

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU

Present:

HON. BERNARD F. McCAFFREY

Justice
TRIAL/IAS, PART 1
NASSAU COUNTY

THOMAS ENGLISH and JUAN RODRIGUEZ,

INDEX NO. 12373/00

Plaintiff,

MOTION SUBMISSION
DATE: 2/26/02

-against-

MOTION NO. 2

CHASSIA ENGLISH,

Defendant.

Defendant's application, pursuant to CPLR 3212 and Insurance Law §5102(d), to summarily dismiss plaintiffs' complaint due to their respective failure to have sustained a "serious injury" is determined as hereinafter provided.

This personal injury action emanates out of a 11/14/99 (8:00 a.m.) single vehicle accident at which time defendant, the owner and operator of an automobile in which plaintiffs were sleeping passengers, reportedly fell asleep causing the car to leave Merrick Road in Massapequa and strike a tree.

Plaintiffs' complaint was filed on 8/9/00 and issue was joined on or about 1/24/01. Plaintiffs' 2/12/01 bill of particulars asserts, in pertinent part, that each plaintiff was confined to bed and home for approximately four (4) weeks following the accident (para. 7) and that no claim for lost earnings is being made (paras. 8-11).

Upon the completion of disclosure, the case was certified for trial on 8/3/01 and on or about 9/25/01 a note of issue was filed. The instant application is therefore timely (CPLR 3212[a]).

During a 7/18/01 deposition, Mr. English testified, inter alia, that he was also involved in a prior 1998 accident during which he sustained injury to his low back and left leg (p.1 4, l. 15 - p. 15, l. 3; p. 19, l. 12). A lawsuit was filed in connection with that earlier accident (p. 21, l. 18) which is still pending (p. 24, l. 15). He was unable to recall the names of any health care providers who treated him for that accident (p. 21, l. 1).

He did not lose consciousness in this accident (p. 38, l. 4) and was transported by ambulance to the Massapequa General Hospital Emergency Room where he was treated and released (p. 44, l. 6). X-rays were taken (p. 45, l. 4) and he was issued a sling for his left elbow (p. 45, l. 20). He was also unable to recall any of the health care providers who treated him for injuries sustained in this accident (p. 47, l. 14) and did not recognize a series of physicians' named including, but not limited to, Morton Aizic, D.O. (P. 48, l. 20).

Apart from the emergency room, the initial treatment he recalled receiving was later that month (p. 47, l. 20) when he saw a chiropractor or physician recommended by his attorney (p. 47, l. 21 - p. 48, l. 3). He remembered receiving "back adjustments, neck adjustments, massage, heat" (p. 49, l. 14) and "ultrasound" (p. 40, l. 10). He did not recall the period of time he received this treatment (p. 50, l. 18) but was certain he saw no one in 2001 (p. 51, l. 9). His present complaints (as of the 7/27/01 deposition) are of neck pain "every other day" (p. 57, l. 13), low back pain "almost every day" (p. 57, l.24), "occasional headaches" (p. 57, l. 10), periodic chest pains when he coughs (p. 57, l. 8) and "flashbacks" of the accident (p. 57, l. 9). He is, however, not taking any medication to relieve these symptoms (p. 60, l. 6). His ability to bowl, play golf and wrestle are also reportedly restricted (p. 61, l. 9).

Mr. Rodriguez was deposed on 5/18/01. After being transported by ambulance to Massapequa General Hospital Emergency Room (p. 23, l. 21), X-rays were taken of his back (p. 24, l. 3) and left leg (p. 24, l. 6). A laceration to his left leg was closed with ten (10) stitches (p. 24, l. 17) leaving what plaintiffs' counsel has described as "an approximate one inch scar" (p. 51, l.1 8). A "couple of days" later (p. 26, l. 19), he visited a chiropractor (p. 26, l. 15) in Hempstead (p. 26, l. 25) whose name he was unable to recall (p. 26, l. 17). He saw him three times a week (p. 29, l. 17) and thereafter twice weekly (p. 31, l. 14). He also underwent a MRI of his neck (p. 32, l. 14) and of his "whole body" (p. 32, l. 4). He denied receiving any other treatment for those injuries (p. 34, ls. 6-21) which would necessarily, include Dr. Aizic.

Contrary to the allegations of his bill of particulars, he testified that he missed only 3-4 days of work (p. 36, l. 23) although afterwards he reportedly came straight home and “would just go to bed” (p. 37, l. 13). At the time of his deposition, his current complaints were of pain to his back, neck and left knee (p. 42, l. 19). More specifically, these injuries purportedly precluded him from either carrying his daughter or standing for too long (p. 42, l. 24). Nor, can he reportedly lift weights or play basketball for an extended period (p. 46, l. 20) and he is “a step slower” (p. 45, l. 2) while playing.

Defendant’s application is premised upon the 7/5/01 and 7/31/01 affirmations of a neurologist, Gershon Ney, M.D. and 6/27/01 and 8/1/01 affirmations of an orthopedist, John C. Killian, M.D., Dr. Ney avers, in sum, that physical examinations of each plaintiff failed to reveal objective neurological verification of their respective subjective complaints. Dr. Killian avers that Mr. English incurred only cervical and lumbar sprains and that Mr. Rodriguez sustained “a minor laceration to the anterior aspect of his left knee” and “cervical and lumbar sprains.” These affirmations, which delineate the objective tests employed during the examinations, are adequate to shift the burden of demonstrating a triable issue of fact to plaintiffs (Grossman vs. Wright, 268 AD2d 79, 707 NYS2d 233 [2d Dept., 2000]; Junco vs. Ranzi, __AD2d__, 733 NYS2d 897 [2d Dept., 2001]).

