

Ryan v Waxenberg

2007 NY Slip Op 31084(U)

April 26, 2007

Supreme Court, Suffolk County

Docket Number: 0025847/2005

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 12-28-06
ADJ. DATE 1-11-07
Mot. Seq. # 001 - MD

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 :
 Plaintiff, :

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- against - :

WILLIAM WAXENBERG and LILLIAN :
WAXENBERG. :
 Defendants. :

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Upon the following papers numbered 1 to 21 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 13 - 18; Replying Affidavits and supporting papers 19 - 21; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that defendant Lillian Waxenberg’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.

This is an action to recover damages for serious injuries allegedly sustained by plaintiff as a result of a motor vehicle accident that occurred on Suffolk Court, at or near its intersection with Adams Avenue, Hauppauge, Town of Smithtown, New York on March 8, 2005. The accident allegedly happened when the vehicle leased and operated by defendant Lillian Waxenberg impacted the vehicle operated by the plaintiff. Defendant Lillian Waxenberg now moves for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a “serious injury” as defined in Insurance Law § 5102 (d). Plaintiff opposes this motion, and defendant has filed a reply.

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 Killhenny*, 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 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 [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 this motion, defendant submits, inter alia, the pleadings, plaintiff’s verified bill of particulars; plaintiff’s St. Catherine of Siena Medical Center emergency room, x-ray and CT scan records; the affirmed report of defendant’s examining radiologist, Elaine Gould, M.D.; the affirmed reports of defendant’s examining orthopedist, Anthony Spataro, M.D.; and plaintiff’s deposition testimony.

Plaintiff claims in his bill of particulars that he sustained a C6 spinous avulsion fracture and a permanent loss of use and motion of all affected body parts. He further claims that he was incapacitated from his employment from March 9, 2005 through to June 6, 2005, and that he was confined to his home from March 8, 2005 through to April 5, 2005, except for medical treatment. Additionally, plaintiff claims a loss of earnings of approximately \$17,009. The Court construes these allegations to mean that plaintiff claims a serious injury in the categories of a fracture, a permanent consequential limitation, and a non-permanent injury.

Plaintiff’s hospital emergency room records on the date of the accident show that he was complaining of headaches and neck pain due to a motor vehicle accident that day. The attending physician examined plaintiff and noted that there was midline tenderness at C5-6 as well as bilateral trapezius tenderness. The attending physician also noted that plaintiff’s gait was intact and that his muscular strength was “5/5” bilaterally. X-rays performed at the hospital that day show that there was no evidence of an acute fracture or subluxation, but that there was soft tissue calcification posterior to the spinal process of C5. Additionally, a CT scan performed at the hospital that day shows degenerative changes and no fractures or dislocations.

In her report dated June 27, 2006, Dr. Gould states that she performed an independent examination

of plaintiff's cervical CT scan studies dated March 8, 2005, and her findings include multi-level degenerative spondylosis with disc space narrowing; anterior and posterior ossific spurring; hypertrophy with selected levels of foraminal narrowing; degenerative changes of the facet joints; and some ossification in the area of the nuchal ligament posteriorly. While she observed no evidence of acute vertebral body compression deformities, she noted that the discal and other soft tissue pathology was limited on the CT scan and could be better accessed with an MRI study. Dr. Gould opined that these studies showed a significant preexisting degenerative condition without definitive evidence of an acute fracture.

In his report dated August 16, 2006, Dr. Spataro states that he performed an independent orthopedic examination of plaintiff on that date, and his findings include a negative Spurling's maneuver; a negative Tinel's sign at the wrists and elbows bilaterally; and a full range of motion of both upper extremities. He also noted that plaintiff's flexion, extension, right/left lateral flexion and right/left rotation were 30, 20, 40/40 and 60 degrees, with the normal ranges being 45, 45, 30-45/30-45 and 60/60 degrees. Dr. Spataro opined that plaintiff had sustained a cervical spine sprain. In addition, he concluded that plaintiff was not orthopedically disabled and that he was able to perform his normal employment duties on a full time basis without restrictions. In his other report dated November 15, 2006, Dr. Spataro states that he examined plaintiff's cervical CT scan studies dated March 8, 2005, and his findings include significant preexisting degenerative changes with no evidence of an acute vertebral compression or fracture. Dr. Spataro opined that plaintiff's subjective complaints of pain and stiffness in the neck were consistent with his preexisting degenerative condition.

Plaintiff testified to the effect that the accident happened while he was engaged in his normal work activities as a Town of Smithtown Highway Project Inspector. It had been snowing and he stopped his vehicle along the curb of Suffolk Court immediately prior to the accident. After the police arrived, he initially drove himself home but later went to the emergency room at St. Catherine of Siena Medical Center. At the emergency room, he was treated and then released the same day. He did not go to work the next day, and he continued to remain out-of-work and on a disability status for another 3 months. He was eventually reimbursed approximately \$17,000 as a worker's compensation award for his loss of earnings. When he returned to work, he resumed his normal activities on a full time basis. At present, he limits his driving and golf activities, but there are no other activities that he is unable to perform as a result of the accident.

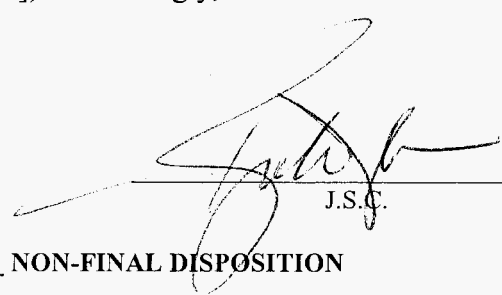
By their submission, defendant made a prima facie showing that plaintiff did not sustain a serious injury (see, *Wright v Peralta*, 26 AD3d 489, 809 NYS2d 465 [2d Dept 2006]; *Farozes v Kamran*, 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]; *Teodoro v Conway Transp. Serv.*, 19 AD3d 479, 798 NYS2d 466 [2d Dept 2005]; *Gousgoulas v Melendez*, 10 AD3d 674, 782 NYS2d 103 [2d Dept 2004]). While defendant's examining orthopedist found that plaintiff had some limitations in his cervical ranges of motion, he attributed these to plaintiff's preexisting degenerative condition. Similarly, defendant's examining radiologist opined, based upon his review of plaintiff's cervical CT scan studies, that he had a significant preexisting degenerative condition of the cervical spine. Moreover, both of defendant's experts opined after their review of plaintiff's cervical CT scan studies, that he did not sustain a vertebral compression or fracture (*c.f.*, *Smolyar v Krongauz*, 2 AD3d 518, 767 NYS2d 873 [2d Dept 2003]). Furthermore, defendant's remaining evidence, including plaintiff's hospital records and his deposition testimony, show that he did not sustain a serious injury. As defendant met her burden as to all categories of serious injury alleged, the Court turns to plaintiff's proffer (see, *Franchini v Palmieri*, 1 NY3d 536, 775 NYS2d 232 [2003]; *Dongelewic v Marcus*, 6 AD3d 943, 774 NYS2d 841 [3d Dept 2004]).

In opposition to the motion, plaintiff submits, among other things, the two unsworn reports of plaintiff's treating orthopedist, Marc Chernoff, M.D., and Dr. Chernoff's personal affirmation. Initially, Dr. Chernoff's unsworn reports are admissible and have been considered as they were submitted by the defendant in support of the motion (see, *Elder v Stokes*, 35 AD3d 799, 828 NYS2d 138 [2d Dept 2006]; *Kearse v NY City Transit Auth.*, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]; *Ayzen v Melendez*, 299 AD2d 381, 749 NYS2d 445 [2d Dept 2002]).

In his report dated March 18, 2005, Dr. Chernoff states that he performed an orthopedic examination of plaintiff on that date and his findings include positive discrete tenderness over the C6 spinous process. He also states that he reviewed plaintiff's hospital x-rays and CT scans, and his findings in this regard include some calcification in the soft tissues adjacent to C5, as well as some calcification posteriorly in the spinous process. He opined that plaintiff had sustained an acute C6 spinous process avulsion fracture. At that time, he recommended that plaintiff remain in a soft collar and out of work for approximately six weeks. During his May 6, 2005 visit, Dr. Chernoff noted that plaintiff was able to perform cervical flexion to within one-half inch of his chest, but that his lateral rotation was restricted bilaterally. He noted that this visit was in connection with plaintiff's C6 spinous process fracture and recommended that plaintiff undergo physical therapy three times per week for six weeks. In his personal affirmation, Dr. Chernoff avers that he personally reviewed plaintiff's x-rays taken at St. Catherine's hospital during plaintiff's March 18, 2005 visit, and he opines that they showed that he had sustained an acute C6 spinous process avulsion fracture as a result of the accident. Dr. Chernoff also avers that he routinely reviews and interprets x-ray films in the course of treating his patients.

By his submissions, plaintiff has raised a triable issue of fact that he sustained a "serious injury" in the category of a fracture (see, *Keevins v Drobbin*, 303 AD2d 463, 758 NYS2d 76 [2d Dept 2003]). Dr. Chernoff's reports and personal affirmation, which include findings of an acute C6 spinous process avulsion fracture, raise a triable issue of fact as to whether the subject accident caused plaintiff to sustain a fracture (see, *Keevins v Drobbin*, *supra*; see also, *Bebry v Farkas-Galindez*, 276 AD2d 656, 714 NYS2d 734 [2d Dept 2000]). Moreover, the contradictory findings of defendant's and plaintiff's experts concerning whether he sustained a fracture raise issues of credibility that cannot be resolved on this motion (see, *Ferrante v American Lung Assoc.*, 90 NY2d 623, 665 NYS2d 25 [1997]). Accordingly, defendant's motion for summary judgment is denied.

Dated: APR 26 2007



J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION