Phong Ngo v Jiuanelli
2007 NY Slip Op 31082(U)
April 26, 2007
Supreme Court, Suffolk County
Docket Number: 0015943/2004
Judge: Robert W. Doyle
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[* 1]

SHORT FORM ORDER

INDEX No. 04-15943
CAL. No. 06-02505-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 11-30-06
ADJ. DATE 2-1-07
Mot. Seq. # 001 - MD

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PHONG NGO,

Plaintiff,

- against -

DEBORAH A. JIUANELLI,

Defendant.

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Upon the following papers numbered 1 to 19 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13; Notice of Cross Motion and supporting papers ______; Answering Affidavits and supporting papers 14 - 17; Replying Affidavits and supporting papers 18 - 19; Other ___________; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED this motion by defendant for summary judgment dismissing the complaint is denied.

This action arose from a vehicular accident, occurring on October 30, 2003 in which the plaintiff allegedly sustained serious personal injuries. The defendant moves for summary judgment dismissing the complaint pursuant to Insurance Law §5102(d). The plaintiff opposes the motion and defendant has submitted a reply affirmation in rebuttal to that opposition.

Under the Insurance Law " '[s]erious injury' means 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" (Insurance Law §5102[d]).

[* 2]

In the context of the plaintiff's claims, the term "significant," as it appears in the statute, has been defined as "something more than a minor limitation of use" (***Licari v Elliott,*** 57 NY2d 230, 455 NYS2d 570 [1982]). For this purpose, the plaintiff must demonstrate not only the extent or degree of the limitation but also its duration (***Beckett v Conte,*** 176 AD2d 774, 575 NYS2d 102 [1991], app. den. 79 NY2d 753, 581 NYS2d 281). The duration of the injury must be more than "fleeting" (***Partlow v Meehan,*** 155 AD2d 647, 548 NYS2d 239 [1989]). The term "consequential" means important or significant (***Kordana v Pomellito,*** 121 AD2d 783, 503 NYS2d 198 [1986], app. dis. 68 NY2d 848, 508 NYS2d 425). A "permanent loss" of use of a body organ, member, function or system must be total (***Oberly v Bangs Ambulance, Inc.,*** 96 NY2d 295, 727 NYS2d 378 [2001]). In order to prove the extent or degree of physical limitation, an expert can designate a numeric percentage of a plaintiff's loss of range of motion or give a "qualitative assessment of a plaintiff's condition...provided that the evaluation has 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 Sys.,*** 98 NY2d 345, 746 NYS2d 865, 868 [2002]; rearg. den. ***Manzano v O'Neil,*** 98 NY2d 728, 749 NYS2d 478).

On a motion for summary judgment to dismiss a complaint for failure to set forth a prima facie case of serious injury as defined by Insurance Law §5102(d), 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 the defendant has met the burden, the plaintiff must then, by competent proof, establish a *prima facie* case that such serious injury exists (***DeAngelo v Fidel Corp. Services, Inc.,*** 171 AD2d 588, 567 NYS2d 454, 455 [1991]). 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 non-moving party, here the plaintiff (***Cammarere v Villanova,*** 166 AD2d 760, 562 NYS2d 808, 810 [1990]).

The defendant submits in support of her motion, inter alia, the affirmation of her attorney, the complaint and verified answer, the verified bill of particulars, the plaintiff's deposition testimony of February 23, 2005, an unsworn x-ray report of the plaintiff's cervical and thoracic spine dated November 10, 2003, the unsworn reports of MRIs taken of the plaintiff's cervical and thoracic spines dated December 3, 2003 and December 4, 2003, respectively, the records of the plaintiff's physical therapy treatments, the sworn report of Dr. Stephen G. Zolan (Dr. Zolan) dated February 6, 2004 who performed an independent medical examination of the plaintiff and the affirmed report of the defendant's expert, Dr. Michael Brooks (Dr. Brooks).[1] The plaintiff's physical therapy records cannot be considered as competent evidence on the motion (***Tornatore v Haggerty,*** 307 AD2d 522, 763 NYS2d 344 [2003]) and are inadmissible as being unsigned and/or undated and/or illegible (***Tornatore v Haggerty***, supra; ***Wadi v Tepedino,*** 242 AD2d 327, 661 NYS2d 260 [1997]; ***Pagan v Gondola Cab Corp.,*** 235 AD2d 251, 652 NYS2d 277 [1997]). The plaintiff alleges in his complaint that the subject accident occurred on October 30, 2002[2] and that he sustained serious and permanent injuries and economic loss greater than basic economic loss as a result of the accident.

