Court of Appeals

STATE OF NEW YORK

NANDKUMAR RAMKUMAR,

Plaintiff-Appellant,

against

GRAND STYLE TRANSPORTATION ENTERPRISES INC., IBRAHIM S. TANDIA, BISNATH BISSESSAR and DANISH BISSESSAR,

Defendants-Respondents.

GRAND STYLE TRANSPORTATION ENTERPRISES INC., and IBRAHIM S. TANDIA,

Third-Party Plaintiff,

against

GEORGINA D. CASTILLO,

Third-Party Defendant.

BRIEF ON BEHALF OF THE DEFENSE ASSOCIATION OF NEW YORK, INC. AS *AMICUS CURIAE*

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Date Completed: April 17, 2013

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CORPORATE DISCLOSURE STATEMENT

The Defense Association of New York, Inc. is a not-for-profit corporation which has no parent companies, subsidiaries or affiliates.

PRELIMINARY STATEMENT

This brief is respectfully submitted on behalf of the Defense Association of New York, Inc. (hereinafter "DANY") as amicus curiae in relation to the appeal which is before this Court in the above-referenced action.

DANY is a bar association, whose purpose is to bring together by association, communication and organization attorneys and qualified non-attorneys in the State of New York who devote a substantial amount of their professional time to the handling of litigated civil cases and whose representation in such cases is primarily for the defense; to continue to improve the services of the legal profession to the public; to provide for the exchange among the members of this association of such information, ideas, techniques, procedures and court rulings relating to the handling of litigation as are calculated to enhance the knowledge and improve the skills of defense lawyers; to elevate the standards of trial practice and develop, establish and secure court adoption or approval of a high standard of trial conduct in court matters; to support and work for the improvement of the adversary system of jurisprudence in our courts and facilitate and expedite the trial of lawsuits; to initiate a program of education and information in law schools in emphasizing trial practice for defense attorneys; to inform its members and their clients of developments in the courts and

legislatures affecting their practice and by proper and legitimate means to aid in such developments when they are in the public interest; to establish an educational program to disseminate knowledge by means of seminars and other pedagogical methods on trial techniques for the defense; to promote improvements in the administration of justice; to encourage prompt and adequate payment of every just claim and to present effective resistance to every non-meritorious or inflated claim; and to take part in programs of public education that promote safety and help reduce losses and costs resulting from accidents of all kinds.

This action is one for damages for personal injuries sustained by plaintiff Nandkumar Ramkumar in an automobile accident. During litigation, the defendants moved for summary judgment, arguing that plaintiff did not sustain a serious injury as defined by the Insurance Law. The motion court granted the motion and plaintiff appealed. The Appellate Division, First Department, in affirming the dismissal of the complaint, noted that by the time plaintiff responded to the defendants' summary judgment motions, it had been 24 months since he had received any medical treatment. The Appellate Division held that an injured party's "bare assertion" that treatment stopped because no-fault coverage was terminated was insufficient without some documentary evidence of the

termination or proof indicating that the party cannot pay for treatment. The Court also rejected as inadequate plaintiff's response to a question regarding the last time he treated wherein he indicated that "[t]hey cut me off like five months."

DANY respectfully submits that the purported explanations or bare assertions, such as the one in this case, based solely on plaintiff's subjective feelings, beliefs, motivations and reasoning should not be deemed reasonable because they are inconsistent with this Court's considered requirement that objective evidence of serious injury is paramount in no-fault cases such as these. To hold otherwise would invite more fraud into a field of cases that has a history of such misconduct.

STATEMENT OF FACTS

a. Nature of the Action

Plaintiff Nandkumar Ramkumar (hereinafter "plaintiff") was involved in a motor vehicle accident while riding as a passenger in a car (A 122-24)(References made are to pages of the Appendix submitted on the Appeal, unless otherwise noted). Claiming to have been injured as a result of this accident, plaintiff filed suit against the driver and owner of the car in which he was a passenger, as well as the driver and owner of the vehicle with which they collided (A 13-21). In his complaint, plaintiff alleges that the negligence, carelessness, and recklessness of the defendants caused him to sustain serious injury, as defined in section 5102(d)of the Insurance Law of the State of New York (A 18-19, 20), and that he is entitled to recover for both economic and non-economic losses (R 20).

b. Ramkumar's Accident and Subsequent Treatment

At approximately 2:00 a.m. on April 8, 2007, plaintiff was a passenger in a car driven by defendant Danish Bissessar when their vehicle collided with another car (A 122, 126-29). Plaintiff was taken from the scene of the accident to the hospital (A 134) where he complained of mild or moderate pain in his head, neck, and back (A 208). After being examined (A 134, 209-211), plaintiff was given a neck brace (A 134),

prescribed Motrin (A 213), and released within a few hours of his arrival (A 212).

On April 9, 2007, plaintiff went to Liberty Advanced Medical, P.C. (the "Clinic") complaining of pain in his neck, right knee, and lower back (A 136, 213). He was examined at the clinic by Dr. William Mejia who recommended that plaintiff commence physical therapy and go for an MRI (A 215). Plaintiff submitted to an MRI of his spine on May 25, 2007, which indicated some herniation (A 267), and an MRI of his knee on June 20, 2007, which indicated a meniscal tear (A 264).

Shortly after his MRIs, plaintiff was referred by Dr. Mejia to Dr. Mehran Manouel for an orthopedic evaluation (A 256). After examining plaintiff, Dr. Manouel presented him with two treatment options for his knee: the "continuation of conservative management" or arthroscopic surgery (A 257). Plaintiff opted for the latter, and underwent surgery on June 29, 2007 (A 140, 257). He was released the same day (A 141). Plaintiff was not given crutches after his surgery, but he did receive a cane that he used for five months (A 141).

c. Ramkumar's Cessation of Treatment

After his surgery, plaintiff had some follow-up consultations with Dr. Manouel (A 142), and for a time he attended physical therapy for his back (A 141). However, at his deposition on July 28, 2008, plaintiff testified that, by the

time approximately one year had passed from the date of his accident, he had stopped receiving treatment. Plaintiff testified as follows:

> Q. When was the last time you saw a doctor or health care provider for the injuries you sustained?
>
> A. About three months.
>
> Q. About three months?
>
> A. Yeah.
>
> Q. And you have an appointment scheduled with Dr. Emmanuel [sic]?
>
> A. Yes.
>
> Q. When is the last time you saw Dr. Emmanuel [sic]?
>
> A. Over that time, three months ago.
>
> Q. When is the last time you treated at Liberty Medical, the clinic located on Liberty?
>
> A. They cut me off like five months.
>
> Q. Did you go anywhere else for physical therapy after that?
>
> A. No.
>
> Q. So the only providers you've seen is [sic] the facility located on Liberty and Dr. Emmanuel [sic]?
>
> A. Yeah, that's it.

(A 156-57).

d. The Supreme Court's Dismissal of Ramkumar's Claims

In the Supreme Court, New York County, the defendants moved for summary judgment on the threshold issue of whether plaintiff had sustained serious injury within the meaning of New York Insurance Law § 5102(d). In support of their motions, the defendants submitted reports from three doctors sharing the opinion that plaintiff did not exhibit serious injury (A 171-183). Dr. Gregory Montalbano, an orthopedic surgeon, examined plaintiff and concluded that the range of motion in his spine, shoulders, and left knee was normal (A 6, 175-79). Dr. Montalbano noted some restricted range of motion in Ramkumar's right knee, but he believed it to be "subjective," and likely due to plaintiff's "morbid obesity" (A 6, 177-78). Dr. Leon Sultan, an orthopedic surgeon, also examined plaintiff and concluded that he had normal range of motion in his spine and right knee, and no ongoing impairments causally related to the accident (A 6-7, 172-73). Finally, Dr. David A. Fisher, a radiologist, reviewed plaintiff's MRI's and concluded that they showed no evidence of "traumatic or causally related injury" to plaintiff's right knee, but that plaintiff's spine showed some degeneration possibly resulting from a pre-existing condition (A 7, 180-81, 182-83).

Based on these reports, the Supreme Court (Thompson, J.), found that the defendants made a sufficient prima facie showing

that plaintiff was not seriously injured (A 8). The trial court also concluded that plaintiff failed to meet his burden of demonstrating a serious injury causally related to his accident (A 8). Additionally, and of greater relevance to the issues raised in this brief, the trial court concluded that plaintiff failed to sufficiently explain the gap in his treatment, and that in the absence of such explanation, the causal chain joining the accident to any injury from which he was suffering was broken (R 10). Based on the foregoing, the trial court granted the defendants' motions and dismissed plaintiff's complaint (A 4-11).

e. The Appellate Division's Order

The Appellate Division, First Department, affirmed the Supreme Court's dismissal relying heavily on plaintiff's failure to give a sufficient explanation for the gap in his treatment. The court reasoned that by the time plaintiff responded to the Defendants' motions for summary judgment, it had been 24 months since he had received any medical treatment. Ramkumar v. Grand Style Transp., Inc., 94 A.D.3d 484, 485, 941 N.Y.S.2d 610 (1st Dep't 2012). In an apparent nod to plaintiff's claim that this gap was the result of his treatment having been cut off (A 157), the court acknowledged that there are limits to the amount of no-fault coverage an injured party can receive for medical treatment. Id. However, the court found that an injured

party's "bare assertion" that treatment was stopped because coverage was terminated is insufficient without some documentary evidence of that termination, or evidence indicating that the party cannot afford to pay for treatment. Because plaintiff provided neither of these, the court concluded that the gap in his treatment was insufficiently accounted for, and that his claim of a serious injury was properly dismissed.

ARGUMENT

As this Court has repeatedly held, "the legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries." Dufel v. Green, 84 N.Y.2d 795, 798, 622 N.Y.S.2d 900, 902 (1995)(citing Licari v. Elliot, 57 N.Y.2d 230, 455 N.Y.S.2d 570 (1982)); Toure v. Avis Rent A Car Sys., Inc., 98 N.Y.2d 345, 350, 746 N.Y.S.2d 865, 867 (2002)(citing Dufel and Licari).

In view of the statute's clear intent, this Court has repeatedly bemoaned the "significant abuse" and outright fraud that abounds in no-fault and soft tissue "serious injury" claims. (See, Perl v. Meher, 18 N.Y.3d 208, 214, 936 N.Y.S.2d 655, 657 (2011)("in 2010, no-fault accounted for 53% of all fraud reports received by the Insurance Department"); Pommells v. Perez, 4 N.Y.3d 566, 571, 797 N.Y.S.2d 380, 382 (2005)("From 1992 to 2000, reports of No-Fault fraud rose more than 1,700% and constituted 75% of all automobile fraud reports received by the Insurance Department in 2000").

As a consequence, this Court has expressed "well deserved skepticism" of soft tissue injury cases. See, Perl, 18 N.Y.3d at 214; Pommells, 4 N.Y.3d at 571-572. Plaintiff now asks this Court to ignore history, put aside its doubts, and accept his ambiguous conclusory assertion that he was "cut off" as adequate proof that he stopped treating because his no-fault benefits ran

out and he could not afford to pay for further treatment.

DANY respectfully submits that given the history of abuse and fraud associated with no-fault and soft tissue serious injury claims, the courts below properly required the submission of some evidence to support plaintiff's ambiguous testimony about when he last received treatment for his allegedly permanent injuries. Therefore, DANY respectfully submits that this Court should affirm the dismissal of plaintiff's complaint.

POINT I

NO-FAULT LAW REQUIRES OBJECTIVE PROOF OF SERIOUS INJURY

To effectuate the statutory purpose of weeding out frivolous claims and limiting recovery to significant injuries, this Court has held that New York's No-Fault law Court requires "objective proof of a plaintiff's injury in order to satisfy the statutory serious injury threshold." Toure, 98 N.Y.2d at 350, 746 N.Y.S.2d at 868. As relevant to this case, this objective standard requires "a plaintiff who terminates therapeutic measures following the accident, while claiming 'serious injury,' must offer some reasonable explanation for having done so." Pommells, 4 N.Y.3d at 574, 797 N.Y.S.2d at 384-385. In addition, where a defendant presents persuasive evidence that the plaintiff's alleged pain and injuries were related to a

preexisting condition, plaintiff has "the burden to come forward with evidence addressing defendant's claimed lack of causation."

In the present case, there is no dispute that the defendants presented prima facie evidence that plaintiff did not suffer a serious injury as defined by Insurance Law §5102(d), including proof that plaintiff's right knee injury was not causally related to the accident and that he ceased treating for his allegedly permanent injuries two years before the defendants moved for summary judgment. Dr. Gregory Montalbano's affirmed report opines that any meniscal tearing in plaintiff's right knee was not related to his accident because he did not initially complain of pain in that joint and when he was examined the next day (A 215) there was no swelling or instability in the knee. (A 177-178) Instead, Dr. Montalbano opined that plaintiff, who was five feet six inches tall and 240 pounds the day after the accident, suffered from degenerative arthritis and degenerative meniscal tearing in his right knee as a result of his "morbid obesity." (A 178) In fact, the operative report of plaintiff's right knee arthroscopy recites the presence of "a medical shelf plica and synovitis," and Grade II-III chondromalacia . . . in the medial facet." (A 218)

Cessation of treatment was proved with plaintiff's own testimony. Although he received physical therapy for several months, he testified "[t]hey cut me off like five months," when

asked the last time he had therapy at his deposition. (A 157) Although the Appellate Division dissent argued that this testimony meant that plaintiff's no-fault benefits were terminated, the testimony was, at best, ambiguous and unsupported by any documentary evidence. Significantly, plaintiff submitted no affidavit in opposition to the defendants' summary judgment motion.

In opposition, plaintiff submitted affirmations from Dr. Manouel, the surgeon who performed the arthroscopy, and Dr. Shapiro, a radiologist who read the June 20, 2007 MRI films taken of plaintiff's right knee. (A 248-252, 262-263, 265-266) Neither physician, however, controverted Dr. Montalbano's assertion that traumatic meniscal tearing causes immediate pain and swelling or that plaintiff's morbid obesity likely caused his knee problems. Instead, Dr. Shapiro's impression from the June 20, 2007 MRI of "no indication of any degenerative condition present" was invalidated by Dr. Manouel's finding of "grade II-III chondromalacia" and "a medial shelf plica" with synovitis during surgery only nine days later. (A 218) Neither plaintiff nor his doctors explained his cessation of treatment, which occurred two years before defendants' summary judgment motions.

The Appellate Division, First Department affirmed the dismissal of plaintiff's complaint on the grounds that he failed

to adequately explain why he ceased treatment for his allegedly permanent serious injuries over two years before opposing the defendants' summary judgment motions. Ramkumar v. Grand Style Transp. Enterp. Inc., 94 A.D.3d 484, 485, 941 N.Y.S.2d 610, 611 (1st Dep't 2012). The court opined that, "[a] bare assertion that insurance coverage for medically required treatment was exhausted is unavailing without any documentary evidence of such or, at least, an indication as to whether an injured claimant can afford to pay for the treatment of his or her own funds." Id.

POINT II

CLAIM THAT NO-FAULT BENEFITS WERE TERMINATED IS NOT OBJECTIVE EVIDENCE JUSTIFYING TREATMENT GAP

As plaintiff has surely pointed out, there are a number of Appellate Division cases that have seemingly accepted plaintiff's conclusory assertion that no-fault benefits were terminated as an adequate explanation for a gap in treatment. See, Bonilla v. Abdullah, 90 A.D.3d 466, 467-468, 933 N.Y.S.2d 682, 683 (1st Dep't 2011), lv. to app. dism., 19 N.Y.3d 885 (2012)("Plaintiff adequately explained the gap in treatment by asserting in her affidavit that she stopped receiving treatment for her injuries when her no-fault insurance benefits were cut off."); Mitchell v. Calle, 90 A.D.3d 584, 585, 936 N.Y.S.2d 23,

25 (1st Dep't 2011)(same); Browne v. Covington, 82 A.D.3d 406, 407, 918 N.Y.S.2d 36, 38 (1st Dep't 2011)(dicta); Eteng v. Dajos Transp., 89 A.D.3d 506, 508, 932 N.Y.S.2d 58, 59-60 (1st Dep't 2011)(same). There are others that have held that plaintiff's assertion that no-fault benefits were cut off, together with plaintiff's assertion she lacked the financial resources to continue treatment, to be a reasonable explanation for ceasing treatment of allegedly permanent injuries. See, Pindo v. Lenis, 99 A.D.3d 586, 587, 952 N.Y.S.2d 544, 544 (1st Dep't 2012)[citing Serbia v. Mudge, 95 A.D.3d 786, 945 N.Y.S.2d 296, 297 (1st Dep't 2012) and Browne]; Rosario v. Chico Car Inc., 95 A.D.3d 607, 607-608, 944 N.Y.S.2d 110, 111-112 (1st Dep't 2012)(infant plaintiff's father's testimony that "plaintiff attended physical therapy for about five months after the accident, but stopped because it became palliative, his benefits expired, and he could not afford to pay out of pocket" was reasonable explanation for treatment gap); Jacobs v. Rolon, 76 A.D.3d 905, 906, 908 N.Y.S.2d 31, 33 (1st Dep't 2010)(same); Salman v. Rosario, 87 A.D.3d 482, 483, 928 N.Y.S.2d 531, 533 (1st Dep't 2011)[same, but citing Mendez v. Mendez, 72 A.D.3d 402, 402, 897 N.Y.S.2d 102, 103 (1st Dep't 2010) where plaintiff's doctors explained treatment gaps]; Abdelaziz v. Fazel, 78 A.D.3d 1086, 1086, 912 N.Y.S.2d 103 (2nd Dep't 2010)(same).

