Amkraut v Evens
2013 NY Slip Op 33950(U)
August 16, 2013
Supreme Court, Bronx County
Docket Number: 308043/2009
Judge: Mitchell J. Danziger
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART IA-2

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MARTIN AMKRAUT,

Plaintiff,

DECISION and ORDER
Index No. 308043/2009

-against-

Present: Hon. Mitchell Danziger
AJSC

KENNETH EVENS,

Defendant.

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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, 3,4
Reply Affirmation.....5,6 & 7

Plaintiff Martin Amkraut commenced this action alleging that he sustained serious injuries as a result of an automobile accident caused by the defendant's negligence on February 28, 2007.

Defendant, Kenneth Evens moves for summary judgment pursuant to CPLR 3212 on the ground that the plaintiff did not sustain serious injuries within the meaning of Insurance Law 5102(d) and also moves for summary judgment on liability.

Serious Injury

The defendant offers as proof of the absence of serious injury to plaintiff, Martin Amkraut the medical affirmation of Dr. Menachem Y. Epstein, an orthopedist. Dr. Epstein conducted an orthopedic examination of the plaintiff on January 25, 2012. Dr. Epstein's report lists the plaintiff's chief complaint at the time of his examination as left knee pain. He had arthroscopic surgery to the

left knee on August 2, 2007 by Dr. Randall Ehrlich. Thereafter, on September 20, 2009 the plaintiff underwent a total left knee replacement by Dr. Cobelli. Prior to the accident in question he allegedly injured his back in 1992 lifting a "heavy cloth roll" and also underwent left knee arthroscopy on December 23, 2005. Dr. Epstein's history also stated as follows: "The accident in question exacerbated the knee and the "fracture in the joint." Range of motion testing of the lumbosacral spine revealed as follows:

> He had reduced active range of motion about the lumbosacral spine with 72/90 degrees flexion (90 normal) with a pain complaint, and 10/30 degrees extension (30 normal)...

Range of motion testing of the right hip, left hip and right knee revealed normal ranges. Further, range of motion testing of the left knee revealed as follows:

> Mr. Amkraut is status post left knee arthroscopy X2 plus a total knee replacement with an 8" midpatellar scar and multiple faded portal scars. He had reduced active range of motion of the left knee with 95/150 degrees flexion (150 normal) and 0/0 degrees extension (0 normal).

The doctor's report also comments on the MRI of plaintiff's left knee dated March 7, 2007 as follows: "Impression: ...consistent with a medial meniscal tear..." The MRI of the lumbar spine dated April 6, 2007 by Dr. Berkowitz revealed as follows: "Impression: ...disc bulges at L2-3, L4-5, L5-S1 ..."

Dr. Epstein opined as follows: "...the 2007 motor vehicle accident of record caused a back sprain (superimposed on prior back injury and degenerative disease) and a left knee sprain

(superimposed on severe arthritis, pre-existing)." Further, "The contusion/sprain to the left knee in the 2007 accident, causally related to the motor vehicle accident, worsened his symptoms to his left knee, which was already due for replacement before the 2007 accident because of seriously arthritic knee."

In opposition, plaintiff submits an Affirmation from treating physician Dr. Randall Ehrlich. Dr. Ehrlich examined the plaintiff, Martin Amkraut on March 6, 2007 and found that the plaintiff sustained "... internal derangement of the lumbar spine and posttraumatic internal derangement of the left knee due to the motor vehicle accident, which occurred on February 28, 2007." Range of motion testing performed at a follow-up examination on April 17, 2007 revealed as follows: Left knee: "Mr. Amkraut's active range of motion was 0 to 130 degrees (140 degrees normal)." In June, 2007 Dr. Ehrlich recommended surgery which he performed on August 2, 2007.

The most recent examination of the plaintiff occurred on February 13, 2013 by Dr. Ehrlich showed the following restrictions: Left knee: "...the active range of motion at 0 to 100 degrees (140 degrees normal) and passive range of motion 0 to 110 (140 degrees normal)." The doctor's report concluded that the aforesaid injuries were caused by the accident in question. Further, "Although, Mr. Amkraut did have a previous history of left knee degenerative disease, before the accident he was asymptomatic."

Dr. Ehrlich explained the gap in treatment as follows:

> The reason for the gap between my last examination and this last visit is due to the fact that at that time Mr. Amkraut had achieved maximum benefits from the arthroscopic surgery and the consistent course of physical therapy and regimen of treatment that he had

> received. However, he still had not achieved complete recovery and any further therapy was discontinued because it was not helping to reduce his symptomology and might even have been counterproductive. His only alternative was to undergo a total knee replacement, which he underwent in 2009.

In opposition to the motion the plaintiff also submits an affirmed report by Dr. Jeffrey Chess, a radiologist. Dr. Chess examined the MRI of the left knee dated March 7, 2007 which showed "There is complex tear of the anterior and posterior horns and body of the medial meniscus."

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 [2nd 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.

(*Pommels 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 [2nd Dept 2002].)

The surgical report by Dr. Ehrlich dated August 2, 2007 states as follows "Left knee medial and lateral meniscal tear.." Dr. Ehrlich's report concluded that the aforesaid injury occurred as a result of the accident in question. The aforesaid tear(s) raises a triable issue of fact (*See*, *Yuen v. Arka Memory Cab Corp.*, 80 AD 3d 481 (1st Dept., 2011); *Peluso v. Janice Taxi Co., Inc.*, 77 AD 3d 491 (1st Dept., 2010).

The medical reports are in conflict with respect to serious injury. The defendant's examining physician concluded that the plaintiff's injuries consist of a back sprain and a left knee sprain. In contrast, the plaintiff's treating physician found permanent injures which included surgery. (*See, Duran v. Kabir*, 93 AD 3d 566 (1st Dept., 2012).

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 herein has provided a reasonable explanation for his treatment gap. (*See Brown v* Achy, 9 AD 3d 30 [1st Dept 2004]; *Turner-Brewster v Arce*,17 AD 3d 189 [1st 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 lumbar spine and left knee 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 [1st Dept 2004]; *Vitale v Lev Express Cab Corp*, 273 AD2d 225 [2nd Dept 2000]; *DiLeo v Blumberg*, 250 AD 2d 364 [1st Dept 1998].)

For the foregoing reasons, the motion by the defendant, Kenneth Evens for summary

judgment on threshold is denied.

Fault

Plaintiff's complaint asserts that the accident in question occurred on February 28, 2007 at the intersection of Boston Road and Boller Avenue, Bronx, New York. The complaint in the above action by plaintiff, Martin Amkraut asserts that the accident in question occurred when the vehicle owned and operated by the defendant, Kenneth Evens improperly struck the vehicle owned and operated by the plaintiff, Martin Amkraut. In a related action, the plaintiffs who are entitled, Martin John Amkraut, an infant under the age of 14 years old, by his mother and natural guardian, Dina Amkraut and Dina Amkraut, individually are suing both Kenneth Evans and Martin Amkraut claiming that the accident in question resulted from the negligence of both defendants. The Index No. in the action against both Kenneth Evens and Martin Amkraut is 350532/2009.

The defendant, Martin Amkraut testified that the accident in question occurred when the vehicle, a Toyota 2003 which he owned and was operating entered the intersection of Boston Road and Boller Avenue. He testified as follows:

> Q. ...From Boller you would have made a left turn onto Boston Road;
>
> is that correct?
>
> A. Yes.

He testified that there was a stop sign on Boller Avenue as follows:

> Q. That stop sign controls traffic for Boller Avenue or for Boston
>
> Road?
>
> A. Boller Avenue.

Amkraut stopped at the aforesaid stop sign for five seconds. He testified as follows:

Q. What did you do during those five seconds that you were stopped?

A. Then I gradually was creeping out because I couldn't see. I was blinded by trucks parked at the corner.

Q. How far did you have to creep forward to get a view of Boston Road to your left?

A. I almost had to come almost into the middle lane right lane in order to clear the trucks because they weren't 100 percent parked into the curb. ...

Amkraut did not complete his left turn as his vehicle collided with the defendant's vehicle. He described contact with the defendant's vehicle as follows:

Q. Why weren't you able to complete your left turn?

A. We kissed each other.

He also testified as follows:

Q. Before the accident, did you see the second vehicle involved in the accident?

A. He was coming up but it was too late already.

The left front portion of his vehicle came in contact with the right front portion of the defendant, Kenneth Evens' vehicle. He also testified that his son, Martin was a front seat passenger in his vehicle at the time of the accident.

In support of its motion for summary judgment on liability counsel for the defendant, Kenneth Evens argues as follows: "the defendant was not responsible for the happening of the subject accident." In addition, defendant's papers annex pleadings, medical records, deposition

transcript of Martin Amkraut dated December 10, 2008 and November 10, 2011 and defendant's physical report.

No sworn testimony is presented to the Court from the defendant, Kenneth Evens in its initial moving papers. In addition, the Court notes that the infant plaintiff, Martin Amkraut was a front seat passenger and was born on September 30, 1995.

In Reply papers, defendant, Kenneth Evens annexes his deposition transcript. Evens testified as follows:

Q. What did you see the other vehicle do?

A. I saw him creep out past of the stop sign and momentarily stop.

Q. About how far onto Boston Road was it?

A. I would say a quarter of his car.

Q. What else did you see the car do?

A. Well, he began to drive again but after I had switched lanes.

Evens testified that he spoke with the plaintiff, Martin Amkraut following the accident and that Amkraut admitted being responsible for the accident. Evens testified as follows: "We basically asked each other if we were okay and he admitted to it being his fault."

The testimony of the drivers involved are conflicting as to liability. Issues of fact are presented for a jury to determine which precludes summary judgment. (*See*, *Hudson v. Cole*, 264 AD 2d 439 (2nd Dept., 1999); *Geschwind v. Hoffman*, 285 AD 2d 448 (2nd Dept., 2001). Questions as to liability and/or apportionment of fault must be determined by a jury.

For the foregoing reasons, the motion by the defendant, Kenneth Evens for summary judgment on threshold is denied. The defendant, Kenneth Evens motion for summary judgment on

fault is also denied.

This constitutes the Decision and Order of this Court.

Dated: August 16, 2013

So ordered,

Mitchell Danziger, JCC