

Dolan v Caputo

2007 NY Slip Op 30898(U)

April 19, 2007

Supreme Court, Suffolk County

Docket Number: 0015580/2004

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 12-1-06

ADJ. DATE 1-19-07

Mot. Seq. # 001-MG; CASEDISP

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DANIEL DOLAN,	:	JOSEPH B. FRUCHTER, ESQ.	
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	:		
- against -	:		
	:	ROBERT P. TUSA, ESQ.	
MICHELE CAPUTO,	:	Attorney for Defendant	
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	:	Hauppauge, New York 11788	
	:		
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Upon the following papers numbered 1 to 30 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 22; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 23-28; Replying Affidavits and supporting papers 29-30; Other _____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by the defendant, Michele Caputo, for an order pursuant to CPLR 3212, granting her summary judgment dismissing the plaintiff's complaint is granted.

This is an action to recover damages for injuries allegedly sustained by the plaintiff, Daniel Dolan, on July 23, 2001, as a result of a motor vehicle accident that occurred on Floyd Road, at or near its intersection with Roberts Road, Town of Brookhaven, County of Suffolk, New York. The front passenger side of plaintiff's vehicle was struck by defendant's vehicle when the defendant attempted to make a left turn onto Floyd Road, causing the plaintiff to sustain serious injuries.

Plaintiff, by his bill of particulars, alleges that he sustained left wrist trauma and pain, delayed left median palmar segmental sensory latency for palm to wrist segment, electro physiological evidence of a left carpal tunnel syndrome, abnormal upper extremities electro diagnostic study, cervical trauma, and pain, cervical radiculopathy, lumbar and thoracic trauma and pain, pinprick, light touch and temperature decreases in the left C5/6 distribution, positive Tinel's and Phalen's sign on the left wrist and loss of quality of life. Plaintiff at the time of the accident was 18 years old and unemployed.

Defendant now moves for summary judgment on the basis that plaintiff failed to sustain a serious injury within the meaning of Insurance Law § 5102 (d), and therefore, his claim is barred under Insurance Law § 5104 (a). Defendant submits, the pleadings, copy of plaintiff's emergency room records and X-ray reports, unsworn copies of plaintiff's medical reports and notes, and the affirmed reports of Drs. Michael J. Katz and Mark J. Zuckerman, dated March 1, 2006 and February 14, 2006, respectively.

Plaintiff opposes defendant's motion on the grounds that plaintiff did suffer a serious injury as defined within the meaning of Insurance Law § 5102 (d) and that defendants' experts are incompetent to determine whether the plaintiff suffered an injury that prevented him from performing his usual and customary daily activities for the first 90 out of 180 days immediately following the accident. Plaintiff submits, plaintiff's affidavit, and affidavits of Dr. Arvind Chopra and Dr. Robert J. Indelicato.

On a motion for summary judgment where the proponent of the motion has presented a prima facie case that the plaintiff's claimed injury is not a "serious injury" by the statutory definition, the burden then shifts to the plaintiff to demonstrate that a "serious injury" was sustained by the plaintiff or that questions of fact exist as to whether the injury sustained was "serious" (*Martin v Schwartz*, 308 AD2d 318, 766 NYS2d 13 [2003]; *Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692 [1992]; *Lowe v Bennett*, 122 AD2d 728, 511 NYS2d 603 [1986]). A defendant seeking summary judgment based on lack of a serious injury, relying on the findings of the defendant's own witnesses, must submit those findings in admissible form, such as, affidavits and affirmations, and not unsworn reports, in order to demonstrate entitlement to judgment as a matter of law (*Pagano v Kingsbury*, *supra*). A defendant may also establish entitlement to summary judgment using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (*see, Fragale v Geiger*, 288 AD2d 431, 733 NYS2d 901 [2001]; *Vignola v Varrichio*, 243 AD2d 464, 662 NYS2d 831 [1997]; *Torres v Micheletti*, 208 AD2d 519, 616 NYS2d 1006 [1994]; *Pagano v Kingsbury*, *supra*). Once defendant has met this burden, plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard for "serious injury" under New York's No-Fault Insurance Law (*Tornabene v Pawlewski*, 305 AD2d 1025, 758 NYS2d 593 [2003]; *Dufel v Green*, 84 NY2d 795, 622 NYS2d 900 [1995]; *Pagano v Kingsbury*, *supra*).

Insurance Law § 5102 (d) defines a "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."

The purpose of New York State's No-Fault Insurance Law is to "assure prompt and full compensation for economic loss by curtailing costly and time-consuming court trial[s]" (*Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]), and requiring every case, even those with minor injuries, to be decided by a jury would defeat the statute's effectiveness (*Licari v Elliott*, *supra*). Therefore, the No-Fault Insurance law precludes the right of recovery for any "non-economic loss, except in the case of

serious injury, or for basic economic loss” (see, Insurance Law § 5104 [a]; *Martin v Schwartz, supra*). Any injury not falling within the definition of “serious injury” is classified as an insignificant injury, and a trial is not allowed under the No-Fault statute (*Pommells v Perez*, 4 NY3d 566, 797 NYS2d 380 [2005]; *Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]; *Martin v Schwartz, supra*). Where a defendant raises the issue of whether a plaintiff has sustained a serious injury, the issue is for the court’s determination (*Cowan v Fish*, 2 Misc3d 1008A, 784 NYS2d 919 [2004]). A plaintiff may establish that a serious injury was sustained by use of an expert’s qualitative assessment of the plaintiff’s injury, so long as the qualitative assessment is based upon an objective basis and compares the plaintiff’s limitations to “the normal function, purpose and use of the affected body organ, member, function or system (*Toure v Avis Rent A Car System, Inc.*, 98 NY2d 345, 746 NYS2d 865 [1994]).

Based upon the adduced evidence, the defendant has satisfied her burden in proving that the plaintiff failed to meet the serious injury threshold as required by Insurance Law § 5102 (d) (*Pagano v Kingsbury, supra*; *Gaddy v Eyler, supra*; *Lowe v Bennett, supra*). Despite the fact that Dr. Zuckerman, in his independent neurological medical evaluation and Dr. Katz, in his independent orthopedic medical evaluation, dated February 14, 2006 and March 1, 2006, respectively, state that plaintiff’s cervical and lumbar sprain injuries were consistent with the type of soft tissue injuries that would be sustained from the July 23, 2001 motor vehicle accident, both doctors also indicate that the plaintiff’s cervical and lumbar sprains have been resolved and there are no signs of permanent disability (see, *Gaddy v Eyler, supra*). Dr. Katz further explained that the plaintiff exhibited signs of symptom magnification by refusing to fully execute his neck’s full range of motion upon belief that his range of motion was limited but after a few attempts was able to move the full range of motion. Dr. Katz’s report also states that plaintiff’s left wrist contusion has been resolved and there are no signs or symptoms of permanent musculoskeletal damage. Additionally, Dr. Zuckerman notes that plaintiff does not exhibit any signs of having carpal tunnel syndrome and there was no evidence of central nervous system dysfunction. Moreover, Dr. Zuckerman and Dr. Katz opine that the plaintiff is not disabled and is not prevented from performing all activities of his daily living. Accordingly, defendants have demonstrated that the plaintiff has failed to meet the serious injury threshold of the New York State No-Fault Insurance statutory scheme (*Pommells v Perez, supra*; *Licari v Elliot, supra*; *Pagano v Kingsbury, supra*).

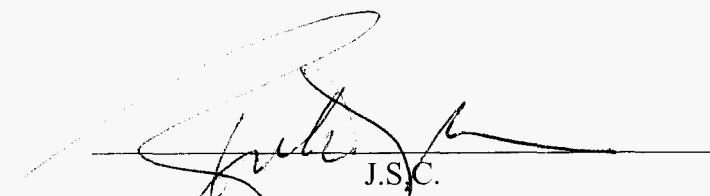
In opposition, plaintiff has failed to raise an issue of fact regarding whether he sustained an injury that substantially prevented him from performing all of the material acts that constituted his usual and daily customs for the first 90 out of 180 days immediately proceeding the accident (*Zinger v Zylberberg*, __ AD3d __, __ NYS2d __, 2006 NY App Div LEXIS 15899, 2006 NY Slip Op 10058 [2 Dept Dec 26, 2006]; *Hasner v Budnik*, __ AD3d __, __ NYS2d __, 2006 WL 3526912, 2006 NY Slip Op 09168 [2 Dept Dec 05, 2006]; *Pantalone v Goodman, supra*). Although plaintiff stated that his employer provided him with an assistant to help him perform his duties, his statement that he was unemployed at the time of the accident effectively undermined his claim that he was prevented from performing all of the material acts that constituted his usual and customary activities during the first 90 out 180 days immediately following the accident (see, *Hasner v Budnik, supra*; *Chinnici v Brown*, 295 AD2d 445, 744 NYS2d 186 [2002]). Moreover, the affidavits submitted by plaintiff’s neurologist and chiropractor, dated December 15, 2006 and January 3, 2007, respectively, in which both Dr. Chopra and Dr. Indelicato state that the plaintiff was diagnosed with cervical radiculopathy and traumatic left carpal tunnel syndrome, however, their opinions were based on examinations that were conducted almost five years before the date of their affidavits and have no probative value in the absence of any recent

Dolan v Caputo
Index No. 04-15580
Page No. 4

examinations (*McKinney v Lane*, 288 AD2d 274, 733 NYS2d 456 [2001], *Frier v Teague*, 288 AD2d 177, 732 NYS2d 428 [2001], *Letellier v Walker*, 222 AD2d 658, 635 NYS2d 682 [1995]). In addition, the Magnetic Resonance Imaging ("MRI") procedures performed on plaintiff on September 6, 2001, approximately two months after the subject accident, revealed that there were no abnormalities, the vertebral bodies were normal in height and alignment and there was no evidence of disc herniation or significant central spinal stenosis. Under these circumstances, plaintiff has failed to make a sufficient showing to defeat defendant's motion for summary judgment on the 90/180 claim (*Uddin v Cooper*; AD3d __, __ NYS2d __, 2006 WL2291134 [1 Dept Nov 21, 2006]; *Pommells v Perez, supra*; *Licari v Elliot, supra*; compare, *Van Norden-Lipo v Hamilton*, 294 AD2d 749, 742 NYS2d 173 [2002], *Monk v Dupuis*, 287 AD2d 187, 734 NYS2d 684 [2001]).

Accordingly, defendant's motion for summary judgment is granted.

Dated: APR 19 2007



J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION