

**Sotirhos v Yount Ok Soe**

2007 NY Slip Op 33265(U)

September 17, 2007

Supreme Court, Nassau County

Docket Number: 8348-05/

Judge: F. Dana Winslow

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SCAN

**SHORT FORM ORDER  
SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. F. DANA WINSLOW,  
Justice**

**GEORGE A. SOTIRHOS,**

**Plaintiff,**

**-against-**

**YOUNG OK SOE and JUNG W. SOE,  
Defendants.**

**TRIAL/IAS, PART 9  
NASSAU COUNTY**

**MOTION DATE: 6/28/07**

**MOTION SEQ. NO.: 001  
INDEX NO.: 018348/05**

**The following papers read on this motion (numbered 1-3):**

- Notice of Motion.....1**
- Affirmation in Opposition.....2**
- Reply Affirmation.....3**

Defendants Young Ok Soe and Jung W. Soe's motion for summary judgment pursuant to CPLR §3212 is determined as follows.

Plaintiff George A. Sotirhos, age 60, alleges that on August 31, 2005 at approximately 8:00 p. m., a motor vehicle owned and operated by him came into contact with a vehicle owned by defendant Jung W. Soe and operated by defendant Young Ok Soe (collectively "defendants"). The accident occurred on Old Country Road, fifteen feet east of its intersection with Central Park Road, Plainview, Town of Oyster Bay. Defendants now move for an order dismissing plaintiff's complaint pursuant to CPLR §3212, on grounds that plaintiff failed to sustain a "serious injury" within the meaning of Insurance Law §5102(d).

Insurance Law §5102(d) provides that a "serious injury means a personal injury

which results in (1) death; (2) dismemberment; (3) significant disfigurement; (4) a fracture; (5) loss of a fetus; (6) permanent loss of use of a body organ, member, function or system; (7) permanent consequential limitation of use of a body organ or member; (8) significant limitation of use of a body function or system; or (9) 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" (numbered by the Court). The Court's consideration in this action is confined to whether plaintiff's injuries constitute a permanent consequential limitation of use of a body organ or member (7) or significant limitation of use of a body function or system (8). The Court finds that plaintiff has demonstrated a *prima facie* failure to prove a medically determined injury which prevented plaintiff from performing all of the material acts constituting his usual and customary daily activities for ninety days of the first one hundred eighty days following the accident (9).

In support of their motion for summary judgment, defendants submit an affirmed report of examination, dated November 2, 2006, of orthopedist Harold Kozinn, MD and report of examination, dated November 2, 2006, of neurologist C.M. Sharma, MD, covering examinations of that date.

Dr. Kozinn provides range of motion testing, comparing the results to normal, of only the shoulders and pelvis level of the lumbosacral spine. He found forward flexion of 70 degrees (70 degrees normal), right lateral bending of 20 degrees (20 degrees normal) and left lateral bending of 20 degrees (20 degrees normal). Dr. Kozinn states that his examination revealed negative straight leg raising, Lasegue sign and Patrick's test, no weakness in foot or great toe dorsiflexors, no clonus, no Babinski, intact sensation bilaterally and normal knee and ankle reflexes. Dr. Kozinn diagnosed a lumbosacral sprain and concluded that "no further treatment is indicated" and that "there is no

disability.”

Dr. Sharma found symmetrical deep tendon reflexes, normal sensory system, including negative Tinel and Phalen signs, normal gait, normal heel, toe and tandem walking, normal posture, normal movements of the neck and shoulder, and no muscle atrophy or deformity. Dr. Sharma also found that plaintiff could bend forward and touch his toes and that “in the supine position, the leg elevation is 30 degrees on both sides.” Dr. Sharma diagnosed subjective lumbar pain. Dr. Sharma concluded that “there are no neurological limitations to usual work and activities” and that “there will be no permanent neurological problems of a causally related nature.”

The Court finds that the report of defendants’ examining physicians, are sufficiently detailed in the recitation of the various clinical tests performed and measurements taken during the examination, so as to satisfy the Court that an “objective basis” exists for their opinions. Accordingly, the Court finds that defendants have made a *prima facie* showing, although marginally, that plaintiff George A. Sotirhos did not sustain a serious injury within the meaning of **Insurance Law §5102(d)**. However, the Court notes that with respect to the straight leg raise test, the Court has been provided with insufficient information and would reserve the question of the efficacy of such test for the jury. With that said, the burden shifts to plaintiff to come forward with some evidence of a “serious injury” sufficient to raise a triable issue of fact. **Gaddy v. Eyler**, 79 NY2d 955, 957.