Plaintiffs rely upon the 1/02 affirmation of Dr. Aizic and the 1/31/02 (Joseph T. Mecca, M.D.) and 2/5/02 (Theodore T. Miller, M.D.) affirmations of the radiologists who performed their 1/19/00 (Mr. English) and 2/22/00 (Mr. Rodriguez) respective MRIs. (Plaintiffs’ reliance upon the unsworn 1/13/00 report of a chiropractor, Kerry Zelanka, is misplaced since it is not in admissible form [Pagano vs. Kingsbury, 182 AD2d 268, 587 NYS2d 692]).

Although Mr. English did not recall being treated by Dr. Aizic (p. 48, l. 20) and Mr. Rodriguez explicitly denied being treated by anyone apart from the emergency room, Dr. Mecca who performed the 2/22/00 MRI, the unspecified chiropractor and a no-fault examination (p. 34, ls. 6-21), Dr. Aizic avers that he “provided a regular and continuous course of treatment to plaintiffs...from November 17, 1999 to date....” (para. 2).

His initial 11/17/99 examinations reportedly revealed “muscle spasm in the cervical and lumbar spine” (para. 6) and specified restrictions in Mr. English’s range of motion as well as “muscle spasm in the cervical and lumbar spine” of Mr. Rodriguez together with specified range of motions restrictions and a left knee laceration (para. 16).

His 1/02 affirmation also incorporates previously unsworn 5/15/00 reports (the only place where he causally relates plaintiffs' injuries to this accident. Indeed, the 1/02 affirmation never mentions Mr. English's 1998 accident). Most importantly, the 1/02 affirmation concludes that Mr. English sustained a bulging disc at L4-L5 by relying upon Dr. Miller's 1/19/00 MRI (despite the fact that Dr. Miller's affirmation was not executed until 2/5/02 or after Dr. Aizic's affirmation [Harney vs. Tombstone Pizza Corp., 279 AD2d 609, 719 NYS2d 704 (2d Dept., 2001); Williams vs. Hughes, 256 AD2d 461, 682 NYS2d 401 (2d Dept., 1998)]). Yet, Dr. Aizic's characterization (para. 8) conveniently omits Dr. Miller's conclusion that the bulge was the result of "degenerative disc disease" and that the stenosis was "[c]ongenital" in nature.

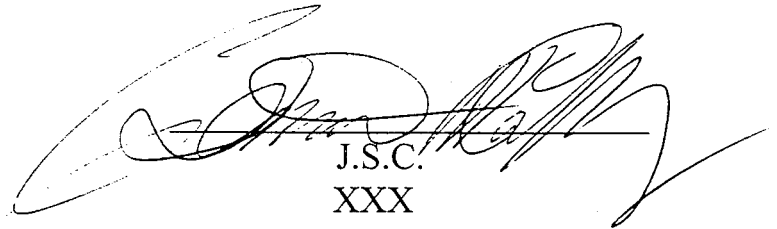
Similarly, Dr. Mecca's 2/22/00 MRI report of Mr. Rodriguez (affirmed 1/31/02) diagnosed bulges at C3-4, C4-5 and C5-6. Yet, "no focal herniation, sagittal stenosis or neural foraminal narrowing" was observed and each disc body was "intact". The law is well settled that a disc bulge does not, per se, constitute a serious injury. "[A] plaintiff must provide objective evidence of the extent or degree of the alleged physical limitations resulting from the disc injury and its duration" (Espinal vs. Galicia, __AD2d__, 737 NYS2d 102, 103 [2d Dept., 2002]).

Despite the fact that each plaintiff allegedly incurred a permanent disability (paras. 10 and 20), Dr. Aizic purportedly discharged them from his care following their "last visit" on 5/15/00 until they returned on 1/9/02 for "re-examinations" plainly prompted by defendant's 12/18/01 application and the need for a rebuttal affirmation. The only explanation proffered for the substantial (5/15/00 - 1/9/02) gap in treatment (Slasor vs. Elfaiz, 275 AD2d 771, 713 NYS2d 742 [2d Dept., 2000]; Calderon vs. Elsenreich, 270 AD2d 380, 704 NYS2d 622 [2d Dept., 2000]) is "because such treatment would have been superfluous on top of the home therapy [plaintiffs] would undertake" (paras. 10 and 20).

Finally, Mr. Rodriguez's left leg laceration is not included within plaintiffs' 2/12/01 bill of particulars (para. 4) or described within Dr. Aizic's 1/02 affirmation (which merely mentions "a laceration of his left knee" [para. 16]) and therefore he has failed to raise a genuine issue of fact as to whether a reasonable person would regard it as "unattractive, objectionable, or as the subject of pity or scorn" (Loiseau vs. Maxwell, 256 AD2d 450, 682 NYS2d 74, 75 [2d Dept., 1998]) i.e., a significant disfigurement. Neither Mr. English's professed, but unsubstantial inability to bowl, play golf or wrestle (p. 61, l. 9) nor Mr. Rodriguez's alleged inability to lift weights or play basketball for extended periods of time (p. 46, l. 20) are sufficient to satisfy the "90 out of 180" days predicate (Harney supra; Watt vs. Eastern Investigative Bureau, Inc., 273 AD2d 226, 708 NYS2d 472 [2d Dept., 2000]).

Accordingly, defendant's application, pursuant to CPLR 3212 and Insurance Law §5102(d), to summarily dismiss plaintiffs' complaint due to their respective failure to have sustained a serious injury is granted.

Dated: APR 12 2002



J.S.C.
XXX

ENTERED

APR 15 2002

NASSAU COUNTY
COUNTY CLERK'S OFFICE