

**Thomas v Bryan**

2013 NY Slip Op 33784(U)

July 24, 2013

Supreme Court, Bronx County

Docket Number: 302424/2011

Judge: Mitchell J. Danziger

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART IA-2

-----X  
COLLIE THOMAS,

Plaintiff,

DECISION and ORDER  
Index No. 302424/2011

-against-

Present: Hon. Mitchell Danziger  
AJSC

BEVERLY BRYAN and DANE BRYAN,

Defendants.

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Recitation, as required by CPLR §2219(a), of the papers considered in reviewing the underlying motion for summary judgment:

Notice of Motion and annexed Exhibits and Affirmation.....	1
Affirmation in Opposition .....	2
Further Affirmation in Opposition.....	3

Plaintiff Collie Thomas commenced this action alleging that he sustained serious injuries as a result of an automobile accident caused by the defendants' negligence on December 3, 2010.

Defendants, Beverly Bryan and Dane Bryan move for summary judgment pursuant to CPLR 3212 on the ground that the plaintiff, Collie Thomas did not sustain serious injuries within the meaning of Insurance Law 5102(d).

The defendants offer as proof of the absence of serious injury to plaintiff, Collie Thomas the medical affirmation of Dr. Robert Israel, an orthopedist. Dr. Israel conducted an orthopedic examination of the plaintiff on June 6, 2012. Dr. Israel's report concluded that the plaintiff's examination showed "no disability as a result of the accident of record." The doctor's report contains the following medical history: "He alleges injuries to his neck, upper back, lower back, right

shoulder and right ankle.” Range of motion testing of the cervical spine, thoracic spine and lumbar spine and right shoulder and right foot/ankle revealed normal ranges of motion. Dr. Israel’s impression was that the plaintiff sustained sprains to the aforesaid areas that were resolved.

In opposition to the motion, the plaintiff, Collie Thomas submits an affidavit from Dr. Henry Hall who examined the plaintiff on December 4, 2010. The plaintiff complained as follows: “Severe pain in the right ankle, knee and shoulder and in the neck and back.” Range of motion testing on December 4, 2010 of the cervical and lumbar spine revealed that he was “unable to perform” these tests due to plaintiff’s complaints of “extreme pain.”

On December 17, 2010 range of motion studies revealed as follows:

Cervical spine: Flexion 19 degrees (normal 50); Extension 20 degrees (normal 60); Left lateral flexion 10 degrees (normal 45); right lateral flexion 13 degrees (normal 45).

Lumbar spine: Flexion 37 degrees (normal 60); Extension 6 degrees (normal 25); Left and right rotation 11 degrees (normal 30).

The plaintiff received the following medical treatment: “The patient began a course of physical therapy and chiropractic treatments coming five times a week for approximately three months and continuing to date at lesser frequency.”

The plaintiff was re-examined on August 21, 2012 which revealed as follows:

Cervical spine: Flexion 20 degrees (normal 60); Extension 20 degrees (normal 50); Left rotation 25 degrees (normal 80); right rotation 35 degrees (normal 80); left lateral flexion 10 degrees (normal 40); right lateral flexion 15 degrees (normal 40).

Lumbar spine: Flexion 30 degrees (normal 90); Extension 10 degrees (normal 30); left and right rotation 10 degrees (normal 30); left and right lateral flexion 5 degrees (normal 20).

Dr. Hall's Affidavit incorporates his narrative report dated August 31, 2012.

Dr. Hall's report concluded as follows: "The patient, as a direct result of the accident on 12/3/10, sustained permanent injuries to his spine, muscular, and neurological systems." Dr. Hall opined that the plaintiff's injuries were causally related to the accident. Further, "the patient has reached maximum medical improvement."

In opposition, plaintiff submits an affirmation from Dr. Ellen Ginsberg who examined the plaintiff for "pain management evaluation" on December 9, 2010. The doctor's report indicates the following medical treatments: "In December 2010, the patient began a course of physical therapy, pain management and chiropractic treatments five times a week for approximately three months and continuing to date at lesser frequency."

Range of motion testing on October 23, 2012 revealed as follows:

Cervical spine: Flexion 30 degrees (normal 60); Extension 25 degrees (normal 50); Left and right rotation 40 degrees (normal 80); Left and right lateral flexion 20 degrees (normal 40).

Lumbar spine: Flexion 45 degrees (normal 90); Extension 15 degrees (normal 30); Left and right rotation 15 degrees (normal 30); Left and right lateral flexion 10 degrees (normal 20).

Dr. Ginsberg's affirmed report incorporates her report dated October 24, 2012.

Dr. Ginsberg's affirmed report concluded that plaintiff's injuries were causally related to the

accident. Further, "as a result of this accident, the patient has suffered a permanent loss of use of a body organ, member, a significant limitation of use of a body function or system (cervical and lumbar spines) and that these injuries further rendered him unable to undertake substantially all of his usual and customary daily activities for not less than ninety (90) days during the one hundred eighty [180] days immediately following the occurrence."

In opposition to the motion the plaintiff submits an affirmation from Dr. Steve B. Losik, a radiologist with Excellent Medical Care Solution, P.C., (hereinafter "Excellent"). The MRI of the cervical spine taken at Excellent on December 29, 2010 revealed as follows: "C4-5, C6-7 disc bulges compressing anterior thecal sac; C5-6 disc herniation compressing anterior thecal sac." The MRI of the right shoulder taken at Excellent on January 18, 2011 showed as follows: "right shoulder MRI demonstrated conditions consistent with partial tear..." The MRI of the Lumbar spine taken at Excellent on January 4, 2011 revealed as follows: "L4-5 disc bulge with impingement..."

In opposition to the motion the plaintiff submits an affirmation from Dr. Jacob Nir who performed electromyography/nerve conduction testing on January 7, 2011 of the upper and lower extremities. The aforesaid tests showed "bilateral cervical radiculopathy of C5/C6 and right S1 lumbar radiculopathy/right sciatica."

#### DISCUSSION

The proponent of a motion for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence

of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers.” (*JMD Holding Corp v Congress Financial Corporation*, 4 NY 3d 373 [2005], quoting *Alvarez v Prospect Hospital*, 68 NY 2d 320 [1986]; *Lesane v Tejada*, 15 AD 3d 358 [2<sup>nd</sup> Dept 2005].) In the present action, the burden rests on the defendants to establish, by the submission of evidentiary proof in admissible form, that the plaintiff did not suffer a serious injury as a result of the accident. The burden thereafter shifts to the plaintiff to demonstrate the existence of a triable issue of fact. (*Seminara v Grossman*, 253 AD 2d 420 [2d Dept 1998].)

The Court of Appeals emphasized in *Pommells v Perez* that litigation can be commenced against a car owner or driver for damages caused by an accident only in the event of serious injury. (*Pommells v Perez*, 4 NY 3d 566 [2005]; Insurance Law §5104[a].) Insurance Law § 5102(d) defines serious injury as:

a personal injury which results in.....permanent loss of use of a body organ, member, function or system; 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 nonpermanent 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.

A claim of serious injury can be substantiated by an expert's designation of a numeric

percentage of a plaintiff's loss of range of motion. (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY 2d 345 [2002].) In the case of *Lopez v Senatore* (65 NY 2d 1017 [1985]), the Court held that where a treating physician, in an affidavit supported by exhibits, set forth the injuries and course of treatment, identified a limitation of movement of the neck of only 10 degrees to the right or left, and on that predicate expressed the opinion that there was a significant limitation of use of a described body function or system, such evidence was sufficient for the denial of summary judgment.

A bulging or herniated disc may constitute serious injury if objective evidence exists as to the extent of the alleged physical limitation resulting from the disc injury and its duration. (*Espinal v Galicia*, 290 AD 2d 528 [2<sup>nd</sup> Dept 2002].)

The medical reports are in conflict with respect to serious injury. Dr. Israel, the defendants' orthopedist concluded that the plaintiff's examination was normal. In contrast, Dr. Hall's report concluded that the plaintiff sustained permanent injuries to his cervical and lumbar spines.

In *Pommels v Perez* (4 NY 3d 566, *supra*), the Court of Appeals required a plaintiff who stops medical treatment to "offer some reasonable explanation for having done so." This Court finds that the plaintiff has provided a reasonable explanation for his treatment gap. (*See Brown v Achy*, 9 AD 3d 30 [1<sup>st</sup> Dept 2004]; *Turner-Brewster v Arce*, 17 AD 3d 189 [1<sup>st</sup> Dept 2005].)

Viewing the objective medical evidence in a light most favorable to the plaintiff this Court finds that the plaintiff's limitations of motion of his cervical and lumbar spines both in the months following plaintiff's accident and thereafter describe a serious injury and raise a triable issue of fact. (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY 2d 345, *supra*; *Brown v Achy*, 9 AD 3d 30 [1<sup>st</sup> Dept 2004]; *Vitale v Lev Express Cab Corp*, 273 AD2d 225 [2<sup>nd</sup> Dept 2000]; *DiLeo v Blumberg*, 250 AD

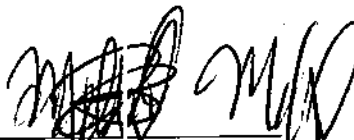
2d 364 [1<sup>st</sup> Dept 1998].)

For the foregoing reasons, the motion by the defendants for summary judgment on threshold is denied with respect to the plaintiff, Collie Thomas.

This constitutes the Decision and Order of this Court.

Dated: July 24, 2013

So ordered,

  
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Mitchell Darziger, AJSC