

Short Form Order

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - PART TT-34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T :

HON. ROBERT J. McDONALD,
Justice

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SOTIR KONOMI,

Plaintiff(s)

- against -

REINO’S TRUCKING, INC and JULIO REINO,

Defendant(s).

-----X

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: Index. No.: 03636 - 2008
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: Motion: 02.18.10
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: Cal.: 18
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: Sequence No. 1
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The following papers numbered 1 through 9 read on this motion by the defendants pursuant to CPLR 3212 to dismiss the instant action on the grounds that the plaintiff did not sustain “serious injury” as defined in Insurance Law 5102.

	Papers Numbered
Defendant’s Notice of Motion, Affirm., and Exhibits	1 - 4
Plaintiff’s Affirmation in Opposition., and Exhibits	5 - 8
Reply Affirmation.....	9

Upon the foregoing papers it is ordered that this motion is determined as follows:

The defendants allege that the plaintiff has failed to demonstrate that he has sustained “permanent loss of use of a body organ, member, function or system” under the sixth category of the No Fault Law (*Oberly v Bangs Ambulance, Inc*, 96 NY2d 295); a “permanent” and “consequential” limitation of use of a body organ or member, under the seventh category (*Pommels v Perez*, 4 NY3d 566); a “significant” injury under the eighth category (*Toure v Avis Rent A Car Systems, Inc*, 98 NY2d 345); a “serious injury” which constitutes a “medically determined injury or impairment of a non-permanent” nature which prevents the plaintiff from “performing substantially all of the material acts which constitute his usual and customary daily activities” for not less than 90 of the first 180 days following the injury (*Licari v Elliot*, 57 NY2d 230).

In order to maintain an action for personal injury in an automobile case a plaintiff must establish, after the defendant has properly demonstrated that it is an issue, that the plaintiff has sustained a “serious injury” which is defined as follows:

“Serious Injury” Insurance Law §5102(d)

In order to maintain an action for personal injury in an automobile case a plaintiff must establish that he has sustained a “serious injury” which is defined as follows:

Serious injury means a personal injury which result in ... 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 constitutes 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.

Whether a plaintiff has sustained a serious injury is initially a question of law for the Court (*Licari v Elliott, supra*). Initially it is defendant’s obligation to demonstrate that the plaintiff has not sustained a “serious injury” by submitting affidavits or affirmations of its medical experts who have examined the litigant and have found no objective medical findings which support the plaintiff’s claim (*Toure v Avis Rent A Car Systems, Inc., supra; Grossman v Wright, 268 AD2d 79*). If the defendant’s motion raises the issue as to whether the plaintiff has sustained a “serious injury” the burden shifts to the plaintiff to prima facie demonstrate through the production of evidence sufficient to demonstrate the existence of a “serious injury” in admissible form, or at least that there are questions of fact as to whether plaintiff suffered such injury (*Gaddy v Eyley, 79 NY2d 955; Bryan v Brancato, 213 AD2d 577*).

Insurance Law 5102 is the legislative attempt to “weed out frivolous claims and limit recovery to serious injuries” (*Toure v Avis Rent-A-Car Systems, Inc., supra, 350*).

Under Insurance Law 5102(d) a permanent consequential limitation of use of a body organ or member qualifies as a “serious injury”, however, the medical proof must establish that the plaintiff suffered a permanent limitation that is not minor slight, but rather, is consequential which is defined as an important or significant limitation.

The defendants rely on report of Dr. Eial Faierman, M.D., dated May 26, 2009 in which he affirms that he examined the plaintiff and gives his assessment. Dr. Faierman indicates that the plaintiff’s lumbar spine strain, cervical spine sprain, and right shoulder sprain were all resolved at the time of his examination of the plaintiff. He states that there is no objective evidence of “any significant pathology on the clinical examination” and that there “is no objective evidence of an orthopedic disability or permanency.”

The defendant also offers the Emergency Record from Woodhull Hospital dated January 15, 2008. As part of the record is a note of Dr. Mark Shafer of the Radiology Department whose impression was that the plaintiff had not sustained a fracture or subluxation of the cervical spine.

Here the defendant has come forward with sufficient evidence to support her claim that the plaintiff has not sustained a “serious injury” (*Gaddy v Eyster, supra*).

The plaintiff submits two affirmations of Dr. John Himelfarb, M.D., both dated January 15, 2010 dealing with the MRI of the plaintiff’s Lumbar Spine and the other with the MRI of the plaintiff’s Cervical Spine. There is also the affirmation of Dr. Thomas M. Kolb, M.D., dated January 20, 2010 dealing with the MRI of the plaintiff’s right shoulder.

The plaintiff submits the affidavit of Dr. Christopher Kyriakides, D.O., a Physiatrist, sworn to January 15, 2010. Dr. Kyriakides relies on the MRI reports of the plaintiff’s lumbar spine, cervical spine, and right shoulder in reaching his osteopathic judgment as to the plaintiff’s orthopaedic condition. He first saw the plaintiff January 29, 2008, two weeks after the accident which is subject of the instant suit. Based on his initial physical examination of the plaintiff he found that he had sustained a serious injury in the January 15, 2008 accident because he found that the plaintiff’s knee exhibited “positive restriction” because he “noticed that the patient exhibited positive restriction for pain bilaterally at 30 degrees” where “90 degrees would be considered normal”. He conducted three types of tests on February 12, 2008 namely, flexion, extension, and rotation of the plaintiff’s cervical and lumbar spine and found that he had restricted movement in both areas, as well as the plaintiff’s right shoulder. Dr. Kyriakides referring to the MRI reports notes that on February 21, 2008 the plaintiff had a partial rotator cuff tear to his right shoulder. On July 16, 2008 the MRI of the plaintiff’s lumbar spine showed that he had a central posterior disc herniation at the L5/S1 level, and a posterior disc bulge at the L4/5 level. Similarly, on July 16, 2008 the MRI of the plaintiff’s cervical spine showed posterior disc bulges at the C2/3 through C6/7 levels.

It was Dr. Kyriakides’ understanding that the plaintiff was employed in the stone and marble business where he worked with heavy solid objects. Dr. Kyriakides advised the plaintiff to discontinue assuming such tasks.

Dr. Kyriakides examined the plaintiff again on October 9, 2009 and found that the plaintiff’s injuries continued and pursuant to his range of motion tests the plaintiff was revealed to have greater impairment with regard to his cervical spine. However, the plaintiff’s lumbar spine, while still impaired had improved. The plaintiff’s right shoulder had a decreased range of motion.

Dr. Kyriakides found that the plaintiff had suffered “potentially permanent and serious injury” That with regard to the plaintiff’s spine and shoulder that he had recurrent symptoms and that the plaintiff has suffered “a serious injury” as a result of the accident. The plaintiff sought treatment for ten months at a frequency of three times a week.

To establish that the plaintiff has suffered a permanent or consequential limitation of use of a body organ or member and/or a significant limitation of use of a body function or system, the plaintiff must demonstrate more than “a mild, minor or slight limitation of use” and is required to provide objective medical evidence of the extent or degree of limitation and its duration (*Booker v Miller, 258 AD2d 783; Burnett v Miller, 255 AD2d 541*). Resolution of the issue of whether “serious

injury” has been sustained involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part (*Dufel v Green*, 84 NY2d 795).

The question presented as to the difference between the measurements of the plaintiff’s and defendant’s experiment relating to the plaintiff’s ability to move creates an issue of fact for the jury (*Martinez v Pioneer Transportation Corp.*, 48 AD3d 306).

The plaintiff has failed to demonstrate that he has a “medically determined” injury or impairment which has prevented him from performing all of his usual and customary daily activities for at least 90 of the first 180 days following the accident. (*Ayotte v Gervasio*, 81 NY2d 1062; *Johnson v Berger*, 56 AD3d 725; *Roman v Fast Lane Car Service, Inc.*, 46 AD3d 535).

Upon the defendant’s properly raising this issue the plaintiff must submit competent medical evidence that the injuries sustained rendered him unable to perform substantially all of his daily activities for not less than 90 days of the first 180 days subsequent to the subject accident (*Vicers v Francis*, 63 AD3d 1150; *Roman v Fast Lane Car Service, Inc.*, 46 AD3d 535).

Regarding the “permanent loss of use” of a body organ, member or system the plaintiff must demonstrate a total and complete disability which will continue without recovery, or with intermittent disability for the duration of the plaintiff’s life (*Oberly v Bangs Ambulance, Inc.*, 96 NY2d 295). The finding of “Permanency” is established by submission of a recent examination (*Melino v Lauster*, 195 AD2d 653 *aff’d* 82 NY2d 828). The mere existence of a herniated disc even a tear in a tendon is not evidence of serious physical injury without other objective evidence (*Sapienza v Ruggiero*, 57 AD3d 643; *Piperis v Wan*, 49 AD3d 840). Merely referring to the plaintiff’s “subjective quality of the plaintiff’s pain does not fall within the objective definition of serious physical injury” (*Saladino v Meury*, 193 AD2d 727, *see, Craft v Brantuk*, 195 AD2d 438).

Regarding “permanent limitation” of a body organ, member or system the plaintiff must demonstrate that he has sustained such permanent limitation (*Mickelson v Padang*, 237 AD2d 495). The word “permanent” is by itself insufficient, and it can be sustained only with proof that the limitation is not “minor mild, or slight” but rather “consequential” (*Gaddy v Eyler, supra*). Once the question has been raised, in order for the plaintiff to sustain proof of permanency, he must demonstrate the existence of such injury through objective medical tests which demonstrate the duration and extent of the injuries alleged (*Gobas v Dowigiallo*, 287 AD2d 690).

The “significant limitation of use of a body function or system” requires proof of the significance of the limitation, as well as its duration (*Dufel v Green*, 84 NY2d 795; *Fung v Uddin*, 60 AD3d 992; *Hoxha v McEachern*, 42 AD3d 433; *Barrett v Howland*, 202 AD2d 383).

The plaintiff who worked in the marble and stone trade was not able to effectively continue with his labor intensive work according his own affidavit and the affidavit of Dr. Kyriakides. The plaintiff submitted an affidavit of Dr. Kyriakides which indicates that he was examined on January

29, 2008 and again on October 9, 2009. Contrary to defendants' reply affirmation the plaintiff's medical affidavit indicates that he was tested initially within two weeks of the accident and again, more than one year later, which report indicates that he has sustained serious injury.

Accordingly, the defendants' motion seeking summary judgment against the plaintiff for his failure to demonstrate "serious injury" is denied based on the affidavits submitted by the plaintiff. However, that aspect of the defendants' motion seeking summary judgment with regard to the plaintiff having sustained a "medically determined" injury or impairment which has prevented his from performing all of his usual and customary daily activities for at least 90 of the first 180 days following the accident is granted.

So Ordered.

Dated: February 19, 2010

Robert J. McDonald, J.S.C.