

Weir v Hackal

2001 NY Slip Op 30066(U)

December 13, 2001

Supreme Court, Suffolk County

Docket Number: 13503-99

Judge: Peter Fox Cohalan

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the grounds that the plaintiff James K. Weir has not sustained a "serious physical injury" as that term is defined in Insurance Law §5102(d). Plaintiff James K. Weir opposes the motion. For the reasons set forth herein, defendant Lynn M. Hackel's, motion for summary judgment and dismissal of plaintiff James K. Weir's complaint is denied in its entirety.

The function of the court on a motion for summary judgment is issue finding not issue determination. It is a most drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable. Elzer v. Nassau County, 111 AD2d 212, 489 NYS2d 246 (2nd Dept. 1985); Steven v. Parker, 99 AD2d 649, 472 NYS2d 225 (2nd Dept. 1984); Gaeta v. New York News, Inc., 95 AD2d 325, 466 NYS2d 321 (1st Dept. 1983). As the New York Court of Appeals noted in Sillman v. Twentieth Century Fox, 3 NY2d 395, 404 (1957):

"To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (DiMenna & Sons v. City of New York, 301 NY 118.). This drastic remedy should not be granted where there is any doubt as to the existence of such issues (Braun v. Carey, 280 App. Div. 1019), or where the issue is 'arguable' (Barnett v. Jacobs, 255 NY 520, 522); 'issue finding, rather than issue determination is the key to the procedure' (Esteve v. Avad, 271 App. Div. 725, 727)."

Although the question of the existence of a "serious injury" is often left to the jury, where properly raised, the issue of whether a plaintiff is barred from recovery in a judicial forum for want of a "serious injury" is, in the first instance, for the Court's determination. Zoldas v. Louis Cab Corp., 108 AD2d 378, 489 NYS2d 468 (1st Dept. 1985); Dwyer v. Tracy, 105 AD2d 476, 480 NYS2d 781 (3rd Dept. 1984). If it can be said, as a matter of law, that plaintiff suffered no serious injury within the meaning of the Insurance Law, then plaintiff has no claim to assert and there is nothing for the jury to decide. Licari v. Elliott, 57 NY2d 230, 455 NYS2d 570 (1982).

Section 5104 of the Insurance Law provides that an individual injured in an automobile accident may bring a negligence cause of action only upon a showing that the individual has incurred a "serious injury"

within the meaning of the no-fault law. Insurance Law §5102(d) defines "serious injury" as a personal injury which results in death; permanent loss of use of a body organ, member, function or system; 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 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.

While defendant's medical authority, Seth B. Paul, M.D., claims no significant limitation or use of a body member, plaintiffs' submitted medical authority, in a sworn affidavit by Jeffrey M. Block, a chiropractor, notes that plaintiff James K. Weir has a significant limitation of movement and use of the cervical regions of the spine and provides documented ranges of motion which are restricted or limited by pain. These limitation of movements were calculated at 10% or more. Dr. Block also noted that the plaintiff had sustained a herniated disc at t'heC6-C7 on the right side of the cervical cord as demonstrated in an MRI taken by Dr. Albert Zilkha of Long Island Magnetic Resonance Imaging on March 29, 1999 and provided to the plaintiff's treating physician, John S. Walsh, M.D.. Dr. Block has posited that the injuries are both consequential to the accident and permanent in nature. Thus, the plaintiff has presented both an affirmation setting forth the doctor's observations supported by objective proof, through specific testing of range motion limitations and an MRI documenting a herniated disc sufficient to raise an issue of fact warranting denial of the motion for summary judgment. See, Grossman v. Wright, 268 AD2d 79, 707 NYS2d 233 (2nd Dept. 2000); Kraemer v. Henning, 237 AD2d 492, 655 NYS2d 96 (2nd Dept. 1997).

Generally a soft tissue injury with cervical and low back sprain does not meet the threshold for serious injury (DeFelippo v. White, 101 AD2d 801, 475 NYS2d 141). These were the types of injuries which the legislature hoped would no longer burden the court system under the no-fault scheme (Scheerv. Koubek, 70 NYS2d 678, 518 NYS2d 788). Neither are subjective complaints of transitory pain due to cervical and lumbar sprains sufficient (Georgia v. Ramautar, 180 AD2d 713, 579 NYS2d 743). However, the Second Department, Appellate Division has consistently held that where there is objective proof of the cervical and lumbosacral pain by way of an MRI or x-ray showing a physical injury (Jacksonv. United Parcel Service, 204 AD2d 605, 612 NYS2d 186; Flanagan v Hoeg, 212 AD2d 756, 624 NYS2d 853; or by a chiropractor's report or affidavit setting forth the degree of any limitation of movement (Rut v. Griqonis, 214 AD2d 721, 625 NYS2d 633;

Carucci v. Tzimopoulos, 1997 WL 214768; Steuer v. Didonna, 650 NYS2d 298; Kraemer v. Hening, 655 NYS2d 96), then the plaintiff has either met his prima facie burden or raised a triable issue of fact warranting a denial of a summary judgment motion on the issue of threshold.

Although a minor limitation of movement is not consistent with the threshold (Gaddy v. Eyler, 79 NY2d 955, 582 NYS2d 990), the Second Department has held that a 10% restriction or more in the movement of the lumbar spine is sufficient to establish a significant permanent limitation of a bodily function. (Schwartz v. New York City Housing, 646 NYS2d 30). See, Lazarre v. Kopczyński, 160 AD2d 772, 553 NYS2d 488 (2nd Dept. 1990); Parker v. Smith, 242 AD2d 374, 664 NYS2d 374 (2nd Dept. 1997).

"The limitation or use of a body member or organ must be permanent and consequential but the limitation need not be total." Savage v. Delacruz, 200 AD2d 707, 474 NYS2d 850 (1984). A 'serious injury' definition should be construed to mean that a person has been curtailed from performing his usual activities to a great extent rather than 'some slight curtailment.' Sole v. Kurnik, 119 AD2d 974, 500 NYS2d 872 (4th Dept. 1986)

While permanent loss does not necessitate proof of a total loss of the "organ, member, function or system" it must establish operating in some limited way or only with pain. Dwyer v. Tracey, 105 AD2d 4767, 480 NYS2d 781 (3rd Dept. 1984). "It is well settled that pain can form the basis of a serious injury." Ottavio v. Moore, 141 AD2d 806, 529 NYS2d 876 (2nd Dept. 1978), appeal denied 73 NY2d 704, 537 NYS2d 492 (1989). See also, Butchino v. Bush, 109 AD2d 1001, 486 NYS2d 478 (3rd Dept. 1985).

It is the function of the court on a motion for summary judgment to consider all the facts in a light most favorable to the party opposing the motion, Thomas v. Drake, 145 AD2d 687, 535 NYS2d 229 (3rd Dept. 1988) and to determine whether there are any material and triable issues of fact presented. The key is issue finding, not issue determination, and the court should not attempt to determine questions of credibility. S.J. Capelin Assoc. v. Globe, 34 NY2d 338, 357 NYS2d 478 (1974). Questions of credibility between experts on behalf of plaintiff and defendant are for the jury and not the court to determine.

Under the facts and circumstances of the instant case, considered in a light most favorable to the plaintiffs, the Court finds that the plaintiff, James K. Weir, has provided sufficient medical evidence to raise a factual issue which requires resolution by a jury. It is well settled that pain can form the basis of a serious injury.

Mooney v. Ovitt, 100 AD2d 702, 474 NYS2d 618 (3rd Dept. 1984). Although the defendant submits considerable expert medical proof to the contrary, the Court views the discrepancies between the medical reports and affidavits submitted on behalf of the parties to involve issues of credibility for resolution by the jury. Vasilatos v. Chatertonon, 135 AD2d 1073, 523 NYS2d 211 (3rd Dept. 1987).

Accordingly, the defendant Lynn M. Hackel's motion for summary judgment and dismissal of plaintiff James K. Weir's action pursuant to CPLR 53212 on the ground that the plaintiff has failed to reach the threshold of a serious physical injury as defined in Insurance Law 55104 is hereby denied.

The foregoing constitutes the decision of the Court.

Date: DEC 13 2001



J.S.C. L