

Curella v Smith

2007 NY Slip Op 30139(U)

March 5, 2007

Supreme Court, Suffolk County

Docket Number: 0015825

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

P R E S E N T :

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 9/11/06
ADJ. DATE 11/17/06
Mot. Seq. # 002 - MG; CASEDISP
003 - XMD

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Plaintiff,	:		:	212 Higbie Lane
	:		:	West Islip, New York 11795
- against -	:		:	
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Defendants.	:		:	Riverhead, New York 11901
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Upon the following papers numbered 1 to 39 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11; Notice of Cross Motion and supporting papers 12 - 30; Answering Affidavits and supporting papers _____; Replying Affidavits and supporting papers 31 - 33; Other 34 - 39 (sur-reply); (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that defendants’ motion for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a “serious injury” as defined in Insurance Law § 5102 (d) is granted and the complaint is dismissed; and it is further

ORDERED that plaintiff’s cross motion for summary judgment on liability grounds is denied as academic.

This is an action to recover damages for serious injuries allegedly sustained by plaintiff as a result of a motor vehicle accident that occurred on Merrick Road at or near its intersection with Grand Central Avenue, Village of Amityville, New York on February 27, 2004. At the time of the accident, the plaintiff was riding as a passenger in a van operated by his employer, Paul Mulford, which was rear-ended by the vehicle owned by defendant Joseph Natasi and operated by defendant Michael Smith. The Court notes that the accident allegedly occurred while Mr. Mulford, a non-party to this action, was driving himself and the plaintiff to a job site. The complaint alleges that plaintiff sustained a “serious injury” as defined in Insurance Law § 5102 (d) and economic loss in excess of basic economic loss

within the meaning of Article 51 of the Insurance Law. Defendants now move for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a “serious injury” as defined in Insurance Law § 5102 (d). Plaintiff cross-moves for summary judgment on liability grounds on the basis that there are no triable issues of fact, and defendants have filed a reply. Plaintiff has also filed a sur-reply, which was without leave of court and which has not been considered in this determination (*see*, CPLR 2214).

Insurance Law § 5102 (d) defines “serious injury” as “a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; 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.”

In order to recover under the “permanent loss of use” category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (*Oberly v Bangs Ambulance Inc.*, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the “permanent consequential limitation of use of a body organ or member” or a “significant limitation of use of a body function or system” categories, either a specific percentage of the loss of range of motion must be ascribed or there must be a sufficient description of the “qualitative nature” of plaintiff’s limitations, with an objective basis, correlating plaintiff’s limitations to the normal function, purpose and use of the body part (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]).

It is for the court to determine in the first instance whether a prima facie showing of “serious injury” has been made out (*Tipping-Cestari v Kilhenny*, 174 AD2d 663, 571 NYS2d 525 [2d Dept 1991]). The initial burden is on the defendant “to present evidence, in competent form, showing that the plaintiff has no cause of action” (*Rodriguez v Goldstein*, 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once defendant has met the burden, plaintiff must then, by competent proof, establish a prima facie case that such serious injury exists (*Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]). Such proof, in order to be in a competent or admissible form, shall consist of affidavits or affirmations (*Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). The proof must be viewed in a light most favorable to the nonmoving party, here, the plaintiff (*Cammarere v Villanova*, 166 AD2d 760, 562 NYS2d 808 [3d Dept 1990]).

In support of their motion, defendants submit, inter alia, the pleadings; plaintiff’s verified bill of particulars; the affirmed report dated January 11, 2006 of defendants’ examining orthopedist, Michael J. Katz, M.D.; the affirmed report dated January 18, 2006 of defendants’ examining neurologist, Mathew M. Chacko, M.D.; and the plaintiff’s deposition transcript.

Plaintiff claims in his bill and amended bill of particulars that he sustained a right rotator cuff tear/impingement; a left knee meniscus tear/ACL tear; carpal tunnel syndrome; posterior discopathy at

L5-S1; partial L5 sacralization; subluxations at C5, and C7-T2; narrowing of the spine at the intervertebral foramina at C5-6 and L5-S1; and sprains/strains of the cervical spine, lumbar spine, and right wrist. Plaintiff also claims that he was incapacitated and confined to his house for approximately sixty days. Moreover, plaintiff claims that he sustained a serious injury in the categories of a permanent loss of use, a permanent consequential limitation, a significant limitation, and a non-permanent injury.

In his report dated January 11, 2006, Dr. Katz states that he performed an independent orthopedic examination of the plaintiff on that date, and his findings include reflexes that were “2+” and symmetrical; no paravertebral muscle spasm about the cervical or lumbosacral spine; no swelling about the shoulders, left wrist or left knee; no effusion within the left knee; and no impingement or crepitation of the shoulders. He also found that there was a normal range of motion of the cervical and the lumbosacral spine. Additionally, he found that there was a normal range of motion of the shoulders, the left wrist, and the left knee with no joint line tenderness. Dr. Katz opined that plaintiff had sustained strains of the cervical and lumbosacral spine and contusions of the shoulders, left wrist and the left knee, which had all resolved. Dr. Katz also concluded that plaintiff was capable of the activities of his daily living, including work, and that he was not disabled.