Plaintiff submits an affirmed report of Stephanie Bayner, MD (also signed by Matthew Winokur, DC), dated March 12, 2007, covering an examination performed by Dr. Bayner on January 8, 2007. Dr. Bayner found limitations in the range of motion of the cervical spine and lumbar spine, comparing the results to normal. Dr. Bayner also noted bilateral tenderness, trigger points and subjective pain upon digital palpation of the cervical and thoracolumbar spines. Dr. Bayner stated further that “the patellar and achilles reflexes are graded +2/4 bilateral” and that the “sensory examination revealed hypoesthesia on the left at L4, L5 and S1 levels.” Dr. Bayner concludes that “the

prognosis for [plaintiff] is good. However, due to the type of injuries sustained, the supporting tissues of the spine have become less effective and [plaintiff] may be subjected to frequent exacerbations due to inevitable shrink joint dysfunction.” Dr. Bayner also opines that “as a direct result of the traumatic injuries sustained by [plaintiff] on 8/31/05, there were extremes of joint movement with concomitant overstretching of the supporting structures of the cervical and lumbar spine” and that due to these injuries, “there may be a permanent partial weakening of these regions and [plaintiff] may be subject to frequent exacerbation.”

Plaintiff also submits an affirmation of radiologist Steven M. Peyser, MD, dated April 24, 2006, affirming an MRI of plaintiff’s cervical spine performed on October 7, 2005, and an affirmation of radiologist George J. Cavaliere, MD, dated April 24, 2006, affirming an MRI of plaintiff’s lumbar spine performed on September 30, 2005. The MRI of plaintiff’s cervical spine found “spondylitic changes with central disc herniation C3-4 and significant central canal stenosis with prominent deformity of the cervical spinal cord.” The MRI of plaintiff’s lumbar spine revealed “disc desiccation, disc bulging, and facet joint hypertrophy L4-5 and L5-S-1, with Grade 1 Spondylolisthesis of L4 on L5.” The MRI found “no evidence of disc herniation at any level.”

The Court finds that plaintiff’s evidence as set forth in the reports of Drs. Bayner, Peyser and Cavaliere is sufficient to raise a triable issue of fact as to whether or not plaintiff sustained a permanent consequential limitation of use of a body organ or member (7) or significant limitation of use of a body function or system (8). *See Green v. Nara Car & Limo, Inc.*, 2007 N.Y. Slip Op. 06021; *Francovig v. Senekis Cab Corp.*, 41 AD3d 643; *Hyun Jun Kim v. Collazo*, 38 AD3d 842; *Lim v. Tiburzi*, 36 AD3d 671; *Holley v. Salsa, Inc.*, 35 AD3d 814. The Court finds that plaintiff sufficiently explained the gap in treatment between the purported end of plaintiff’s treatment in November 2005 and the examination by Dr. Bayner on January 8, 2007. Plaintiff testified that he stopped physical therapy treatments “when Allstate cut off all my benefits” and that he could not

afford any further treatments. *See Francovig v. Senekis Cab Corp., supra.* (four year gap with explanation that no-fault was cut off and plaintiff could not afford further treatments out of her own pocket). *See also Black v. Robinson*, 305 AD2d 438. Though this Court believes that more than an unsubstantiated statement may be necessary, such as proof of financial condition and no insurance, coupled with proof of an attempt to obtain treatment from a present treating physician or clinic, the state of the law requires the **Francovig** and **Black** statements which resemble the present one. This Court concludes such cases state the status of the law and follows them.

The Court has examined the parties' remaining contentions and find them to be without merit.

On the basis of the foregoing, it is

**ORDERED**, defendants YOUNG OK SOE and JUNG W. SOE's motion for summary judgment dismissing the complaint of plaintiff GEORGE A. SOTIRHOS, on the grounds that plaintiff GEORGE A. SOTIRHOS failed to sustain a "serious injury" within the meaning of **Insurance Law §5102(d)** is **denied**.

Defendants shall serve plaintiff with a copy of this Order within 15 days after entry of this Order in the records of the Nassau County Clerk.

This constitutes the order of the Court.

Dated: September 17, 2007

ENTER:

*FY*

J.S.C.

*Matthew Wilson*

**ENTERED**

OCT 11 2007  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE