Valentine v Monterroso
2010 NY Slip Op 32614(U)
July 30, 2010
Supreme Court, Queens County
Docket Number: 29940-2008
Judge: Robert J. McDonald
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Short Form Order **b**

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - PART TT-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

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LONNIE VALENTINE,	Index. No.: 29940 - 2008
Plaintiff(s)	Motion: 07.29.10
- against -	
	Cal.: 21
GEORGE MONTERROSO, HORTON MALCOLM, and ERHAND E. MALCOLM,	Sequence No. 2
Defendant(s).	

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The following papers numbered 1 through 8 were read on this motion by defendant George Monterroso to dismiss the instant summons and complaint on the ground that the plaintiff did not sustain "serious injury" :

	Papers Numbered
Defendant's Notice of Motion, Affirm., and Exhibits	1 - 3
Affirmation in Opposition. and Exhibits	4 - 7
Reply Affirmation..	8

Upon the foregoing papers it is Ordered that this motion is determined as follows:

The moving defendants assert that the plaintiff has not sustained a "serious injury" as a result of the accident.

In order to maintain an action for personal injury in an automobile case a plaintiff must

establish, after the defendant has properly demonstrated that it is an issue, that the plaintiff has sustained a "serious injury" which is defined as follows:

"Serious Injury" Insurance Law §5102(d)

In order to maintain an action for personal injury in an automobile case a plaintiff must establish that he has sustained a "serious injury" which is defined as follows:

> Serious injury means a personal injury which result in ... permanent consequential limitation of use of a body organ or member; 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 person from performing substantially all of the material acts which constitutes 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.

Whether a plaintiff has sustained a serious injury is initially a question of law for the Court (*Licari v Elliott,* 57 NY2d 230). Initially it is defendant's obligation to demonstrate that the plaintiff has not sustained a "serious injury" by submitting affidavits or affirmations of its medical experts who have examined the litigant and have found no objective medical findings which support the plaintiff's claim (*Toure v Avis Rent A Car Systems, Inc.,* 98 NY2d 345; *Lowe v Bennett,* 122 AD3d 718 *aff'd* 69 NY2d 701; Grossman *v Wright,* 268 AD2d 79). If the defendant 's motion raises the issue as to whether the plaintiff has sustained a "serious injury" the burden shifts to the plaintiff to prima facie demonstrate through the production of evidence sufficient to demonstrate the existence of a "serious injury" in admissible form, or at least that there are questions of fact as to whether plaintiff suffered such injury (*Gaddy v Eyler,* 79 NY2d 955; *Bryan v Brancato,* 213 AD2d 577).

Insurance Law 5102 is the legislative attempt to "weed out frivolous claims and limit recovery to serious injuries" (*Toure v Avis Rent-A-Car Systems, Inc.,* 98 NY2d 345, 350).

Under Insurance Law 5102(d) a permanent consequential limitation of use of a body organ or member qualifies as a "serious injury", however, the medical proof must establish that the plaintiff suffered a permanent limitation that is not minor slight, but rather, is consequential which is defined as an important or significant limitation.

The defendant submits the affirmation of Dr. Ravi Tikoo, M.D., a Board Certified Neurologist, dated September 2, 2009. The plaintiff presents his subjective complaints about pain in his lower back, right shoulder, and bilateral knees. Dr. Tikoo states that the plaintiff has a "history" of lumbosacral strain and a "history" of soft tissue injuries. Dr. Tikoo finds with a reasonable degree of medical certainty that the plaintiff was "essentially" normal despite his subjective complaints. "Lonnie does not need any further treatment or diagnostic testing" "he does not have significant clinical evidence of neuropathy, radiculopathy, or disc herniation from the accident" "Lonnie is not disabled from a neurological basis."

The defendant submits the undated affirmation of Dr. Robert J. Orlandi, M.D., a Board Certified Orthopaedic Surgeon, who conducted an examination on September 1, 2009. The plaintiff complained of shoulder pain when he lifts heavy objects. The plaintiff demonstrated no abnormality in his cervical spine and shoulders. Similar non remarkable results were found with regard to the plaintiff's lumbar spine. The plaintiffs knees were found to be essentially normal. Dr. Orlandi found that the plaintiff did not exhibit any musculoskeletal disability and his prognosis was excellent.

Dr. Jessica F. Berkowitz, M.D. , a Board Certified Radiologist, submitted three affirmations dated February 25, 2010 with regard to three MRIs of the plaintiff. Dr. Berkowitz reviewed the MRI of the plaintiff's cervical spine taken August 4, 2008 and found "slight straightening of the normal cervical lordosis. Minimal disc bulges are noted at C3-4 through C5-6. No other disc bulges or herniations are present." She notes that "[t]his report is in disagreement with the original radiology report." Dr. Berkowitz reviewed the MRI of the plaintiff's lumbar spine taken August 12, 2008. She found "[m]inimal disc bulges, T12-L1 and L3-4. Slight diffuse disc bulges are associated with spondylosis, L5-S1." There finding are chronic in origin and the finds are unrelated to the accident. Dr. Berkowitz' review of the MRI performed July 28, 2008 of the plaintiff's right shoulder was conducted. "Question of a small amount of subacromial/subdeltoid bursitus. This is nonspecific e tiology. Os acromiale is developmental. Tendinopathy and partial thickness rotator cuff tear. These findings are associated with chronic repetitive microtrauma to rotator cuff degeneration, tendinopathy and tearing." She found no causal relationship between the MRI and the accident.

Here the defendant has come forward with sufficient evidence to support her claim that the plaintiff has not sustained a "serious injury" (*Gaddy v Eyler,* 79 NY2d 955).

The plaintiff submits the affirmation of Dr. Benjamin Yentel, M.D. This affirmation purports to be a "NARRATIVE REPORT" however, it is undated. There is a "Range of motion" tests conducted with regard to the plaintiff's Cervical Spine, Lumbar Spine, and Thoracic Spine. Whether these tests were conducted objectively is speculative. However, Dr. Yentel does refer to the MRI reports of the plaintiff's lumbar spine and surgical spine. He also refers to an MRI of the plaintiff's right shoulder. "**M.R.I. of the right shoulder**: *Grade 1 shoulder impingement syndrome with a partial tear of the supraspinatus tendon and moderate associated tendropathy/tendinitis as well as bursitis."* Dr. Yentel's prognosis is that the plaintiff "is at great risk of long term neurological dysfunction and persistent pain."

The plaintiff submits the affirmation of Dr. David L. Hsu, M.D. a Board Certified Orthopedist, dated July 7, 2010. Dr. Hsu saw the plaintiff initially on July 15, 2008. Dr. Hsu noted that the plaintiff's range of shoulder motion was restricted and he had pain in his right shoulder. Dr. Hsu notes in his prognosis that the plaintiff has a direct result of the accident had sustained "traumatic injuries" and that with regard to the "affected areas" it is Dr. Hsu's opinion that "such weakness might predispose the areas affected to further aggravation that might not have been otherwise, bothering the patient before the accident. It is my opinion that these areas will be permanently weakened for an indefinitie period resulting in significant and permanent restricted mobility. In view of the nature of the injuries that the patient sustained, there is partial permanent

disability."

There is an affirmation dated September 19, 2008 of Dr. Natalio Damien, M.D., a radiologist, who states that he supervised the MRI of plaintiff's right shoulder taken July 28, 2008; the MRI of plaintiff's cervical spine taken August 4, 2008, the MRI of plaintiff's lumbar spine taken August 12, 2008, and the x-rays of plaintiff's left and right knee taken July 28, 2008. Attached are the reports of each MRI taken and their acknowledgment in the September 19, 2008 affirmation.

To establish that the plaintiff has suffered a permanent or consequential limitation of use of a body organ or member and/or a significant limitation of use of a body function or system, the plaintiff must demonstrate more than "a mild, minor or slight limitation of use" and is required to provide objective medical evidence of the extent or degree of limitation and its duration (*Booker v Miller,* 258 AD2d 783; *Burnett v Miller,* 255 AD2d 541). Resolution of the issue of whether "serious injury" has been sustained 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 (*Dufel v Green,* 84 NY2d 795). Upon examination of the papers and exhibits submitted this Court finds that the plaintiff has raised triable factual issue as to whether the plaintiff has "permanent consequential" and "significant limitation" categories.

Where a plaintiff alleges soft-tissue injury to the spine, range-of-motion testing is used to determine whether the plaintiff has sustained a "serious injury". In order to demonstrate that the plaintiff has not sustained a serious injury the defendant must initially demonstrate that the plaintiff's range-of-motion is "normal" (*Chiara v Dernago,* 70 AD3d 746; *Knopf v Sinetar,* 69 AD3d 809).

The question presented as to the difference between the conflicting measurements of plaintiff's ability to move creates an issue of fact for the jury (*Martinez v Pioneer Transportation Corp.,* 48 AD3d 306). When the findings reported by one physician are assessed by application of the standard of "normal" stated by the other, the reports present "contradictory proof" (*Dettori v Molzon,* 306 AD2d 308). The use of the word "normal" should not differ between physicians (*Ortiz v S&A Taxi Corp,* 68 AD3d 734).

Generally, an unexplained cessation of medical treatment may be fatal to the plaintiff's claim of a significant or permanent consequential limitation *(Baez v Rahamatali,* 24 AD3d 256 *aff'd* 6 NY2d 868) A diagnosis of permanency having been sustained by the plaintiff obviates the need for further treatment and, therefore, there is no "gap" in treatment (*Pommells v Perez,* 4 NY3d 566). Also, a finding by the treating physician that continued treatment would be merely palliative can be considered a sufficient explanation for cessation of treatment (*Toure v Avis Rent A Car Systems,* 98 NY2d 345; *Turner-Brewster v Arce,* 17 AD3d 189).

The plaintiff has failed to demonstrate that he has a "medically determined" injury or impairment which has prevented his from performing all of his usual and customary daily activities for at least 90 of the first 180 days following the accident. (*Ayotte v Gervasio,* 81 NY2d 1062; *Johnson v Berger,* 56 AD3d 725;*Roman v Fast Lane Car Service, Inc.,* 46 AD3d 535). Upon the

defendant's properly raising this issue the plaintiff must submit competent medical evidence that the injuries sustained rendered him unable to perform substantially all of his daily activities for not less than 90 days of the first 180 days subsequent to the subject accident (*Vicers v Francis,* 63 AD3d 1150; *Roman v Fast Lane Car Service, Inc,* 46 AD3d 535).

Regarding the "permanent loss of use" of a body organ, member or system the plaintiff must demonstrate a total and complete disability which will continue without recovery, or with intermittent disability for the duration of the plaintiff's life (*Oberly v Bangs Ambulance, Inc.,* 96 NY2d 295). The finding of "Permanency" is established by submission of a recent examination (*Melino v Lauster,* 195 AD2d 653 *aff'd* 82 NY2d 828). The mere existence of a herniated disc even a tear in a tendon is not evidence of serious physical injury without other objective evidence (*Sapienza v Ruggiero,* 57 AD3d 643; *Piperis v Wan,* 49 AD3d 840; *Meely v 4G's Truck Rental Co, Inc.,* 16 AD3d 26). Merely referring to the plaintiff's "subjective quality of the plaintiff's pain does not fall within the objective definition of serious physical injury" (*Saladino v Meury,* 193 AD2d 727, *see, Craft v Brantuk,* 195 AD2d 438). The plaintiff has avoided dismissal on this ground through the affirmation of Dr. Hsu who found that the plaintiff had sustained a permanent partial disability.

Regarding "permanent limitation" of a body organ, member or system the plaintiff must demonstrate that he has sustained such permanent limitation (*Mickelson v Padang,* 237 AD2d 495). The word "permanent" is by itself insufficient, and it can be sustained only with proof that the limitation is not "minor mild, or slight" but rather "consequential" (*Gaddy v Eyler, supra*). Once the question has been raised, in order for the plaintiff to sustain proof of permanency, he must demonstrate the existence of such injury through objective medical tests which demonstrate the duration and extent of the injuries alleged (*Gobas v Dowigiallo,* 287 AD2d 690).

The "significant limitation of use of a body function or system" requires proof of the significance of the limitation, as well as its duration (*Dufel v Green,* 84 NY2d 795; *Fung v Uddin,* 60 AD3d 992; *Hoxha v McEachern,* 42 AD3d 433; *Barrett v Howland,* 202 AD2d 383). Dr. Hsu has stated that it was his opinion that the plaintiff has sustained permanent injury.

Accordingly, the plaintiff has sustained his burden with regard to the defendants' motion to dismiss the compliant upon the grounds that the plaintiff has not sustained "serious injury". However, the plaintiff has failed to demonstrate that he has a "medically determined" injury or impairment which has prevented his from performing all of his usual and customary daily activities for at least 90 of the first 180 days following the accident and that portion of the plaintiff's case is dismissed.

So Ordered.

Dated: July 30, 2010

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Robert J. McDonald, J.S.C.