

Bayk v Martini

2015 NY Slip Op 31594(U)

August 3, 2015

Supreme Court, Suffolk County

Docket Number: 05747/2013

Judge: William B. Rebolini

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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Al Bayk,

Plaintiff,

-against-

Ronald Martini and JP Express Leasing Corp.,

Defendants.

Motion Sequence No.: 001; MG; CD

Motion Date: 10/20/14

Submitted: 2/4/15

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Clerk of the Court

Upon the following papers **electronically filed** and numbered 1 to 35 read upon this motion for summary judgment: Notice of Motion and supporting papers, 1 - 32; Answering Affidavits and supporting papers, 33 - 35; it is

ORDERED that this motion by defendants for an order pursuant to CPLR 3212 granting summary judgment in their favor dismissing the complaint on the ground that plaintiff did not sustain a serious injury as defined in Insurance Law § 5102 (d) is granted.

This is an action to recover damages for injuries allegedly sustained by plaintiff on March 10, 2010 when his vehicle was rear-ended by a vehicle leased by defendant JP Express Leasing Corp. and operated by defendant Ronald Martini. The accident allegedly occurred on Mineola Avenue at

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its intersection with High Street in North Hempstead, New York. By his bill of particulars, plaintiff alleges that he sustained serious injuries as a result of the subject accident including, disc bulges of the lumbar spine, bulges and herniations of the thoracic spine, and bulges and herniations of the cervical spine; cervical radiculopathy; and mild neuropathy of the left lower extremity. Plaintiff also alleges economic loss in excess of basic economic loss as defined in Insurance Law § 5102 (a).

Defendants now move for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury as defined in Insurance Law § 5102 (d). Defendants' submissions include the pleadings, plaintiff's bill of particulars, plaintiff's deposition transcript, plaintiff's medical records and the affirmed reports of defendants' examining orthopedic surgeon and neurologist.

Insurance Law § 5102 (d) defines "serious injury" as "a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; 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 non-permanent 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 ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment."

In order to recover under the "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (*Oberly v Bangs Ambulance*, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system" categories, either objective evidence of the extent, percentage or degree of plaintiff's limitation or loss of range of motion must be provided or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (*see Perl v Meher*, 18 NY3d 208, 936 NYS2d 655 [2011]; *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865 [2000]). In order to qualify under the 90/180-days category, an injury must be "medically determined" meaning that the condition must be substantiated by a physician, and the condition must be causally related to the accident (*see Damas v Valdes*, 84 AD3d 87, 921 NYS2d 114 [2d Dept 2011]). A preexisting condition does not foreclose a finding that the injuries were causally related to the accident (*see Rodgers v Duffy*, 95 AD3d 864, 944 NYS2d 175 [2d Dept 2012]).

On a motion for summary judgment, the defendant has the initial burden of making a prima facie showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) (*see Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]; *Akhtar v Santos*, 57 AD3d 593, 869 NYS2d 220 [2d Dept 2008]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851,

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487 NYS2d 316 [1985]; *Boone v New York City Tr. Auth.*, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]). “Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923 [1986], citing to *Zuckerman v City of New York*, 49 NY2d 557, 562, 427 NYS2d 595 [1980]).

Plaintiff’s deposition testimony reveals that his vehicle was impacted heavily twice in the rear and that his neck moved forward and then back each time and his right knee hit the dashboard. He complained of neck pain at the scene of the accident. Plaintiff did not go to the hospital but shortly after the accident he began treatment with a chiropractor in Connecticut where he lived, receiving adjustments for his neck and back pain. He received treatment three times a week until he moved to Long Island. Plaintiff went to a different chiropractor on Long Island, Dr. Smith, complaining of neck pain and pain radiating from his right shoulder blade to his right elbow. The new chiropractor treated him two times per week by performing adjustments and plaintiff continued to take over-the-counter pain medication. Plaintiff also saw an orthopedist, Dr. DeLaMora, who referred him for physical therapy and referred him to a neurologist, Dr. DeRosa. He saw Dr. Elfiky, a neurologist, for a second opinion concerning surgery recommended by Dr. DeRosa. Dr. Elfiky diagnosed a pinched nerve in his neck and gave him two injections. Plaintiff received physical therapy treatment two or three times a week “for a couple of months.” Plaintiff was involved in a prior motor vehicle accident in 2006 in which his vehicle was struck head-on and he sustained a broken ankle and left pelvis. He was also involved in a subsequent accident in the spring of 2011 when his vehicle was struck in the rear passenger side and he felt pain in areas of his body that were injured in the two prior accidents. Plaintiff also subsequently saw an orthopedist, Dr. Lantner, in Connecticut for treatment. He was not confined to bed following the subject accident and could not recall when he returned to work. Plaintiff’s work and work hours did not change following the subject accident. He currently has variable pain for a week or two that prevents him from lifting then it disappears. It affects his ability to lift weights when he goes to the gym.

