

**June v Erfani**

2007 NY Slip Op 30147(U)

March 5, 2007

Supreme Court, Suffolk County

Docket Number: 0022930

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 11/9/06  
ADJ. DATE 1/12/07  
Mot. Seq. # 002 - MD

-----X  
JAMES M. JUNE, JR., :  
 :  
 Plaintiff, :  
 :  
 - against - :  
 :  
 AMIN ERFANI, :  
 :  
 Defendant. :  
-----X

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Upon the following papers numbered 1 to 22 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 9; Notice of Cross Motion and supporting papers \_\_\_\_\_; Answering Affidavits and supporting papers 10 - 20; Replying Affidavits and supporting papers 21 - 22; Other \_\_\_\_\_; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that this motion by defendant for summary judgment dismissing the complaint against him on the ground that plaintiff did not sustain a “serious injury” as defined in Insurance Law § 5102 (d) is denied.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff James June, Jr., when his vehicle was rear-ended by a vehicle owned and operated by defendant Amin Erfani on North Loop Road in Stony Brook, New York, on October 27, 2003.

By his bill of particulars, plaintiff alleges that he sustained serious injuries as a result of the subject accident, including a herniated disc at L5-S1; bulging discs at C5-C6 and C6-C7; cervical radiculopathy at L5-S1; cervical, thoracic and lumbar spine sprain/strain; myospasm and myofascitis; and sciatic neuritis. In addition, plaintiff claims that he was not confined to bed and home.

Defendant now moves for summary judgment in his favor dismissing the complaint on the ground that plaintiff has not sustained a serious injury as defined in Insurance Law § 5102 (d). In support, defendant submits, *inter alia*, the pleadings; a bill of particulars; the affirmed medical report dated July 11, 2006 of his examining neurologist, Dr. Warren Cohen; the affirmed medical report dated July 11, 2006 of his examining orthopedist, Dr. Wayne Kerness; two affirmed MRI reports dated June 28, 2005 of Dr. Natalio Damien concerning plaintiff's cervical and lumbar spine, taken on November 21, 2003.

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 (*Tippling-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 (*Camarere v Villanova*, 166 AD2d 760, 562 NYS2d 808 [1990]).

Here, defendant made a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) through the affirmed reports of his examining physicians and plaintiff's bill of particulars (*see, Thompson v Abbasi*, 15 AD3d 95, 788 NYS2d 48 [2005]). Dr. Damien's MRI report of plaintiff's cervical spine dated June 28, 2005 revealed that plaintiff had slight bulging discs at C5-C6 and C6-C7. For a bulging disc to constitute a serious injury, there must be

objective evidence of the extent or degree of the alleged limitation resulting from the injury and its duration (*see, Guzman v Paul Michael Mgt.*, 266 AD2d 508, 698 NYS2d 719 [1999]). On July 11, 2006, approximately two years and nine months after the subject accident, defendant's examining neurologist, Dr. Cohen, examined plaintiff, using certain orthopedic and neurological tests including Foraminal Compression test, Spurling test, Jackson's Compression test, Soto-Hall test, Cervical Distraction test, Bechterew's test, Straight Leg Raising and Kernig test. Dr. Cohen found that all the test results were negative and that there was no tenderness, trigger points or spasm in plaintiff's cervical and lumbar spine. Dr. Cohen reported his findings with respect to the various ranges of motion of plaintiff's cervical and lumbar spine and compared those findings to the normal ranges of motion. Dr. Cohen found that plaintiff had full range of motion in his cervical and lumbar spine, except 80 degrees flexion of his lumbar spine (90 degrees normal). Dr. Cohen concluded that plaintiff was capable of performing his daily normal activities and that there were no disabilities related to the subject accident (*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 the same date, defendant's examining orthopedist, Dr. Kerness, also examined plaintiff, using certain neurological and orthopedic tests including Straight Leg Raising. All the test results were negative. Dr. Kerness reported his findings with respect to the various ranges of motion of plaintiff's cervical and lumbar spine and compared those findings to the normal ranges of motion. Dr. Kerness found that plaintiff had full range of motion in his cervical and lumbar spine and that there was no spasm in his cervical, thoracic and lumbar spine, although there is a minimal tenderness at the right sacroiliac joint. Dr. Kerness opined that plaintiff had no disability or restrictions related to the subject accident, that there was no need for further treatment, and that he was capable of working on a full-time basis and performing his normal activities of daily living (*see, Willis v New York City Tr. Auth., supra*). Thus, defendant has sustained his burden of demonstrating that there is no objective evidence of physical limitations resulting from plaintiff's alleged injuries (*see, Santos v Marcellino*, 297 AD2d 440, 746 NYS2d 111 [2002]; *O'Neal v Cancilla*, 294 AD2d 921, 741 NYS2d 815 [2002]; *Hutchinson v Beth Cab Corp.*, 204 AD2d 151, 207 AD2d 283, 612 NYS2d 10 [1994]).

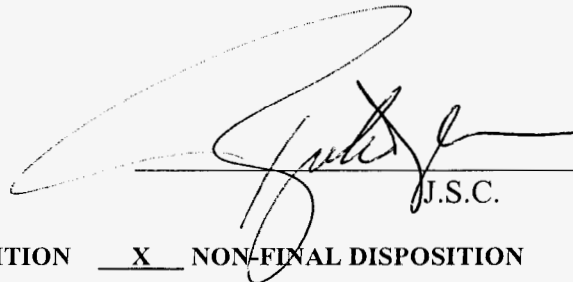
In opposition, plaintiff contends that he did sustain a serious injury within the meaning of Insurance Law § 5102 (d). In support, plaintiff submits his own affidavit; the affirmed affidavit dated January 2, 2006 of his treating chiropractor, Dr. Michael Campo; the medical record of South Shore Chiropractic, including the affirmed report dated December 28, 2006 of Dr. Michael Campo, numerous reports, notes and test results; the affirmed affirmation of January 4, 2007 of Dr. Mark Shapiro; and two affirmed MRI reports of plaintiff's cervical and lumbar spine, taken on November 21, 2003 by Dr. Mark Shapiro.

Here, on January 4, 2007, Dr. Shapiro affirmed plaintiff's MRI reports, performed on November 21, 2003. The MRI reports revealed that plaintiff had a straightening of the cervical lordosis, bulging discs at C5-C6 and C6-C7 and a herniated disc at L5-S1. For a herniated or bulging disc to constitute a serious injury, there must be objective evidence of the extent or degree of the alleged physical limitations resulting from the injury and its duration (*see, Nelson v Amicizia*, 21 AD3d 1015, 803 NYS2d 87 [2005]; *Kearse v New York City Tr. Auth.*, 16 AD3d 45, 789 NYS2d 281 [2005]; *Guzman v Paul Michael Mgt.*, 266 AD2d 508, 698 NYS2d 719 [1999]). Dr. Campo had treated plaintiff for approximately six months after the subject accident and administered certain orthopedic and

neurological tests including Cervical Compression test, Rotary Cervical Compression test, Jackson Cervical Compression test, Maximum Cervical Compression test, Soto-Hall test, Kemp's test, Bechterew's test, Milgram's test, Lasegue's test and Hibb's test. All the test results were positive. On November 5, 2003, nine days after the subject accident, Dr. Campo performed a range of motion test of plaintiff's cervical and lumbar spine, using a computerized inclinometer, which is the proper and approved method to test an alleged restriction of motion to the cervical and lumbar spine (see, *Kraemer v Henning*, 237 AD2d 492, 655 NYS2d 96 [1997]; *Taher v Valerio-Mena*, 195 Misc2d 687, 759 NYS2d 646 [2003]). On December 22, 2006, approximately three years and two months after the subject accident, Dr. Campo re-examined plaintiff and performed a range of motion test of his cervical and lumbar spine, using a computerized inclinometer. Based on the positive orthopedic tests and the comparison of plaintiff's limitations of motions with normal function, Dr. Campo concluded that plaintiff sustained a serious injury within the meaning of Insurance Law § 5102 (d). Furthermore, Dr. Campo satisfactorily explained in his affidavit the approximately two year and six month gap between the end of the medical treatment to plaintiff on June of 2004 and the re-examination on December 22, 2006 (see, *Williams v New York City Tr. Auth.*, 12 AD3d 365, 786 NYS2d 183 [2004]; *Black v Robinson*, 305 AD2d 438, 759 NYS2d 741 [2003]). As an explanation for the cessation of treatment, Dr. Campo stated that plaintiff's "no-fault benefits have been terminated and due to lack of insurance and economic reasons [plaintiff] has stopped treatment."

Thus, plaintiff has raised a triable issue of fact as to whether he sustained a significant limitation of use of a body function or system constituting a serious injury as defined by Insurance Law § 5102 (d) (see, *Kraemer v Henning*, 237 AD2d 492, 655 NYS2d 96 [1997]). Accordingly, defendant's 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 denied.

Dated:           MAR 05 2007          

  
\_\_\_\_\_  
J.S.C.

           FINAL DISPOSITION      X   NON-FINAL DISPOSITION