Other Appellate Division cases have accepted "no-fault cut off" as a reasonable explanation when supported by evidence. See, e.g. Peluso v. Janice Taxi Co., 77 A.D.3d 491, 492, 909 N.Y.S.2d699, 700 (1st Dep't 2010)("Plaintiff adequately explains the gap in treatment by offering proof of the termination of her insurance benefits and her own statement that she could not continue physical therapy out of pocket.")

Other courts have rejected the explanation when no evidence or only conflicting evidence supported plaintiff's conclusory claims. See, Merrick v. Lopez-Garcia, 100 A.D.3d 456, 457, 954 N.Y.S.2d 25, 26 (1st Dep't 2012)(no-fault benefit cut off not a reasonable explanation where plaintiff gave no explanation why private health insurance would not cover treatment); Britton v. Villa Auto Corp., 89 A.D.3d 556, 556, 934 N.Y.S.2d 6, 7 (1st Dep't 2011)("although plaintiff testified that she underwent physical therapy for six months beginning a week after the accident and that she stopped going because no-fault would no longer pay her bills, there is no evidence of this treatment in the record"); Hospedales v. Doe, 79 A.D.3d 536, 537, 913 N.Y.S.2d 195, 197 (1st Dep't 2010)(doctor "statement that unspecified 'insurance coverage issues' prevented plaintiff from complying with a recommendation to see an orthopedic surgeon was not a reasonable explanation for cessation of treatment); Antonio v. Gear Trans Corp., 65 A.D.3d 869, 870-871, 885

N.Y.S.2d 48, 50 (1st Dep't 2009)(finding doctor's conclusory opinion that plaintiff reached maximum medical improvement insufficient to show reasonable excuse for seven year gap in treatment).

DANY respectfully submits that the mere termination of no-fault benefits is not, standing alone, a reasonable excuse for ceasing treatment. Benefits may have been terminated for any number of reasons including because plaintiff failed to appear for treatment appointments or examinations, or even because treatment is no longer medically necessary since plaintiff is no longer injured. Thus, this Court should overrule the many Appellate Division cases that have accepted the conclusory assertion that no-fault benefits were "cut off" or "ran out."

DANY respectfully submits that the termination of no-fault benefits can only be a reasonable excuse for failing to treat allegedly permanent injuries if benefits are terminated because a doctor has determined the injured plaintiff has obtained maximum benefit but still suffers from functional limitations constituting serious injuries, or if the injured plaintiff still suffers from functional limitations constituting serious injuries and benefits were terminated because the no-fault cap was reached. Moreover, providing such evidence should be relatively easy - both the injured plaintiff and the medical provider whose charges were rejected can provide the necessary

evidence.

Furthermore, because a plaintiff is obligated to take reasonable steps to minimize his damages, the plaintiff should be required to submit some evidence of the financial inability to afford necessary treatment even if the no-fault cap limits treatment. Financial inability to obtain necessary treatment should be relatively rare since many, if not most medical providers provide care upon an assignment of rights where the patient has brought suit.

More generally, DANY respectfully submits that explanations based solely on plaintiff's subjective feelings, motivations, and even reasoning [Compare Lipscomb v. Cohen, 93 A.D.3d 1059, 1061, 942 N.Y.S.2d 235 (3rd Dep't 2012)(plaintiff's explanation that he initially rejected surgery and only increasing pain caused renewal of treatment "provided a reasonable explanation for the gap" in treatment) with Smyth v. McDonald, 101 A.D.3d 1789, 1790-1791, 958 N.Y.S.2d 250, 251 (4th Dep't 2012)(plaintiff's refusal to engage in pain management program because of fear of narcotics not reasonable explanation for 31 month treatment gap)] should not be deemed reasonable because they are inconsistent with the Court's considered requirement that in no-fault cases, objective evidence of serious injury is paramount. Thus, this Court should reject treatment gap explanations based solely on plaintiffs' conclusory claims that

their no-fault benefits were "cut off." To do otherwise would be to invite more fraud in no-fault and soft tissue injury cases and to abandon this Court's properly skeptical view such cases.

CONCLUSION

From the foregoing, amicus Defense Association of New York respectfully submits that this Court should affirm the dismissal of plaintiff's complaint because plaintiff failed to offer objective evidence in support of his explanation for his cessation of treatment.

Dated: Jericho, New York
April 16, 2013

Respectfully submitted,

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