Calvo v Tolentino-Perez
2007 NY Slip Op 30142(U)
March 5, 2007
Supreme Court, Suffolk County
Docket Number: 0019633
Judge: Robert W. Doyle
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SHORT FORM ORDER

INDEX No. 04-19633
CAL. No. 06-01047-MV

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

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 9/22/06
ADJ. DATE 11/13/06
Mot. Seq. # 002 - MG

---X
LUIS M. CALVO and CESAR A. ALVARADO,

Plaintiffs,

- against -

EDDY TOLENTINO-PEREZ and MTLR CORP.,

Defendants.
---X

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Upon the following papers numbered 1 to 10 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 10; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers ____; Replying Affidavits and supporting papers ____; Other ____; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that this motion for summary judgment dismissing the first cause of action in complaint on the ground that plaintiff Luis M. Calvo did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is granted.

This is an action to recover damages for serious injuries allegedly sustained by plaintiffs Luis M. Calvo and Cesar A. Alvarado as a result of a motor vehicle accident that occurred on the northbound lane of Brentwood Road at or near its intersection with Third Avenue, Town of Islip, New York on June 7, 2004. The accident allegedly happened when the vehicle owned by defendant MTLR Corp. and operated by defendant Tolentino-Perez rear-ended the vehicle owned and operated by plaintiff Luis M. Calvo, and in which plaintiff Cesar A. Alvarado was riding as a passenger. The first cause of action in the complaint alleges that Luis M. Calvo 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. The second cause of action in the complaint alleges that Cesar A. Alvarado 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. By Order dated October 11, 2006 (Doyle, J.), plaintiff Luis M. Calvo was granted summary judgment against defendants on the counterclaim pleaded in the answer, dated September 22, 2004, and the remaining causes of action were severed and

continued. Defendants now move for an order pursuant to CPLR 3212 granting them summary judgment dismissing the first cause of action in the complaint on the grounds that plaintiff Luis M. Calvo did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). No opposition has been filed to this motion.

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; plaintiffs' verified bill of particulars; the report of defendants' examining neurologist, Paul Wright, M.D.; and Mr. Calvo's deposition transcript. Plaintiffs claim in their bill of particulars that Mr. Calvo sustained, among other things, cervical, thoracic, and lumbar strains and sprains; straightening of curvature of the cervical spine; cervical radiculopathy; post-traumatic lumbar facet joint syndrome; and L5-S1 spondylolisthesis[1].

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[1] Spondylolisthesis is defined as the forward movement of the body of one of the lower lumbar vertebrae on the vertebra below it, or upon the sacrum (Stedman's Medical Dictionary 1678 [27th ed 2000]).

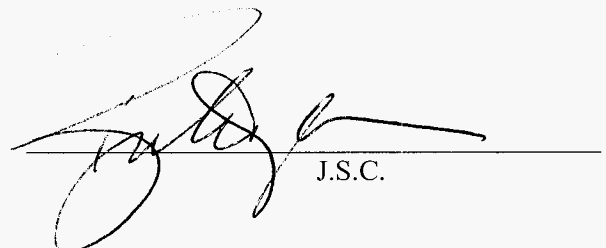
Plaintiffs also claim that Mr. Calvo's injuries are permanent and that he is restricted in the activities of his daily living. In addition, plaintiffs claim that Mr. Calvo was not confined to a hospital or to his bed, and that he was not incapacitated from his employment. The Court construes these allegations to mean that Mr. Calvo sustained a serious injury in the categories of a permanent consequential limitation and a significant limitation.

In his report dated November 2, 2005, Dr. Wright states that he performed an independent medical examination of Mr. Calvo on November 2, 2005, and his findings include a normal motor examination that was symmetrically "5/5"; no muscle atrophy or fasciculations; an "intact" sensory system; normal gait; and an "intact" straight leg raising test. He also noted that there was no muscle spasm in the paraspinal muscles of the cervical, thoracic, and lumbar spine. Dr. Wright opined that there was no evidence of a neurological dysfunction.

Mr. Calvo testified that he was the driver of the vehicle in which he and plaintiff Alvarado were riding when the accident happened. He declined ambulance assistance at the scene of the accident, and instead drove to his place of business. The next day, he saw Dr. Michalowicz, but he has not seen him since that time. He currently works regularly at a store which he owns and is able to load and unload merchandise. Mr. Calvo further testified that he participates in physical activities such as football, baseball, and martial arts.

By their submissions, defendants have made a prima facie showing that Mr. Calvo did not sustain a serious injury (*see*, ***Ranzie v Abdul-Massih***, 28 AD3d 447, 813 NYS2d 473 [2d Dept 2006]; ***Wright v Peralta***, 26 AD3d 489, 809 NYS2d 465 [2d Dept 2006]; ***Hernandez v DIVA Cab Corp.***, 22 AD3d 722, 804 NYS2d 396 [2d Dept 2005]; ***Gousgoulas v Melendez***, 10 AD3d 674, 782 NYS2d 103 [2d Dept 2004]; ***Grant v Heli Trucker, Inc.***, 294 AD2d 538, 742 NYS2d 874 [2d Dept 2002]). Dr. Wright found upon his examination conducted in 2005, that Mr. Calvo had no muscle atrophy or fasciculations. Furthermore, other tests performed by Dr. Wright showed no abnormalities, and he opined that Mr. Calvo had no disability as a result of the accident. The defendants' remaining evidence, including Mr. Calvo's deposition testimony, also supports a finding that he did not sustain a serious injury or economic loss in excess of basic economic loss (*see*, ***Rulison v Zanella***, 119 AD2d 957, 501 NYS2d 487 [3d Dept 1986]). As this motion is unopposed and no triable issues of fact have been raised, defendants are granted partial summary judgment dismissing the first cause of action on behalf of Mr. Calvo (*see*, CPLR 3212 [e]). Accordingly, the second cause of action on behalf of plaintiff Cesar A. Alvarado is severed and continued for trial (*see*, CPLR 3212 [e], [1]; ***Yaraghi v Zeller***, 286 AD2d 765, 730 NYS2d 517 [2d Dept 2001]).

Dated: MAR 0 5 2007



J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION