursuant to N.Y. C.P.L.R. 3212 (e) and (g),

[a] party seeking summary judgment has the burden of tendering evidentiary proof in a form admissible at trial to show the absence of material issues of fact entitling that party to judgment as a matter of law (*see Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324). Where the moving party establishes a prima facie entitlement to such relief, the burden then shifts to the opposing party to demonstrate by evidentiary facts that genuine issues of fact exist to preclude summary judgment (*see id.* at 324; *Zuckerman v. City of New York*, 49 NY2d 557, 562-563). ‘[S]ince summary judgment is the procedural equivalent of a trial, it must be denied if any doubt exists as to a triable issue or where a material issue of fact is arguable’ (*see Dykeman v. Heht*, 52 AD3d 767, 769). Even the color of a triable issue forecloses the remedy (*Dorival v. DePass*, 74 AD3d 729, 730, quoting *Rudnitsky v. Robbins*, 191 AD2d 488, 489) [internal quotations omitted].

(*Fairlane Financial Corp. v. Longspaugh*, 144 AD3d 858 [2d Dept 2016]; *see also Phillip v. D&D Carting Co., Inc.*, 136 AD3d 18 [2d Dept 2015]). “The proponent of a summary judgment motion must make 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 Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]) [internal citations omitted]. “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers.” (*Id.*).

When moving for summary judgment on the grounds that a plaintiff has not sustained a serious injury,

a defendant can establish that the 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. With this established, the burden shifts to the plaintiff to come forward with evidence to overcome the defendant’s submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance. The plaintiff in such a situation must present objective evidence of the injury. The mere parroting of language tailored to meet statutory requirements is insufficient. Further, [. . .] a plaintiff’s subjective claim of pain and limitation of motion must be sustained by verified objective medical findings. Moreover, these verified objective medical findings must be based on a recent examination of the plaintiff.

(*Grossman v. Wright*, 268 AD2d 79, 83-84 [2d Dept 2000] [internal citations omitted]).

Pursuant to Article 51 of the New York State Insurance Law, “serious injury” is defined as: (1) death; (2) dismemberment; (3) significant disfigurement; (4) fracture; (5) loss of a fetus; (6) permanent loss of use of a body organ or member, function, or system; (7) permanent consequential limitation of use of a body organ or member; (8) significant limitation of use of a body function or system; or (9) a medically determined injury of a non-permanent nature that prevents the injured person from performing substantially all of his/her usual and customary daily activity for not less than 90 days during the 180 days immediately following the occurrence of the injury. (See McKinney’s Consolidated Laws of New York, Insurance Law § 5102 [d]). By his bill of particulars, plaintiff oddly alleges injury falling within all except the most common seventh and eighth statutory categories.²

To meet the threshold for serious injury, the law requires that the claimed limitation be more than minor, mild, or slight and that the claim be supported by proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition. (*Licari v. Elliott*, 57 NY2d 230 [1982]; see also *Gaddy v. Eyer*, 79 NY2d 955 [1992]; *Scheer v. Koubeck*, 70 NY2d 678 [1987]). A minor, mild or slight limitation will be deemed “insignificant” within the meaning of the statute. (*Licari*, 57 NY2d 230; *Grossman v. Wright*, 268 AD2d 79, 83 [2d Dept 2000]).

When a claim is raised under the “permanent consequential limitation of use of a body organ or member, function, or system” or “significant limitation of use of a body function or system” categories, then, in order to prove the extent of the physical limitation, an expert’s designation of a numeric percentage of plaintiff’s loss of range of motion is acceptable. (See *Toure v. Avis Rent A Car Systems*, 98 NY2d 345, 353 [2002]). In addition, an expert’s qualitative assessment of a plaintiff’s condition is also probative, provided that: (1) the evaluation has an objective basis, and (2) the evaluation compares the plaintiff’s limitations to the normal function, purpose and use of the affected body organ, member, function or system. (See *id.*; see also *Cho v. Demelo*, 175 AD3d 1235 [2d Dept 2019] [holding that the defendant’s prima facie burden for summary judgment in a personal injury case was not met without the orthopedic surgeon’s identification of the objective test utilized to measure the plaintiff’s ranges of motion in the affirmed report). Thus, whether a limitation of use or function 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 a body part. (See *Dufel v. Green*, 84 NY2d 795, 798 [1995]).

In *Perl v. Meher*, 18 NY3d 208 [2011], the Court of Appeals held that a quantitative assessment of a plaintiff’s injuries does not have to be made during an initial examination but may be conducted much later, even in connection with litigation. Thus, a plaintiff need not show quantitative, i.e. range of motion testing, contemporaneous with the accident or injury. (*Id.* at 218).

² Although the plaintiff does not allege the seventh and eighth categories of serious injury in his bill of particulars, the parties and their experts have addressed those categories on this motion, so the court deems the bill of particulars to be so amended.

Still, “a contemporaneous doctor’s report is important to proof of causation; an examination by a doctor years later cannot reliably connect the symptoms with the accident.” (*Id.* at 217-218; *see also Rosa v. Mejia*, 95 AD3d 402 [1st Dept 2012] [“Perl did not abrogate the need for at least a qualitative assessment of injuries soon after the accident.”]).

Finally, significant injury pursuant to the ninth category of serious injury requires a showing based on competent medical evidence that plaintiff “was unable to perform substantially all of her daily activities for not less than 90 out of the first 180 days as a result of the subject accident[.]” (*Picott v. Lewis*, 26 AD3d 319, 321 [2d Dept 2006]; *see also Williams v. Perez*, 92 AD3d 528 [1st Dept 2012]; *Barzey v. Clarke*, 27 AD3d 600, 601 [2d Dept 2006] [affirming summary judgment where “there was no competent medical evidence to support a claim that the plaintiff was unable to perform substantially all of his daily activities for not less than 90 of the first 180 days as a result of the subject accident.”]).

In support of this motion, movants submit the affirmed report of Leon Sultan, M.D., who saw the plaintiff on February 19, 2019. Upon presentation, plaintiff indicated that he injured his neck, lower back, left shoulder, right hand and left foot as a result of the accident. He reported missing two weeks from work as a carpet cleaner and floor sander. MRI testing of plaintiff’s cervical and lumbar spine showed herniations with impingement and spinal stenosis both before and after the subject accident. Plaintiff underwent left shoulder arthroscopy on July 10, 2013, prior to the accident and again on April 27, 2017.

Upon physical examination, Dr. Sultan found normal range of motion of plaintiff’s cervical spine, thoracolumbar spine, and bilateral shoulders when measured with the aid of a goniometer and comparing measured values to published normal values. He also noted an unremarkable examination of plaintiff’s right hand and left foot, save for a “small nodule involving the right palm consistent with early Dupuytren’s contracture.” Significantly, Dr. Sultan opined that the plaintiff “*sustained multiple injuries involving his neck, thoracolumbar spine, left shoulder, right hand, and left foot following the occurrence of February 13, 2015*” (emphasis added). He indicated that the examination revealed a low-grade cervical spine motion restriction consistent with plaintiff’s age and underlying degenerative changes. Dr. Sultan also noted plaintiff’s pre-existing trauma to the same parts of the body and noted that the plaintiff’s shoulder had normal range of motion following arthroscopic procedures. Dr. Sultan concluded that the plaintiff is stable and requires no additional treatment or testing.

Movants also rely on the affirmed report of neurologist Kenneth R. Einberg, M.D., who examined the plaintiff on February 13, 2019. Plaintiff complained of a stiff neck, localized lower back pain, and right hip pain. On examination, Dr. Einberg found normal sensory responses and normal range of motion of plaintiff’s cervical and lumbar spine save for lumbar flexion, which was restricted by 10 degrees. Dr. Einberg indicated that the observation of mildly reduced range of motion measurements does not reflect objective neurological pathology, “as the results are entirely dependent on the patient’s effort.” Dr. Einberg diagnosed the plaintiff with cervical sprain/strain – resolved and lumbar sprain/strain – resolving. He opines that the plaintiff shows

no clinical signs of neurological dysfunction and there is no medical necessity for further treatment and may work and perform activities of daily living without restriction.

Although Dr. Einberg has satisfied the affirmation requirement pursuant to CPLR 2106, Dr. Einberg's signed report does not state how the evaluation has an objective basis or which measuring tools were used for the range of motion testing pursuant to the holdings of *Toure, Cho and Dufel*. Even crediting Dr. Einberg's report, he found a 10 degree restriction in lumbar flexion, which by his own standards is a 17 % deficit.

In opposition, plaintiff argues that the differing normal values for range of motion testing used by Drs. Einberg and Sultan warrant denial of the motion. Although the varying normal values used by plaintiff's treating physicians are subjects for cross-examination, they do not render their opinions inadmissible. (*See Kang v. Almanzar*, 116 AD3d 540 [1st Dept 2014] [plaintiff's contention that defendants' expert selected normal values that were substantially lower than those he personally used in other cases raised only an issue of credibility]).

Next, plaintiff asserts that the broad spectrum of normal values for range of motion testing used by Dr. Sultan fails to satisfy defendants' prima facie burden because such standards lack specificity. As a result, plaintiff claims that Dr. Sultan's report should be inadmissible. Plaintiff cites to various cases in support. One particular citation, *Lee v. M&M Auto Coach, Ltd.*, 2011 NY Misc. Lexis 1131 [Sup. Ct. Nassau County 2011], though nonbinding, is persuasive. In that case, the defendant's IME physician compared the plaintiff's ranges of motion to spectrums of normal values, similar to Dr. Sultan's examination. There, the court held that "the lack of specificity in [the IME] report essentially creates an issue of fact with respect to determining whether the Plaintiff has a significant limitation of range of motion for a particular body part." (*Lee*, 2011 NY Misc. Lexis 1131 at *8). As a result, the court held that the defendants failed to establish their prima facie burden. (*See id.*). In any event, in this case, Dr. Sultan acknowledged injuries sustained by the plaintiff as a result of the accident and limits his opinion to the need for future treatment.

Plaintiff affirmatively submits the January 8, 2020 report of Sunil H. Butani, M.D. Upon examination, Dr. Butani concludes that "[r]ange of motion of the cervical spine is restricted in side bending and rotation." However, as was the case with Dr. Einberg's affirmation, Dr. Butani wholly fails to state how his evaluation has an objective basis or which measuring tools were used for the range of motion testing. Accordingly, his opinion is without effect pursuant to *Toure, Cho and Dufel*.

Plaintiff also submits evaluations from several physicians associated with Interventional Physical Medicine and Rehabilitation, P.C. from shortly after the accident on February 17, 2015 through November 9, 2015. At his initial visit, Dr. Rafeal Abramov found restricted ranges of motion of plaintiff's cervical spine and lumbar spine, combined with significant complaints of pain and numbness in plaintiff's right hand. Plaintiff was started on a course of physical therapy and advised to refrain from strenuous activity. In addition, Dr. Abramov opined that if the history

provided was correct, plaintiff's injuries were caused by the subject accident. Subsequent examinations revealed continued restricted ranges of motion.

On this record, the deficiencies in the reports provided by movant's experts combined with the findings of plaintiff's treating physicians preclude summary judgment on the issues of whether the plaintiff sustained a serious injury within the meaning of New York Insurance Law § 5102(d).

For the foregoing reasons, it is hereby

ORDERED, that the Warren defendants' motion for summary judgment as against plaintiff Clive A. Parker is **denied**; and it is further

ORDERED, that the Warren defendants' motion to dismiss Clover Ghany's complaint is **granted** to the extent that plaintiff Ghany's complaint is struck unless within 30 days of the formal resumption of standard court operations plaintiff Ghany provides full responses to written disclosure demands and appears for deposition; and it is further

ORDERED, that counsel for the movants shall serve a copy of this order with notice of entry on Clover Ghany by certified mail, return receipt requested and shall file proof of service with the court.

This constitutes the decision and order of this court. All applications not specifically addressed herein are denied.

Dated: April 17, 2020

Mineola, New York

/s/ Jeffrey S. Brown

Jeffrey S. Brown, J.S.C

ENTERED

Apr 21 2020

NASSAU COUNTY
COUNTY CLERK'S OFFICE