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[1] Although Dr. Brook's affirmation is undated, he indicated in his affirmation that his examination of the plaintiff occurred on October 6, 2005 and a time stamp on the affirmation indicates that it was received by defendant's counsel on October 17, 2005.

[2] The correct date of the accident appears to be October 30, 2003 (*see*, paragraph one of defendant's Exhibit C and page 15 of Exhibit D).

[* 3]

The plaintiff avers in his bill of particulars that he sustained as a result of the accident, inter alia, neck and back pain, persistent torticollis[3], limited range of motion in his back and muscle spasms in his back and neck. The plaintiff claims that as a result of these injuries he was, and still is, prevented from doing his normal daily activities including attending to his occupational duties. The plaintiff alleges that after the accident, although he was not admitted at the hospital, he was confined to bed for approximately one month and to his home for approximately four months and he has been unable to work at his former occupations as a restaurant chef and landscaper. He is a shareholder of Broadview Gardens East Hampton, Inc. He has lost at least $67,700 in earnings at the restaurant and has not yet computed the lost income and profit from his inability to work as a landscaper. The plaintiff further alleges that he has sustained various medical and hospital related expenses. At the time of the accident he was not a student and he is not asserting a property damage claim. The plaintiff also avers that as a result of the accident he sustained economic loss in excess of basic economic loss and personal injuries in the serious injury category of non-permanent injury. The court construes from the allegations in the complaint and bill of particulars that the plaintiff is also claiming the serious injury category of significant limitation.[4]

The plaintiff testified in his deposition on February 23, 2005 that at the time of his accident he was employed as a line chef at the American Bistro (Bistro) restaurant. His duties there required him to "prep" the food. He earned $1000 to $1300 per week and worked five days each week including weekends. On weekends he worked at the Bistro from 9AM to about 11PM and on weekdays he worked from 5PM to 11PM because he worked during the day as a landscaper. He also drew a salary from a corporation, Broadview Gardens (Broadview), which he co-owned with another person. Prior to the accident he earned approximately $1000 per week at Broadview which was a landscaping business. He did landscaping almost his entire life and prior to the accident he was doing it all year except for the winter season which was from November to Mid-March. He was home and out of work all winter and was "let go" by the Bistro which eventually was sold sometime in January or February of 2004. As a result of the accident he is claiming lost wages but did not yet know the amount claimed.

The plaintiff also testified that after the accident he drove to the Bistro and then home. The next morning he had pain and stiffness in his upper back. He then sought treatment from Dr. Kerr at the Amagansett walk-in clinic. Dr. Kerr prescribed anti-inflammatory and pain-killing medications. Approximately one week later he sought treatment at another walk-in clinic in East Hampton where x-rays of his body from his head to his torso were ordered. He went to the East Hampton walk-in clinic three or four times. The East Hampton clinic ordered MRIs of his upper body and prescribed physical therapy. After the accident he did not wear a neck brace. He had 18 weeks of physical therapy after which he received no further treatment because he had no medical insurance and his no-fault benefits ran

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[3] The Court takes judicial notice that "torticollis", which is sometimes referred to as wryneck, is defined as a stiff neck "caused by spasmodic contraction of neck muscles drawing the head to one side with [the] chin pointing to the other side" (Taber's Cyclopedic Medical Dictionary, Tenth Edition, page T-36 [bracketed material added). It is also noted that the observation of spasms is considered objective medical evidence of a serious injury (***Toure v Avis Rent A Car Sys.,*** supra).

[4] Although the plaintiff did claim in the complaint that he sustained permanent injuries, he claimed in the bill of particulars that "At present it is impossible to determine the *permanent nature* and consequences of the injuries sustained as a result of this accident" (Defendant's Exhibit C, paragraph 9). Since it does not appear that the bill of particulars was amended, the court was constrained from construing the plaintiff's allegations as including the serious injury categories involving permanent injury.

out. He also incurred out of pocket expenses for medications and treatment by doctors after his no-fault benefits ran out.

The plaintiff further testified that he can no longer do heavy lifting because of the pain in his upper body. His previous job as a landscaper involved digging. Since the accident he has not worked as a chef because he could not stand for more than a couple hours at one time. Finally, the plaintiff testified that he has not taken any other jobs and was not working as landscaper because it was winter.

An x-ray report of the plaintiff's cervical and thoracic spine, dated November 10, 2003, indicated that there was a slight reversal of the normal cervical lordosis centered at C3-C4 and no vertebral collapse in either spinal area. The MRI report of the plaintiff's thoracic spine, dated December 4, 2003 contained a Clinical Indication of pain and persistent torticollis and left sided radiculopathy. The Findings section of the report indicated that the thoracic spinal cord appeared normal, the thoracic vertebrae were intact and that there was no disc herniation or central canal stenosis. The Impression section of the report indicated a negative MRI of the thoracic spine. The MRI report of the plaintiff's cervical spine, dated December 3, 2003, indicates a history of neck pain and persistent torticollis. The MRI report also revealed the presence of minimal disc bulges at C4-C5 and C5-C6. The report further indicated that there was no cord compression, central canal stenosis or focal disc herniation.

Dr. Zolan, an osteopath, states in his report dated February 6, 2004 that he performed an orthopedic examination of the plaintiff on the same date. Dr. Zolan indicated that the plaintiff complained of upper back and neck pain. He found on the examination that the plaintiff exhibited a normal gait, that there was a normal cervical lordosis, that there was no palpable or visible spasm, that there was no deficit of motor, sensory or reflex function in the upper extremities and that there was no restriction of movement. Dr. Zolan also found no spasm or tenderness in the thoracic spine. He further noted that the plaintiff's injuries were causally related to the accident. Dr. Zolan's diagnosis was theracocervical sprain which had resolved. He concluded that the plaintiff needed no further orthopedic or physiotherapeutic treatment, that there was no objective evidence of orthopedic disability and that the plaintiff was able to perform all activities of work and daily living without restriction.

Dr. Brooks, an orthopedic surgeon, stated in his report that he examined the plaintiff on October 6, 2005. The plaintiff complained that he continued to have constant pressure between the shoulder blades and spasms. The plaintiff also informed him that as a result of the accident he lost his job but was working as a supervisor in his own landscaping company. Dr. Brooks, upon reviewing the x-ray and MRI films of November 10, December 3 and December 4, 2003, respectively, found them to be "not remarkable."

Dr Brooks observed upon his physical examination that the plaintiff walked with a normal gait and stood relatively erect, that a visual examination of the spine did not reveal abnormal spinal curvature or scoliosis, that in the erect position the plaintiff was able to stand and walk on heels and tip-toes and that the plaintiff did not have difficulty getting on or off the examining table. While Dr. Brook's visual examination of the cervical spine was "unremarkable", he also found that the voluntary range of motion of the cervical spine "was 60% of normal in extension, forward flexion, left and right rotation without muscle spasm palpable" (Notice of Motion, Exhibit G). While Dr. Brook's visual examination of the dorsal/lumbosacral spine was also "unremarkable" and palpation of the dorsal and lumbosacral paraspinal musculature did not reveal muscle spasm, he found that the voluntary range of motion of the lumbosacral

spine was "60% of normal in forward flexion, extension, left and right side bending" (Ibid.). Dr Brooks' examination of the upper extremities showed that voluntary shoulder abduction and forward flexion was 145 degrees, that motor power was at least 25% less than what it should have been and that there was no atrophy. Dr Brooks' examination of the lower extremities showed that in a sitting position the plaintiff could straight leg raise to 90 degrees, that in a supine position he could straight leg raise to 45 degrees at which point the plaintiff complained of pain, that there was a normal range of motion of the hips, that the plaintiff was able to arise from the supine position without difficulty and that repalpation of the spine did not reveal muscle spasm.

Although Dr. Brooks concluded that his orthopedic examination was "not remarkable" and there were no causally related objective findings to substantiate subjective complaints, he also noted that there were contradictory findings the most obvious of which being the difference between sitting straight leg raising and supine straight leg raising. Dr. Brooks further opined that the plaintiff was not precluded from performing his daily activities, that the plaintiff has "long since" made a recovery from the injuries sustained in the subject accident and that he has no causally related disability.

Initially, the Court notes that defendant's attorney states in paragraph four of his affirmation that defendant appeared in this action by service of an answer and amended answer dated August 25, 2004. Defendant has submitted to the Court only a copy of a "verified" answer dated August 18, 2004. Since an amended answer supersedes the original answer in the action and becomes the new pleading (***Felder v Wank,*** 227 AD2d 442, 642 NYS2d 695 [1996], app. den. 89 NY2d 806, 654 NYS2d 716), the defendant's failure to submit a copy of the amended answer compels denial of the motion pursuant to CPLR 3212[b] which requires submission of copies of the pleadings in support of a motion for summary judgment. However, even if this Court had considered the defendant's submissions on their merit, the motion would be denied.

