

## TAHSIN OZARSLAN

v.

## ROYAL CARIBBEAN CRUISES LTD.

Florida, Circuit Court of the 11<sup>th</sup> Judicial Circuit, May 15, 2008

No. 04-2933

**FRAUD — False Personal Injury Claim — PERSONAL INJURY — 1392. Pre-Existing Injury or Disease — PRACTICE — 17. Suits Prematurely or Wrongfully Brought.**

Seaman's personal injury claim against shipowner is dismissed as it is a fraud on the court where clear and convincing evidence shows that he intentionally and fraudulently concealed prior back and knee problems at the preliminary physical examination before he joined the ship and lied in his discovery responses about those problems, which were the heart of his case against the shipowner.

Jason Margulies (Lipson, Margulies and Alsina, P.A.) for *Ozarslan*  
Robert D. Peltz and Carol L. Finklehoffe (McIntosh, Sawran, Peltz & Cartaya) for  
*Royal Caribbean*

PEDRO P. ECHARTE, JR., Ct.J.:

This cause having come on to be heard before the Court upon an evidentiary hearing on May 1, 2008, the Court having read the motions, memoranda and discovery of record, having heard argument of counsel and being otherwise duly advised in the premises, finds as follows:

**a. Facts**

This case arises from a personal injury claim filed by the Plaintiff, Tahsin Ozarslan, who alleges that he was injured on or about June 3, 2003, while working for the Defendant Royal Caribbean Cruises Ltd. as a waiter aboard its vessel the *Enchantment of the Seas*. The Plaintiff claims that he injured his back and knees “due to repetitive lifting as a result of being required to carry trays of dishes up the stairs from decks 4 to 5 and/or because the dishwasher on deck 4 was broken for extended periods of time.”

The Plaintiff, who has dual U.S. and Turkish citizenship, previously worked for Royal Caribbean Cruises Ltd. from 1990 to 1994. The Plaintiff then left his shipboard employment and married Marta Hicks, a U.S. citizen, following which he lived and resided in San Francisco. Subsequently, the Plaintiff and his then wife instituted divorce proceedings, following which Mr. Ozarslan applied to return to work for the Defendant Royal Caribbean Cruises Ltd. in 2003.

On February 10, 2003, the Plaintiff underwent a Pre-Employment Physical, as part of which he was provided with a written questionnaire that he executed. The questionnaire provided in pertinent part:

Do you have or have you ever had any of the following conditions? (All Yes responses will require the medical provider to comment below):

| <i>Condition</i>                                 | <i>Yes</i> | <i>No</i> |
|--|------------|-----------|
| ...  |            |           |
| 38. Joint/pain arthritis/numbness in extremities |            | X         |
| 39. Sprains/fractures?                           |            | X         |
| 40. Backache/sciatica?                           |            | X         |
| ...  |            |           |
| 48. Serious accidents/illnesses?                 |            | X         |
| 50. Have you ever been hospitalized? For what?   |            | X         |

My signature below acknowledges that all statements provided by me in this application are true and correct to the best of my knowledge and belief . . . I understand that falsification will be grounds for loss of benefits and/or termination of employment. . . .

Signed: Tahsin Ozarlan

Due to the lack of affirmative responses as noted above, the only radiological testing performed on the Plaintiff was a chest x-ray. The accompanying physical examination therefore was reliant upon the Plaintiff's subjective responses to the examining doctor's questions. In reliance upon the Plaintiff's Pre-Employment Questionnaire and resulting examination, he was accepted for employment and began to actually work as a waiter aboard the *Enchantment* on May 26, 2003. Within 6 weeks, he began to complain of low back and knee pain.

As a result, the Plaintiff was signed off of the vessel on medical leave and was eventually provided with over \$450,000 in maintenance and cure benefits, including two back surgeries and three knee surgeries.

On June 18, 2004, the Plaintiff testified on his deposition:

Q: Prior to July 2003, did you ever have any problems with your back?

A: No.

Q: Prior to July 2003, did you ever have any problems with your knees?

A: No.

In addition to expressly denying the existence of any prior back or knee problems, the Plaintiff further testified that the only time he had ever been to the hospital was on one occasion in 2000 after his wife had obtained a retraining order against him and he began to have an increased heartbeat. The Plaintiff identified the hospital as Alta Bates. The Plaintiff further testified that the only time that he had ever seen a doctor other than this occasion was “once when I had a cold,” “maybe ‘96 or ‘97.”

The Plaintiff’s answers to the Defendant’s initial interrogatories, which were filed on April 30, 2004, mirrored his deposition testimony. In these answers, the Plaintiff stated that the only problem that he had ever sustained was “a minor injury for his leg while playing soccer,” for which he went to the Alta Bates Emergency Room. Other than the one visit to the Alta Bates Emergency Room for chest pain in 2000, the Plaintiff also denied any other prior medical treatment.

Following the Plaintiff’s initial deposition, the Defendant eventually tracked down the divorce file for the ongoing proceedings between Mr. Ozarlan and Ms. Hicks. In this file, the Defendant discovered an affidavit filed by Ms. Hicks stating:

[The Plaintiff] did not take a job on the cruise ship. He had been telling me for a long time that he wanted to get a worker’s compensation claim, and that he was going to Florida to set that up. I told him, before he left, that if he came back with ill gotten gains, “our marriage was over.”

The affidavit further indicated that Ms. Hicks had been the victim of both physical and mental abuse and previously obtained a domestic violence restraining order.

Following the discovery of this affidavit, the Defendant then took the deposition of Ms. Hicks, at which time she confirmed the matters set forth in her affidavit and further testified that for “a couple of months before May 2003,” the Plaintiff had told her that “he wanted to set up a worker’s compensation claim and, that he was going to Florida to set it up.”

Ms. Hicks further testified that her husband had periodic problems with back pain that at times radiated into his legs over a 5 to 7 year period prior to 2003. She further testified that on a number of occasions, his back was bothering him so badly that he couldn’t work and as a result he was not even able to get out of bed. She also testified that he complained about knee problems during this time period as well. Ms. Hicks also testified that he had gone to the Alameda Hospital on a number of occasions for his back, which was a different hospital than identified by the Plaintiff on

his deposition for his chest pain and “minor injury to his leg while playing soccer.”

Thereafter, the Defendant eventually managed to obtain copies of the Plaintiff’s records, from Alameda Hospital, which showed that the Plaintiff had been treated on at least 3 occasions for the same back problems for which he was seeking recovery in this case over a 3 year period prior to his subject employment with Royal Caribbean Cruises in 2003. The relevant portions of the records set forth as Exhibit E to Defendant’s motion, included the following:

(1) On November 17, 2000, the Plaintiff was seen with a complaint of “sciatic pain,” which was so significant that he could not walk normally, but was instead “limping.” The records contained a history of “past medical back pains.” The records also noted that the Plaintiff’s low back pain radiated into his right leg and that he had the “same three years ago.” While in the hospital, the Plaintiff was given Demerol and Vistaral, narcotic pain medications, and at the time of discharge was given a prescription for Vicodin, a very potent narcotic pain medication.

(2) On May 3, 2001, the Plaintiff returned to the Alameda Hospital, once again with complaints of “right sided back pain radiating into the back of right leg.” Under the complaint section of the record, the Plaintiff stated “I have sciatica.” The record goes on to further state that the Plaintiff reported that he “has a history of prior back problems.” The treating physician reported finding muscle spasm and a positive straight leg raising test and diagnosed Mr. Ozarlan as suffering from “acute sciatica.” The Plaintiff was once again given a prescription for Vicodin at the time of his discharge.

In addition, the Plaintiff was given written instructions from the hospital which stated “Your exam shows you have sciatica, a condition most often seen in patients with disc disease in the lower back. Sciatica causes pain to radiate from the lower back or buttock area down the leg. It results from pressure on nerve roots coming out of the spine when a disc deteriorates and pushes to one side.” The instruction sheet further told the Plaintiff that he should “avoid bending, lifting and all other activities which make the problem worse.” He was further advised to see a doctor for further evaluation and to undergo “a program for back injury rehabilitation.”

(3) On May 10, 2002, the Plaintiff again returned to the Alameda Hospital. Although his chief complaint was for left neck and shoulder pain, he was noted to still have back complaints: “has no history of trauma, but has had this reoccurring [neck] pain in additional to sciatica over the years.”

A diagnosis of “sciatica” was also made during this hospitalization and the Plaintiff was once again prescribed Vicodin upon discharge.

The Defendant subsequently had the Plaintiff’s initial MRI after his medical sign off in 2003 examined by Dr. Elliot Lang, a board certified orthopedic surgeon. Dr. Lang opined that an acute herniated disc has certain specific signature characteristics, which were not present on the Plaintiff’s films. As a result, he concluded that the Plaintiff’s herniated disc was of a long standing nature and predated the claimed accident.

During the continuation of the deposition of Marta Hicks, which had initially been adjourned prior to completion, the Plaintiff’s ex-wife also subsequently produced a series of three x-rays of Mr. Ozarlan’s back, which had been taken in Turkey in September of 1999, which he had left in the former marital residence upon his departure. During this continued deposition, Ms. Hicks reiterated her prior testimony concerning the extent of the Plaintiff’s pre-existing back and knee problems as well as his stated intent to “set up” a claim with Royal Caribbean. Ms. Hicks further testified that she had actually gone with him on a number of occasions to the emergency room and heard the doctors advise Mr. Ozarlan that he should see a back specialist, since the emergency room visits “could only give him temporary help. . .”

Subsequently, on September 1, 2006, Ms. Hicks sent a letter to counsel for both the Plaintiff and Defendant attempting to “withdraw” her testimony from her prior depositions “due to the fact that I *may* have erred in answering some of the questions incorrectly in the last two depositions.” Ms. Hicks further indicated in the letter, that “during the depositions . . . it was so confusing . . . I *may* have been wrong answering some of the questions.” (Emphasis added).

This Court entered its order denying the Plaintiff’s Motion to Strike the earlier depositions of Marta Hicks on September 27, 2006, and permitted a follow up deposition of Ms. Hicks in which she acknowledged that her prior depositions had been given with her divorce attorney present, that she had been permitted to take breaks and talk with her attorney whenever she wished and that whenever she was confused on a question, she asked for it to be repeated or clarified. She further acknowledged that after the initial deposition was transcribed, she read it and signed it. She also testified that at the time of her first deposition, she tried to answer the questions as truthfully as possible.

Following the depositions of his ex-wife, Mr. Ozarlan was deposed again on October 25, 2007. Despite knowing of the importance of his prior medical history and the testimony of his wife, the Plaintiff once again

denied having had any prior accidents or injuries to his back or knee, and once again denied having received any medical or hospital treatment for his knee and back. He again claimed that the only time he had gone to a hospital or emergency room was in connection with a minor soccer injury, a stiff neck and a cold.

*b. Legal Standards*

The Third District Court of Appeal has set forth the relevant standard for analyzing motions to dismiss for fraud upon the Court in a number of recent cases. In *Long v. Swofford*, 805 So.2d 882, 884 (Fla. 3d DCA 2002), the Court held:

A trial court has a duty and an obligation to dismiss a cause of action based upon fraud. See *Hogan v. Dollar Rent-a-Car Systems, Inc.*, 783 So.2d 1211 (Fla. 4<sup>th</sup> DCA 2001) (trial court's dismissal of personal injury action was warranted because of Plaintiff's fraud regarding medical history); *Desmoine v. Old Dominion Ins. Co.*, 740 So.2d 1233 (Fla. 4<sup>th</sup> DCA 1999) (trial court's dismissal of action was justified because of Plaintiff's fraud during discovery). Here the Plaintiff concealed her pre-existing back injury, during her deposition, by stating that she had not received medical treatment for her back prior to the accident. See *Baker v. Myers Tractor Services, Inc.*, 765 So.2d 149 (Fla. 1<sup>st</sup> DCA 2000) (trial court's dismissal in personal injury claim, based upon injury to Plaintiff's right knee was justified because Plaintiff had lied about a pre-existing injury to his right knee); *Metropolitan Dade County v. Martinsen*, 736 So.2d 794 (Fla. 3d DCA 1999) (trial court's failure to dismiss the Plaintiff's action was not justified because the Plaintiff had given untruthful testimony in a deposition). The Plaintiff's false and misleading statements were given under oath concerning issues sensual [sic] to her case amounted to fraud. See *Cox v. Burke*, 706 So.2d 43 (47 Fla. 5<sup>th</sup> DCA 1998).

In *Austin v. Liquid Distributors, Inc.*, 928 So.2d 521 (Fla. 3d DCA 2006), the Third District further held:

Where a Plaintiff makes misrepresentations and omissions about her accident and medical history in interrogatories and deposition, those misrepresentations and omissions go to the heart of her claim and subvert the integrity of her action.

In *Metropolitan Dade County v. Martinsen*, 736 So.2d 794, 796 (Fla. 3d DCA 1999), in which the Third District reversed the failure to enter an

order of dismissal where the Plaintiff had concealed a prior back problem, Justice Sorrondo, in a concurring opinion, concluded:

The suggestion that perjury in a civil case is acceptable, or in the alternative, that it will go unpunished even when discovered, has gained regrettable acceptance among many. I can think of few crimes, however, that strike more viciously against the integrity of our system of justice than the crime of perjury. In my judgment, it is imperative that when such misconduct is identified, offenders be immediately investigated and, if the evidence warrants, prosecuted to the full extent permitted by the law.

The other appellate courts of this state have also recognized that the intentional concealment of pre-existing material injuries by a Plaintiff in a personal injury action warrants dismissal, especially where the injuries are the same as claimed to have occurred in the subject incident. *See e.g. Baker v. Myers Tractor Services*, 765 So.2d 149 (Fla. 1<sup>st</sup> DCA 2000)(concealment of pre-existing knee injury); *Desmoine v. Old Dominion*, 740 So.2d 1233 (Fla. 4<sup>th</sup> DCA 1999)(concealed prior relevant personal injury); *Hogan v. Dollar Rent-A-Car*, 783 So.2d 1211 (Fla. 4<sup>th</sup> DCA 2001)(concealed subsequent elbow injury); *Paunno v. R.F. Concrete*, 904 So.2d 658 (Fla. 4<sup>th</sup> DCA 2005)(concealed prior hip injury).

The Court rejects the suggestion made by the Plaintiff that a different standard is applicable in cases filed by seamen. *See Papadopoulos v. Cruise Ventures III Corp*, 2008 AMC 1619, 974 So.2d 418 (Fla. 3<sup>d</sup> DCA 2007), which affirmed the dismissal of a Jones Act action by a seaman for intentionally concealing prior medical conditions and treatment. In relying upon the very same legal authorities and standards applicable in non-maritime cases, the Third District in *Papadopoulos* went on to conclude:

We entirely agree with the trial court that Papadopoulos has forfeited his right to seek redress from his claimed injuries based upon his material misrepresentations and omissions that go to the heart of his claims. We, therefore, affirm the trial court's order dismissing Papadopoulos' negligence action.

#### *Application of the Law to the Facts*

The evidence of this case conclusively establishes that the Plaintiff had suffered from a long standing history of prior back and knee [injuries] prior to his employment in May of 2003, which were the very same problems for which he seeks recovery in this case. Regardless of the weight to be

accorded the testimony of the Plaintiff's ex-wife Marta Hicks, the medical records which have been located through discovery uncontrovertably establish that the Plaintiff had a long standing history of back and knee problems for which he had received treatment in both the United States and Turkey at a minimum in 1999, 2000, 2001 and 2002. The November 17, 2000 Alameda Hospital Emergency Room record dated the onset of the problems to at least 3 years earlier, which would be 1997.

The only explanation offered by the Plaintiff for the failure to disclose his prior back and knee problems was the suggestion by his attorneys that "he did not consider them significant," or "a big deal." In light of the length and duration of the Plaintiff's treatment and history of complaints, and the clarity and unambiguous nature of the discovery questions directed to the Plaintiff, the Court finds this suggestion untenable. See *Metropolitan Dade County v. Martinsen*, 736 So.2d 794, 795 (Fla. 3d DCA 1999) ("the extensive nature of Plaintiff's history belie her contention that she had forgotten about the incidents, injuries and treatments. In addition, her confusion concerning the information requested . . . is disingenuous in light of the clear and unambiguous questions concerning prior injuries and the Plaintiff's failure to seek clarification."); *Baker v. Myers Tractor Services, Inc.*, 765 So.2d 149, 150 (Fla. 1<sup>st</sup> DCA 2000) ("The questions which *Baker* was asked at deposition were straightforward and easily understandable and clearly required disclosure of these prior injuries").

This conclusion is further reinforced by the fact that even after the initial deposition testimony of his ex-wife, the Plaintiff continued to insist on his follow up deposition taken on October 25, 2007 that he had not sustained any prior injuries or problems to his back or neck before 2003.

The fact that the Plaintiff advised the doctors of his prior medical history when he sought treatment at the Alameda Hospital in 2000, 2001 and 2002 also contradicts the suggestion that the Plaintiff had forgotten about his injuries or did not consider them sufficiently note worthy to mention during the course of this litigation. See *Metropolitan Dade County v. Martinsen*, 736 So.2d 794, 796 (Fla. 3d DCA 1999)(the fact that Plaintiff had recalled prior back problem in filling out an employment application several months before the subject accident belied her contention during the litigation that she had forgotten about the problems).

Based upon the foregoing, the Court finds that the evidence in this case is clear and convincing in establishing that the Plaintiff intentionally and fraudulently concealed the existence of his prior back and knee problems, lied in his discovery responses and that this deception went to the heart of the Plaintiff's claim in this case, which was based on the contention that

these back and knee injuries instead resulted from his employment. Accordingly, the Court expressly finds that the Plaintiff's intentional deception was intended to mislead the Court and subvert the integrity of this litigation and therefore amounted to a fraud upon the Court. The Court further notes that if the Plaintiff's deliberate concealment had remained undiscovered, the ability of the Court to impartially adjudicate this case would have been seriously impaired, especially since the misconduct was directly related to the central facts necessary to establish the Plaintiff's claims. As a result, the Court finds that the Plaintiff's conduct and actions have surpassed the level of fraudulent, wilful and intentional conduct necessary to cause the Plaintiff to forfeit his right to proceed forward with this case.

Wherefore, the Court therefore grants the Defendant's Motion to Dismiss the Plaintiff's Claim with prejudice and will enter a Final Judgment in the Defendant's favor.