In his report dated January 18, 2006, Dr. Chacko states that he performed an independent neurological examination of the plaintiff on that date, and his findings include no focal neurological deficits; normal muscle strength; no atrophy or fasciculations in the upper or lower extremities; a normal Tinel’s sign at the wrists bilaterally; and a negative straight leg raising test bilaterally. He also found that there was a normal range of motion of the cervical and lumbar spine with no palpable tenderness or muscle spasm. Dr. Chacko opined that plaintiff had sustained causally-related cervical and lumbar strains, but there was no objective evidence of any neurological disability. Additionally, he concluded that there were no clinical signs of carpal tunnel syndrome and that plaintiff was capable of performing the normal activities of his daily living.

Plaintiff testified that he was a front seat passenger in a van at the time of the accident. As a result of the impact, he was thrown forward but did not lose consciousness. Although emergency personnel arrived at the scene, he declined treatment at that time. After he was driven home by his employer’s wife, he took some aspirin, iced his body, and rested. About seven to ten days later, he sought treatment with Dr. Carrino, a chiropractor. Plaintiff also testified that he missed about 60 days from work due to his injuries. He has difficulty working a full work week due to knee pain and is able to lift only light weights. He is also no longer able to run, cycle, or play basketball. Lastly, plaintiff testified that he has not had surgery for any of his injuries.

By their submissions, defendants made a prima facie showing that plaintiff did not sustain a serious injury (*see, Oberly v Bangs Ambulance Inc., supra; Wright v Peralta*, 26 AD3d 489, 809 NYS2d 465 [2d Dept 2006]; *Faroze v Kamran*, 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]; *Teodoro v Conway Transp. Serv.*, 19 AD3d 479, 798 NYS2d 466 [2d Dept 2005]; *Gousgoulas v Melendez*, 10 AD3d 674, 782 NYS2d 103 [2d Dept 2004]). Defendants’ examining physicians found a normal range of motion of the plaintiff’s cervical and lumbar spine with no palpable muscle spasm. They also found that there was a normal range of motion of the plaintiff’s shoulders and left knee. In addition, defendants’ examining physicians opined that plaintiff had no disability as a result of the

accident and that he had merely sustained sprains and contusions which had resolved. The defendants' remaining evidence, including plaintiff's deposition testimony, also supports a finding that he did not sustain a serious injury. As defendants have met their burden as to all categories of serious injury alleged by plaintiff, the Court turns to plaintiff's proffer (*see, Franchini v Palmieri*, 1 NY3d 536, 775 NYS2d 232 [2003]; *Dongelewic v Marcus*, 6 AD3d 943, 774 NYS2d 841 [3d Dept 2004]).

In opposition to this motion plaintiff submits, inter alia, the unsworn reports dated March 26, and May 17, 2004 of plaintiff's treating chiropractor, Anthony Carrino, D.C.; the unsigned report dated April 30, 2004 of plaintiff's treating radiologist, Mark J. Decker, M.D.; the affirmed report of plaintiff's treating physician, Eric D. Shapiro, M.D.; and the plaintiff's personal affidavit. Initially, the Court notes that the unsworn reports of Dr. Carrino and the unsigned report of Dr. Decker, which are not in admissible form, have not been considered in this determination (*see, Legendre v Bao*, 29 AD3d 645, 816 NYS2d 495 [2d Dept 2006]; *Zeigler v Ramadhan*, 5 AD3d 1080, 774 NYS2d 211 [4th Dept 2004]; *Buonaiuto v Shulberg*, 254 AD2d 384, 679 NYS2d 89 [2d Dept 1998]). Further, Dr. Shapiro's report is deficient to the extent he attempts to rely upon the unaffirmed and unsworn medical reports of other doctors (*see, Olson v Russell*, 2006 NY Slip Op 9576 [2d Dept, Dec 19, 2006]; *Dominguez-Gionta v Smith*, 306 AD2d 432, 761 NYS2d 310 [2d Dept 2003]).

In his report dated October 13, 2006, Dr. Shapiro states that he performed an initial examination of the plaintiff on March 30, 2004, and his findings include a positive right shoulder impingement sign; a positive Tinel's sign bilaterally; and a positive drawer test with respect to the left knee. He noted at that time that plaintiff's past medical history included a left hip dislocation. Dr. Shapiro examined the plaintiff again on May 25, 2004 and noted that there was a positive impingement sign of the right shoulder. While he observed some positive test signs for plaintiff's left knee, he also noted that there was some improvement in the condition of his knee. Although plaintiff complained of pain on palpation of the L5/S1 interspinous muscles, he also noted that there was some improvement in plaintiff's lumbar spine. During Dr. Shapiro's last examination of October 13, 2006, he found a positive impingement sign for the right shoulder, a positive Tinel's sign bilaterally, and a positive McMurray's sign with respect to the left knee. Dr. Shapiro opined that plaintiff sustained a left knee meniscus tear; double crush syndrome (cervical radiculopathy and carpal tunnel syndrome); a right rotator cuff tear/impingement; sprains/strains of the lumbosacral spine; and a left wrist sprain. Furthermore, he concluded that plaintiff had a permanent partial disability, even though he had been working.

Plaintiff avers that his right shoulder, right arm, left knee, both wrists, neck, back and tail bone hurt him after the accident. He underwent physical therapy treatments for his right shoulder and right knee for several months post accident, but the pain persisted. Plaintiff further alleges that the pain in his left knee presently hinders him from engaging in various physical activities and that he wears a brace on his left knee, left wrist and on his back every day.

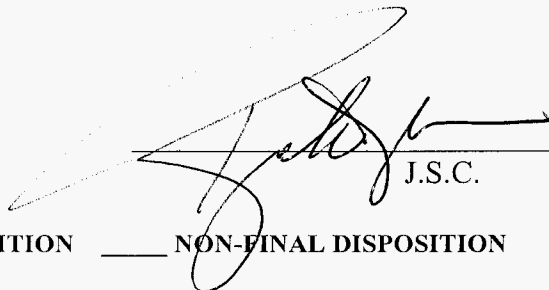
At the outset, the Court notes that plaintiff has not submitted any medical proof addressing the past injury to his left hip and the plaintiff's condition prior to the instant accident (*see, Luckey v Bauch*, 17 AD3d 411, 792 NYS2d 624 [2d Dept 2005]; *Grant v Fofana*, 10 AD3d 446, 781 NYS2d 160 [2d Dept 2004]). While Dr. Shapiro records plaintiff's complaints of pain, plaintiff has failed to present any medical proof that was contemporaneous with the accident showing any initial range of motion

restrictions for the affected body parts (*see, Ramirez v Parache*, 31 AD3d 415, 818 NYS2d 238 [2d Dept 2006]; *Yeung v Rojas*, 18 AD3d 863, 796 NYS2d 661 [2d Dept 2005]; *Petinrin v Levering*, 17 AD3d 173, 794 NYS2d 12 [1st Dept 2005]). Furthermore, Dr. Shapiro's report contains no opinion as to the causation of plaintiff's alleged injuries (*see, Vishnevsky v Glassberg*, 29 AD3d 680, 815 NYS2d 152 [2d Dept 2006]). In any event, Dr. Shapiro has not provided an adequate explanation for the gap between the end of plaintiff's treatment on May 25, 2004 and his recent re-examination of him on October 13, 2006 (*see, Pimentel v Mesa*, 28 AD3d 629, 813 NYS2d 517 [2d Dept 2006]; *Ali v Vasquez*, 19 AD3d 520, 797 NYS2d 528 [2d Dept 2005]). Plaintiff's two-year gap in treatment was, in essence, a cessation of treatment, which he has entirely failed to address by way of competent medical proof (*see, Pommells v Perez*, 4 NY3d 566, 797 NYS2d 380 [2005]; *McConnell v Ouedraogo*, 24 AD3d 423, 805 NYS2d 418 [2d Dept 2005]; *Ketz v Harder*, 16 AD3d 930, 793 NYS2d 203 [3d Dept 2005]). Therefore, the conclusory report of Dr. Shapiro, which was clearly tailored to meet the statutory requirements, is insufficient to establish a "serious injury" under the no-fault law (*see, Burke v Galli*, 242 AD2d 595, 664 NYS2d 742 [2d Dept 1997], *lv denied*, 91 NY2d 806, 669 NYS2d 1 [1998]; *Khan v Hamid*, 19 AD3d 460, 798 NYS2d 444 [2d Dept 2005]).

While plaintiff has submitted an affidavit listing various physical ailments and limitations, his subjective complaints of pain do not constitute a significant injury within the meaning of the statute (*see, Felix v New York City Transit Auth.*, 32 AD3d 527, 819 NYS2d 835 [2d Dept 2006]; *Moore v Sarwar*, 29 AD3d 752, 816 NYS2d 503 [2d Dept 2006]). Additionally, the proof submitted by plaintiff is insufficient to raise a triable issue of fact that he sustained a medically-determined injury or impairment, rendering him unable to substantially perform all of his usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident (*see, Magarin v Kropf*, 24 AD3d 733, 807 NYS2d 398 [2d Dept 2005]; *Drexler v Melanson*, 301 AD2d 916, 754 NYS2d 433 [3d Dept 2003]; *Keena v Trappen*, 294 AD2d 405, 742 NYS2d 344 [2d Dept 2002]).

Accordingly, the defendants' motion for summary judgment is granted, and plaintiff's motion is denied as academic in light of the above determination.

Dated: MAR 05 2007



J.S.C.

 X FINAL DISPOSITION NON-FINAL DISPOSITION