

Ramirez v Jefferson

2007 NY Slip Op 30140(U)

March 5, 2007

Supreme Court, Suffolk County

Docket Number: 0016431

Judge: Robert W. Doyle

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of no-fault carrier's physician, Dr. Joseph Paul; the affirmed report dated February 20, 2006 of their examining orthopedist, Dr. Joseph Stubel; and the affirmed report dated February 22, 2006 of their examining neurologist, Dr. Richard Pearl.

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*, 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 Sys.*, 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 [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 [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 Eycler*, 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 [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 [1990]).

Here, defendant made a prima facie showing that plaintiff Ramirez did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) through the affirmed reports of his examining physicians and plaintiffs' bill of particulars (see, *Thompson v Abbasi*, 15 AD3d 95, 788 NYS2d 48 [2005]). On August 26, 2003, approximately two and a half months after the subject accident, Dr. Paul examined plaintiff Ramirez, using certain orthopedic and neurological tests including Cervical Compression test, Sitting Lasegue test, Straight Leg Raising test and Patrick test. Dr. Paul found that all the test results were negative and that there was no spasm or tenderness around plaintiff Ramirez' cervical, thoracic and lumbar spine. Dr. Paul reported his findings with respect to the various ranges of motion of plaintiff Ramirez' cervical and lumbar spine and compared those findings to the normal ranges of motion. Dr. Paul opined that plaintiff Ramirez had no disability or restrictions related to the subject accident at the time of the examination; that there was no need for further treatment; and that he was capable of performing his normal activities of daily living (see, *Willis v New York City Tr. Auth.*, 14 AD3d 696, 789 NYS2d 223 [2005]; compare, *Christman v Cueva*, 6 AD3d 375, 773 NYS2d 903 [2004]). On February 20, 2006,

approximately two years and eight months after the subject accident, defendant's examining orthopedist, Dr. Stubel, examined plaintiff Ramirez, using certain orthopedic and neurological tests including Tinel's sign, Straight Leg Raising test and Patrick test. Dr. Stubel found that all the test results were negative and that there was no spasm or tenderness around plaintiff Ramirez' cervical, thoracic and lumbar spine. Dr. Stubel reported his findings with respect to the various ranges of motion of plaintiff Ramirez' cervical, thoracic and lumbar spine and compared those findings to the normal ranges of motion. Dr. Stubel opined that plaintiff Ramirez had no disability or restrictions related to the subject accident at the time of the examination and that he was capable of performing his normal activities of daily living (*see, Willis v New York City Tr. Auth., supra*). On February 22, 2006, defendant's examining neurologist, Dr. Pearl, also examined plaintiff Ramirez, using certain orthopedic and neurological tests including Babinski sign, Romberg test, Tinel's sign and Straight Leg Raising test. All the test results were negative and there was no spasm or tenderness around plaintiff Ramirez' cervical, dorsal and lumbosacral spine. Dr. Pearl reported his findings with respect to the various ranges of motion of plaintiff Ramirez' cervical and lumbar spine and compared those findings to the normal ranges of motion. Dr. Pearl opined that plaintiff Ramirez had no disability or restrictions related to the subject accident at the time of the examination and that there was no need for further treatment (*see, id.*).

At his deposition, plaintiff Ramirez testified that, at the time of the accident, he was a high school student and was not employed; that, as a result of the subject accident, he never missed any of his class and was not confined to his bed or home; and that he had received acupuncture, shock therapy, heat and physical therapy for a couple of months and did not take any pain medication. Plaintiff Ramirez' deposition testimony thus reveals that his injuries did not prevent him from performing "substantially all" of the material acts constituting his customary daily activities during at least 90 out of the first 180 days following the accident (*see, Curry v Velez, 243 AD2d 442, 663 NYS2d 63 [1997]*). Thus, defendant has met his initial burden of establishing that plaintiff Ramirez did not sustain a permanent consequential limitation of use of a body organ or member or significant limitation of use of a body function or system and that he was not prevented from performing substantially all of his usual and customary daily activities for 90 of the first 180 days following the accident within the meaning of Insurance Law § 5102 (d) (*see, Gonzalez v Green, 24 AD3d 939, 805 NYS2d 450 [2005]*).

In opposition, plaintiffs contend that plaintiff Ramirez did sustain a serious injury within the meaning of Insurance Law § 5102 (d). In support, plaintiffs submit only the deposition testimony given by plaintiff Ramirez. Plaintiffs failed to submit any medical reports or expert opinions to support their allegations that plaintiff Ramirez did sustain a permanent consequential limitation in the use of his cervical and lumbar spine (*see, Hemmes v Twedt, 180 AD2d 925, 580 NYS2d 510 [1992]*). Plaintiffs also failed to submit any competent medical evidence to support a claim that plaintiff Ramirez was unable to perform substantially all of his daily activities for not less than 90 of the first 180 days as a result of the subject accident (*see, Vita v Enterprise Rent-A-Car, 8 AD3d 558, 779 NYS2d 128 [2004]*).

Under the circumstances, this Court notes that plaintiffs failed to raise a triable issue of fact that plaintiff Ramirez had sustained a "serious injury" under Insurance Law § 5102 (d) as a result of the subject accident. Thus, defendant's motion for summary judgment dismissing the first cause of action on behalf of the plaintiff Sebastian Ramirez is granted.

Dated: MAR 05 2007

J.S.C.

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