Plaintiff’s initial treatment provider, a chiropractor in New Haven, Connecticut, Dr. John Cianciolo, indicated in his report dated March 31, 2010 that he first examined plaintiff on March 22, 2010 and diagnosed acute bilateral lumbar strain/sprain syndrome; hyperextension facet syndrome with extension fixations L3-S1; and bilateral posterior thigh myofascial referred pain. By the time he was re-evaluated on June 18, 2010, Dr. Cianciolo found that plaintiff was showing signs of progressive improvement despite exacerbation of lumbar spasm and immobility. Notably, there is no mention of any problems other than those involving his lower back. When he presented to a new chiropractor in Bohemia, New York, Dr. Michael W. Smith, D.C., on July 7, 2010, plaintiff complained of pain in his lower and mid back as well as neck. Dr. Smith performed range of motion testing and provided in his initial report the testing results which he compared to normal findings. In said report he diagnosed cervical, thoracic and lumbar sprain/strain and stated that the possibility of disc herniations were to be ruled out by an MRI at a later date. Plaintiff did not undergo any MRI testing until late September and October 2010.

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After undergoing MRI testing of his cervical, thoracic and lumbar spine, plaintiff visited Alexandre B. deMoura, M.D. at the New York Spine Institute on December 13, 2010. He examined plaintiff's cervical spine and found tenderness to palpation, muscle spasm, and decreased range of motion with pain. He also examined plaintiff's lumbar spine and found tenderness to palpation in the posterior lumbar spine, muscle spasm, and decreased range of motion with pain. Dr. deMoura performed a neurological examination and noted a neurological deficit in the right upper extremity. His interpretation of plaintiff's cervical spine MRI was herniated nucleus pulposis at C4-5 and C5-6 and his interpretation of plaintiff's lumbar spine MRI was spondylolisthesis at L4-5 and herniated nucleus pulposis at L3-4, L4-5, and L5-S1. Dr. deMoura diagnosed cervical radiculitis, cervical herniated nucleus pulposis, low back pain, and lumbar herniated nucleus pulposis and opined that plaintiff's diagnosis was causally related to the subject accident. He recommended cervical and lumbar epidural steroid injections and surgery in the form of anterior cervical decompression and fusion and lumbar fusion.

Plaintiff also saw a neurologist, Ahmed Elfiky, M.D., who performed an EMG/NCV study of plaintiff's upper extremities on January 24, 2011 and found left sensory median nerve neuropathy at the wrist and bilateral C5-C6 radiculopathy. He also performed an EMG/NCV study of plaintiff's lower extremities on February 7, 2011 which revealed mild axonal neuropathy of the left lower extremity and bilateral L5-S1 nerve root irritation. He also saw an orthopedic surgeon, Sebastian Lattuga, M.D., on August 4, 2011 who diagnosed cervical spine sprain and radiculopathy.

Then, plaintiff saw Howard Lantner, M.D. of "Minimally Invasive Spine and Neurosurgery" in Connecticut on July 11, 2013. Dr. Lantner reported the following:

Good range of motion of cervical spine and lumbar spine. There is no tenderness upon palpation to the cervical, thoracic and lumbar spine. Painless passive range of motion to bilateral shoulders and hips. 5/5 motor strength to bilateral deltoids, biceps, triceps, wrist extensors, wrist flexors, finger abductors, finger flexors, hip flexors, quadriceps, hamstrings, plantar flexors, dorsiflexors and EHLs ... No evidence of upper or lower extremity myelopathy, Hoffman's or clonus. Ambulates steadily and is able to tandem gait.

He diagnosed neck and arm pain with evidence of C5-6 disc degeneration and low back pain with multilevel spondylosis. Plaintiff underwent MRI's of the cervical spine and lumbar spine on August 1, 2013. The report of the cervical spine MRI indicates moderate bilateral foraminal stenosis and mild canal stenosis at C5-C6 secondary to disc osteophyte complex; moderate canal stenosis at C4-C5 secondary to disc osteophyte complex; and mild to moderate canal stenosis at C3-C4. The lumbar spine MRI report concludes "[d]egenerative facet and disc changes with a left paracentral/foraminal disc protrusion and endplate spondylitic changes at L5-S1. The protruding disc displaces the transiting [sic] left S1 nerve root resulting in mild canal narrowing and moderate left foraminal narrowing." On plaintiff's follow-up visit on October 3, 2013, Dr. Lantner reported that plaintiff noted improvement in his arm symptoms since last seen three months prior but that

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plaintiff continued to have neck and low back pain without any upper or lower extremity radiculopathy. Dr. Lantner found that plaintiff's examination results were unchanged from three months earlier and diagnosed multilevel spondylosis of the cervical and lumbar spine with no significant radiculopathy of the upper or lower extremities. As for treatment options, Dr. Lantner indicated that surgery was not recommended for plaintiff's present symptoms of neck and back pain and that he would follow-up with plaintiff on an as needed basis if his symptoms escalated unacceptably.

Defendants' examining orthopedic surgeon, Teresa Habacker, M.D., indicated in her affirmed report that she performed an orthopedic examination of plaintiff on April 22, 2014; that his current complaints were neck pain radiating into his arms and pain in his elbows radiating to his dorsal forearms; and that he was not receiving any treatment. She provided range of motion testing results using a goniometer for plaintiff's cervical spine and thoracolumbar spine which results when compared to normal findings were all normal. Dr. Habacker noted that there was no erythema or edema or tenderness or muscle spasm upon examination of the cervical spine and thoracolumbar spine. She added that straight leg raising was negative bilaterally. As for her neurological evaluation of plaintiff's upper and lower extremities, Dr. Habacker reported that the biceps, triceps, brachioradialis, patellar and Achilles deep tendon reflexes were not elicited, that plaintiff had normal general sensation to light touch over the upper and lower extremities, and that muscle strength was 5/5. She diagnosed cervical sprain and strain and thoracolumbar sprain and strain, both resolved, and concluded that plaintiff did not demonstrate any objective disability and could continue his normal daily living activities and regular work duties without restrictions. Dr. Habacker indicated the absence of a reason to refute causality based on plaintiff's medical records and physical examination and concluded that there was a causal relationship between the diagnosis and the accident based on plaintiff's proffered history.

By his affirmed report, defendants' examining neurologist, Lawrence J. Robinson, M.D., stated he performed a neurological examination of plaintiff on April 22, 2014, and that plaintiff complained of occasional neck pain and stiffness and occasional pain in his forearms limiting his ability to lift. Dr. Robinson reported a normal cranial nerve examination, motor examination, and sensory examination as well as alert and oriented higher intellectual functioning. He diagnosed an intact neurological examination with no objective findings of neurological injury. Dr. Robinson concluded that there were no objective findings to show cervical or lumbar radiculopathy, spinal cord injury or significant spinal injury. He added that although plaintiff had subjective complaints, there were no objective findings to substantiate causality with the subject accident.

Here, defendants met their prima facie burden of showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (*see Paredes v Boudreau*, 129 AD3d 1046, 10 NYS3d 879 [2d Dept 2015]; *Olivencia v Depompeis*, 129 AD3d 1045, ___ NYS3d ___ [2d Dept 2015]). The Court initially notes that sprains and strains are not serious injuries within the meaning of Insurance Law § 5102 (d) (*see Rabolt v Park*, 50 AD3d 995, 858 NYS2d 197 [2d Dept 2008]; *Washington v Cross*, 48 AD3d 457, 849 NYS2d 784 [2d Dept 2008]; *Maenza v Letkajornsook*, 172 AD2d 500, 567 NYS2d 850 [2d Dept 1991]). Thus, plaintiff's

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cervical, thoracic and lumbar spine sprain and strain injuries do not constitute serious injuries for which plaintiff can recover under the No Fault Law. In addition, the mere existence of a herniated disc, a bulging disc, or radiculopathy is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the injury and its duration (see *Keith v Duval*, 71 AD3d 1093, 898 NYS2d 184 [2d Dept 2010]; *Casimir v Bailey*, 70 AD3d 994, 896 NYS2d 122 [2d Dept 2010]). Based on the proffered medical records of plaintiff, by the summer of 2013, plaintiff's cervical spine and lumbar spine had "good range of motion" and no upper or lower extremity radiculopathy as noted by his treating physician Dr. Lantner. Defendants' examining physicians also found during their examinations of plaintiff in April 2014 that plaintiff had full range of motion of the cervical spine and thoracolumbar spine as well as no objective findings to show cervical or lumbar radiculopathy. Defendants further established that plaintiff did not sustain a serious injury under the 90/180-day category of Insurance Law § 5102 (d) (see *Guevara v Keen*, 129 AD3d 1024, 10 NYS3d 460 [2d Dept 2015]; *Marin v Ieni*, 108 AD3d 656, 969 NYS2d 165 [2d Dept 2013]). Moreover, there is no evidence that plaintiff incurred economic loss in excess of basic economic loss as defined in Insurance Law § 5102 (a) (see *Moran v Palmer*, 234 AD2d 526, 651 NYS2d 195 [2d Dept 1996]).

The burden then shifted to plaintiff to show, by admissible evidentiary proof, the existence of a triable issue of fact (see *Marietta v Scelzo*, 29 AD3d 539, 815 NYS2d 137 [2d Dept 2006]).

In opposition to the motion for summary judgment, plaintiff contends that defendants failed to meet their burden inasmuch as defendants' examining physicians failed to review plaintiff's MRI films showing herniations and disc bulges and failed to address said herniations and disc bulges thereby rendering the contents of their reports unreliable and speculative. By submitting evidence in the form of objective range of motion testing results demonstrating that plaintiff had a normal range of motion in the cervical and thoracolumbar regions of his spine, defendants established, prima facie, that plaintiff did not sustain a serious injury to the cervical and thoracolumbar regions of his spine within the meaning of Insurance Law § 5102 (d) (see *Robles v Munich*, 110 AD3d 866, 972 NYS2d 707 [2d Dept 2013]; *Rodriguez v Huerfano*, 46 AD3d 794, 849 NYS2d 275 [2d Dept 2007]). Thus, they also established, prima facie, that the alleged injuries to the cervical, thoracic and lumbar regions of plaintiff's spine did not constitute serious injuries under the permanent consequential limitation of use or significant limitation of use categories of Insurance Law § 5102 (d) (see *Stewart v Dubuisson*, 2015 NY Slip Op 06128 [2d Dept 2015]; *Rzeszutko v Raffone*, 129 AD3d 702, 10 NYS3d 313 [2d Dept 2015]; *Staff v Yshua*, 59 AD3d 614, 874 NYS2d 180 [2d Dept 2009]). Plaintiff correctly asserts that both of defendants' examining physicians reviewed plaintiff's MRI reports, not the actual films. Defendants therefore were unable to establish that plaintiff's alleged injuries were not caused by the subject accident (see *Vaughan-Ware v Darcy*, 103 AD3d 621, 959 NYS2d 698 [2d Dept 2013]). But it was not necessary for defendants to establish lack of causation when they already met their burden by demonstrating that plaintiff did not sustain a serious injury (see *Vaughan-Ware v Darcy*, 103 AD3d 621; compare *Osario-Salcedo v Mazarova*, 100 AD3d 976, 954 NYS2d 642 [2d Dept 2012]). Therefore, defendants did meet their burden of establishing that plaintiff did not sustain a serious injury as a result of the subject accident.

Plaintiff also asserts that he did sustain a “serious injury” as defined in Insurance Law § 5102 (d) as a result of the subject accident. He submits the affirmed report dated November 10, 2014 of his treating neurologist, Dr. Elfiky, who performed a neurological examination of plaintiff on said date. Dr. Elfiky provides range of motion testing results for plaintiff’s cervical and thoracolumbar spine and compares said results with normal findings from the AMA Guides to the Evaluation of Permanent Impairment 6th Edition. However, there is no indication as to whether said range of motion testing results were objectively measured inasmuch as there is no mention of any instrument such as a goniometer or inclinometer or arthroidal protractor being used to take said measurements (see *Geliga v Karibian, Inc.*, 56 AD3d 518, 867 NYS2d 519 [2d Dept 2008]; *DeLeon v J & J Towing, Inc.*, 32 AD3d 986, 822 NYS2d 120 [2d Dept 2006]; *Desulme v Stanya*, 12 AD3d 557, 785 NYS2d 477 [2d Dept 2004]; see also *Perl v Meher*, 18 NY3d 208). Dr. Elfiky only describes the testing as “manual range of motion” testing. Thus, it cannot be said that said report provides objective evidence of the extent of plaintiff’s alleged physical limitations to support the diagnosis of cervical C3-C4, C5-C6 and C6-C7 disc herniations with radiculopathy, thoracic multilevel disc bulges with myofascial pain, and lumbar L2-L3, L3-L4, L4-L5 and L5-S1 disc bulges with radiculopathy (see *Catalano v Kopmann*, 73 AD3d 963, 900 NYS2d 759 [2d Dept 2010]). Therefore, said report is insufficient to raise a triable issue of fact.

Plaintiff next refers to the submission of his medical records and reports with defendants’ motion papers and asserts that said medical evidence demonstrates that he did sustain a serious injury. As mentioned above, plaintiff’s medical records indicated sprains and strains which are not considered serious injuries under the No Fault statute (see *Rabolt v Park*, 50 AD3d 995). As for the diagnoses of radiculopathy and disc herniations and disc bulges, their mere existence is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting therefrom and its duration (see *Keith v Duval*, 71 AD3d 1093). The alleged physical limitations and their duration must be corroborated by a recent examination (see *Seecoomar v Ly*, 43 AD3d 900, 841 NYS2d 624 [2d Dept 2007]). “[A] contemporaneous doctor’s report is important to proof of causation” (*Perl v Meher*, 18 NY3d 208, 217–218). The absence of a contemporaneous medical report invites speculation as to causation (*Griffiths v Munoz*, 98 AD3d 997, 950 NYS2d 787 [2d Dept 2012]). Here, the submitted reports of plaintiff’s initial treating chiropractors are deficient inasmuch as Dr. Cianciolo did not provide normal range of motion testing results for comparison (see *Cheour v Pete & Sals Harborview Transp., Inc.*, 76 AD3d 989, 907 NYS2d 517 [2d Dept 2010]) and he and Dr. Smith did not indicate what instrument they used to perform range of motion testing (see *Geliga v Karibian, Inc.*, 56 AD3d 518; *DeLeon v J & J Towing, Inc.*, 32 AD3d 986; *Desulme v Stanya*, 12 AD3d 557; see also *Perl v Meher*, 18 NY3d 208). Plaintiff’s other medical records contain similar deficiencies such that they do not provide objective evidence of physical limitations contemporaneous to the time of the accident as well as recent.

Moreover, plaintiff did not proffer any evidence that he was unable to perform substantially all of his daily activities for 90 days during the 180-day period immediately following the accident (see *Bacon v Bostany*, 104 AD3d 625, 960 NYS2d 190 [2d Dept 2013]). Furthermore, plaintiff

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failed to establish economic loss in excess of basic economic loss (*see Diaz v Lopresti*, 57 AD3d 832, 870 NYS2d 408 [2d Dept 2008]).

Accordingly, the instant motion is granted and the complaint is dismissed in its entirety.

Dated: 8/3/2015


HON. WILLIAM B. REBOLINI, J.S.C.

 X FINAL DISPOSITION NON-FINAL DISPOSITION