With regard to the category of non-permanent injury, the plaintiff has alleged in his bill of particulars that after the accident he was confined to bed for approximately one month and confined to his home for approximately four months. He testified that after the accident he was out of work all winter and that he was not able to continue to work as either a restaurant chef or landscaper. While the Court is not unmindful that the plaintiff also testified that he ordinarily did not work as a landscaper in the winter season which ran from November to March, he also testified that prior to the accident his landscaping duties sometimes required him to work at the job site which could involve digging and that after the accident he could no longer do heavy lifting. The plaintiff told Dr. Brooks that he was currently working at Broadview as a supervisor. Although the plaintiff testified that he could not work as a chef at the Bistro because it was sold three to four months after the accident, he also testified that after the accident he did not seek other employment as a chef because he could not stand for more than a couple of hours.

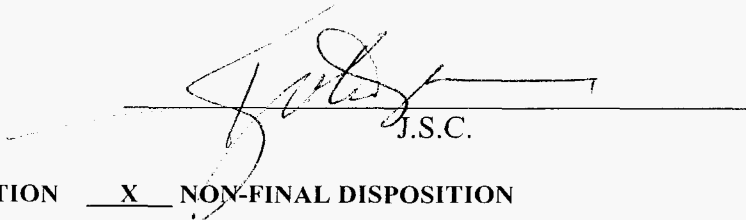
Nor does the medical proof adduced by the defendant demonstrate, prima facie, the absence of a medically determined injury or impairment which would have prevented the plaintiff from performing his usual and customary daily activities. Both of the MRI reports indicated the presence of persistent torticollis and the MRI of the cervical spine noted the existence of bulging discs at C4-C5 and C5-C6. While Dr. Zolan noted in his report of February 6, 2004 that the plaintiff was able to perform all the activities of daily living, he did not specifically address the plaintiff's inability to perform these functions during the period from the date of the accident to his examination and also related the plaintiff's injuries to the accident. Dr. Zolan's report was also deficient in that he failed to set forth the objective tests used

to support his observation that the plaintiff had no restrictions of movement and did not specifically address the presence of persistent torticollis (***Rodriguez v J & K Taxi, Inc.,*** 12 AD3d 434, 783 NYS2d 843 [2004]). The plaintiff also testified at his deposition that following the accident he received eighteen weeks of physical therapy and that the reasons these treatments were discontinued were because his no-fault benefits ran out and he had no medical insurance. Accordingly, the Court finds that the defendant failed to meet her prima facie burden with respect to the category of non-permanent injury (***Pijuan v Brito,*** 35 AD3d 829, 828 NYS2d 427 [2006]; ***Nembhard v Delatorre,*** 16 AD3d 390, 791 NYS2d 144 [2005]; ***Polizzi v Won Jun Choi,*** 264 AD2d 830, 695 NYS2d 402 [1999]).

With regard to the category of significant limitation, Dr. Brooks in his report found significant limitations in the plaintiff's range of motion. He noted that the plaintiff's range of motion in the cervical spine was only 60% of normal for extension, forward flexion and left and right rotation. He also found that range of motion in the dorsal/lumbosacral spine was only 60% of normal for forward flexion, extension and left and right side bending. Furthermore, in his examination of the plaintiff's upper extremities he observed that the plaintiff's motor power was 25% less than normal. His findings-that plaintiff's voluntary shoulder abduction and forward flexion was at 145 degrees and that the plaintiff's straight leg raising was at 90 degrees and 45 degrees-were not compared to the normal range for these tests (***Iles v Jonat,*** 35 AD3d 537, 825 NYS2d 540 [2006]). Dr. Brooks, in determining that the plaintiff had a normal range of motion of the hips, failed to set forth the objective tests he relied on and to quantify the results (***Rodriguez v J & K Taxi,*** supra; ***Iles v Jonat,*** supra). In any event, although Dr Brooks noted the contradictory findings between the plaintiff's straight leg raising in the sitting position and in the supine position, he failed to adequately explain this anomaly. This proof is insufficient to demonstrate, prima facie, that the plaintiff did not sustain a serious injury in the significant limitation category (***Buchanan v Celis,*** NYS2d , 2007 N.Y. Slip Op. 02689 [N.Y. App. Div. 2d Dep't]; ***Bluth v Worldomni Fin. Corp.,*** NYS2d , 2007 N.Y. Slip Op. 02687 [N.Y. App. Div. 2d Dep't]; ***Kovalenko v General Elec. Capital Auto Lease, Inc.,*** 37 AD3d 664, 2007 N.Y. Slip Op. 01523).

Since the defendant failed to meet her prima facie burden with respect to the serious injury categories of non-permanent injury and significant limitation, the Court need not consider the sufficiency of the plaintiff's opposition (***D'Onofrio v Arsenault,*** 35 AD3d 646, 828 NYS2d 117 [2006]). Accordingly, defendant's motion for summary judgment dismissing the complaint is denied.

Dated: APR 2 6 2007



J.S.C.

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**