Torain v Gaye
2012 NY Slip Op 33895(U)
March 9, 2012
Supreme Court, Bronx County
Docket Number: 300178/2009
Judge: Betty Owen Stinson
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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DEVON TORAIN,

Plaintiff,

INDEX № 300178/2009

-against-

DECISION/ORDER

SOULEYE GAYE,

Defendant.

----------X

HON. BETTY OWEN STINSON:

This motion by defendant for summary judgment dismissing the plaintiff's complaint is granted.

On August 24, 2008 plaintiff was involved in a motor vehicle accident with the defendant and thereafter sued defendant for injuries allegedly suffered as a result. After certain discovery was completed, defendant made the instant motion for summary judgment dismissing the plaintiff's complaint for failure to demonstrate he had suffered a serious injury in the accident.

Summary judgment is appropriate when there is no genuine issue of fact to be resolved at trial and the record submitted warrants the court as a matter of law in directing judgment (*Andre v Pomeroy*, 35 NY2d 361 [1974]). A party opposing the motion must come forward with admissible proof that would demonstrate the necessity of a trial as to an issue of fact (*Friends of Animals v Associated Fur Manufacturers*, 46 NY2d 1065 [1979]).

In order to recover for non-economic loss resulting from an automobile accident under New York's "No-Fault" statute, Insurance Law § 5104, the plaintiff must establish, as a threshold matter, that the injury suffered was a "serious injury" within the meaning of the statute. "Serious

injury" is defined by Insurance Law § 5102(d) to include, among other things not relevant here, a "permanent loss of use of a body organ, member, function or system", a "permanent consequential limitation of use of a body organ or member", a "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 activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment."

The initial burden on a threshold motion is upon the defendants to present evidence establishing that plaintiff has no cause of action, i.e.: that no serious injury has been sustained. It is only when that burden is met that the plaintiff would be required to establish *prima facie* that a serious injury has been sustained within the meaning of Insurance Law § 5102(d) (*Franchini v Palmieri*, 1 NY3d 536 [2003]; *Licari v Elliot*, 57 NY2d 230 [1982]).

To make out a *prima facie* case of serious injury, a plaintiff must produce competent medical evidence that the injuries are either "permanent" or involve a "significant" limitation of use (*Kordana v Pomelito*, 121 AD2d 783 [3rd Dept 1986]). A finding of "significant limitation" requires more than a mild, minor or slight limitation of use (*Broderick v Spaeth*, 241 AD2d 898, *lv denied,* 91 NY2d 805 [1998]; *Gaddy v Eyler*, 167 AD2d 67, *aff'd,* 79 NY2d 955 [1992]). Strictly subjective complaints of a plaintiff unsupported by credible medical evidence do not suffice to establish a serious injury (*Scheer v Koubek*, 70 NY2d 678 [1987]). To satisfy the requirement that plaintiff suffered a medically determined injury preventing her from performing substantially all of her material activities during 90 out of the first 180 days, a plaintiff must show that "substantially all" of her usual activities were curtailed (*Gaddy*, 167 AD2d 67). The

"substantially all" standard "requires a showing that plaintiff's activities have been restricted to a great extent rather than some slight curtailment" (*Berk v Lopez*, 278 AD2d 156 [1st Dept 2000], *lv denied*, 96 NY2d 708).

Allegations of sprains and contusions do not fall into any of the categories of serious injury set forth in the statute (*Maenza v Letkajornsook*, 172 AD2d 500 [2nd Dept 1991]). Evidence of radiculopathy is not alone sufficient to establish a serious injury (*Casimir v Bailey*, 70 AD3d 994 [2nd Dept 2010]).

In support of the motion, defendant offered copies of the pleadings, plaintiff's bill of particulars, an affirmation by Dr. Maria Audrie De Jesus and plaintiff's deposition testimony. The bill of particulars alleged plaintiff suffered L4-5 radiculopathy and spasm, right knee contusion and cervical spine sprain and spasm.

Dr. De Jesus, a neurologist, examined plaintiff on August 23, 2010. Plaintiff complained of neck, low back and right knee pain, on and off. Dr. De Jesus found the 21-year-old plaintiff's examination to be entirely unremarkable, with full range of motion in the cervical and lumbar spine, measured numerically and compared to normal values in accordance with the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition. Plaintiff had normal muscle tone in all extremities and a negative straight leg raising test. Romberg, Soto-Hall, Spurling's, Cervical Distraction, Compression, Kernig's, Patrick's, Waddell's and Phalen's tests were all negative. Dr. De Jesus' diagnosis was alleged injuries to the cervical and lumbar spine, resolved.

Plaintiff testified that he missed two months of work after the accident (deposition of Devon Torain, July 15, 2010 at 69-70). Now his knee swells if he stands a lot (*id.* at 74). He suffers from pain in his low back and discomfort sleeping (*id.* at 75). If he does not stretch in the

morning, he will have pain all day (*id.*).

In opposition to the motion, plaintiff offered medical reports by various physicians, but none after December 2008. No recent examination was offered.

Dr. Larry M. Neuman examined plaintiff on September 2, 2008, nine days after the accident. Plaintiff complained of low back pain, right shoulder pain, right knee pain and chest pain. He reported, however, that he no longer had pain in his cervical spine and he was able to demonstrate full and functional range of motion in that area. Range of motion in his lumbar spine was decreased. By September 26, 2008, Dr. Neuman noted that plaintiff's chest abrasion had healed.

MRI examinations of plaintiff's right knee and lumbar spine, performed by Dr. Robert D. Solomon, radiologist, on December 3, 2008, were unremarkable. There were no bulges or herniations found.

Dr. Gregory Chiaramonte, an orthopedic surgeon, examined plaintiff on November 12, 2008 and found full range of motion in plaintiff's cervical spine, lumbar spine and right knee, as well as a negative straight leg raising test. Plaintiff's right knee had no joint line tenderness, no effusion and all other tests were negative. The only abnormality identified was "mild spasm" in plaintiff's lumbar spine. Dr. Chiaramonte's diagnosis was resolved cervical, thoracic and low back sprain/strain and resolving lumbar sprain/strain.

Defendant has established his entitlement to summary judgment which plaintiff has not refuted with admissible medical evidence. Defendant met his burden of showing by admissible medical evidence that the plaintiff suffered from sprain injuries which have completely resolved. Plaintiff's bill of particulars list injuries that are not considered serious in the first place. His

claim of missing two months of work as a result of the accident does not rise to the 90 days out of the first 180 following the accident, as specified by the statute. Dr. De Jesus found plaintiff's recent examination to be unremarkable. His deposition testimony did not make claims of more than pain in his back if he does not stretch in the morning and swelling in his knee if he stands a lot.

Plaintiff's submissions in opposition do not raise an issue of fact, but rather confirm his good health. He was cleared by Dr. Neuman to return to work at full duty by October 17, 2008, only 54 days after the accident. He offered no recent examination to show permanence and his last examination by Dr. Chiaramonte found no more than mild spasm in his lumbar spine, a condition Dr. Chiaramonte considered to be "resolving".

The complaint is, therefore, dismissed. Movant is directed to serve a copy of this order with notice of entry on the Clerk of Court who shall enter judgment dismissing the plaintiff's complaint.

This constitutes the decision and order of the court.

Dated: March 9, 2012
Bronx, New York

BETTY OWEN STINSON, J. S.C.