Sapienza v Ruggiero
2007 NY Slip Op 31495(U)
May 31, 2007
Supreme Court, Suffolk County
Docket Number: 0021766/2005
Judge: Robert W. Doyle
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SHORT FORM ORDER

INDEX No. 05-21766
CAL. No. 06-02946-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 2-7-07
ADJ. DATE 4-20-07
Mot. Seq. # 004 - MG; CASEDISP

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FRANK J. SAPIENZA, III,

Plaintiff,

- against -

DEBRA A. RUGGIERO a/k/a DEBRA A. BELTZ and RAFAEL AYALA,

Defendants.
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Upon the following papers numbered 1 to 33 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 17 ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 18 - 30 ; Replying Affidavits and supporting papers 31 - 33 ; Other___~~; and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by the defendant Ruggiero/Beltz 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 granted.

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 Sunrise Highway at or near Exit 51 in the Town of Islip, New York on January 2, 2004. Plaintiff alleges that his vehicle was struck from behind by a vehicle owned and operated by defendant Debra A. Ruggiero also known as Debra A. Beltz, causing plaintiff's vehicle to strike the rear of defendant Rafael Ayala's vehicle. By prior order dated May 18, 2006 (Molia, J.), plaintiff was granted, inter alia, partial summary judgment against defendant Ruggiero/Beltz on the issue of liability. Defendant Ruggiero/Beltz 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 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 this motion, defendant Ruggiero/Beltz submits, inter alia, the pleadings; the plaintiff's verified bill of particulars; the unaffirmed report of plaintiff's treating orthopedist, Michael Shapiro, M.D.; the affirmed report of defendant's examining orthopedist, Michael J. Katz, M.D.; and a transcript of the plaintiff's deposition testimony. Plaintiff claims in his bill of particulars that he sustained cervical, thoracic and lumbar spine sprains; cervical, thoracic and lumbar myofascitis; cervicalgia; and a central disc herniation at L5-S1. Additionally, plaintiff claims that he was unable to participate in physical education after the accident, and that he was unable to attend school on a full-time basis from the date of the accident through to February 6, 2004. Plaintiff further claims that he was incapacitated from his employment for approximately three months after the accident. Lastly, plaintiff claims that he sustained a serious injury in the categories of a permanent loss of use, a permanent consequential limitation, a significant limitation and a non-permanent injury.

In his report dated June 10, 2004, Dr. Shapiro states that he performed a follow-up examination of plaintiff on that date, and his findings include mild dysrhythmia with flexion and extension of the

lumbar spine; tenderness to palpation but no spasm about the lumbar spine; motor power that was "5/5" in all distributions; DTR's that were intact, equal and symmetrical bilaterally; and an intact sensory system. Dr. Shapiro opined that plaintiff had a cervical strain and that a herniated lumbar disc was contributing to his lower back pain, but that he was capable of returning to full activities.

In his report dated September 19, 2006, Dr. Katz states that he performed an independent orthopedic examination of plaintiff on that date, and his findings include reflexes that were "2+" and symmetrical; intact sensation; normal gait; and a negative straight leg raising test. He also observed that there was a normal range of motion of the cervical and thoracic spine with no paravertebral spasm. Dr. Katz opined that plaintiff had sustained strains of the cervical and thoracic spine which had resolved without any permanence. Dr. Katz also concluded that plaintiff was capable of performing the activities of his daily living.

Plaintiff testified at his deposition to the effect that he refused medical treatment and declined an ambulance at the scene. The next day, he went to the emergency room at Brookhaven Memorial Hospital. On January 6, 2004, he saw his primary care physician, Dr. Singh, who gave him a referral for an MRI. He was referred to doctors Orlin and Cohen and he saw them approximately five times, the last time being January 2004. Plaintiff also underwent a course of physical therapy at Spagnoli Physical Therapy two to three times per week for a period of about four months, and for the last time in June 2004. In addition, he began chiropractic treatment in June 2004 for approximately one month, but has not had any treatment since that date. Plaintiff was in the twelfth grade at the time of the accident, and he subsequently graduated in 2004 even though he had missed some classes. While in the eleventh grade, he sought chiropractic treatment for a neck injury that he sustained during a wrestling tournament. Plaintiff further testified that he also re-injured his back once or twice while undergoing rigorous exercises at physical therapy.

By their submissions, defendant has 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]; ***Teodoru v Conway Transp. Svc.***, 19 AD3d 479, 798 NYS2d 466 [2d Dept 2005]; ***Willis v New York City Trans. Auth.***, 14 AD3d 696, 789 NYS2d 223 [2d Dept 2005]; ***Grant v Heli Trucker, Inc.***, 294 AD2d 538, 742 NYS2d 874 [2d Dept 2002]). Plaintiff's treating orthopedist found, upon his last examination of plaintiff, that there was no palpable spasm about the lumbar spine. Defendant's examining orthopedist found that plaintiff had a full range of motion of the cervical and thoracic spine with no paravertebral spasm, as well as a negative straight leg raising test. Defendants' remaining evidence, including plaintiff's deposition testimony, also supports a finding that he did not sustain a serious injury. As defendants have met their burden as to all categories of serious injury alleged by plaintiff, 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 affirmed report of his treating radiologist, Michael Streiter, M.D.; the two affirmed reports of his treating orthopedist, Michael Shapiro, M.D.; the affirmed report of his treating neurologist, David Khanan, M.D.; the personal affidavit of his treating chiropractor, Walter Alexovitz, M.D.; and his own personal affidavit. In his report dated January 7, 2004, Dr. Streiter states that he performed MRI studies of plaintiff's lumbar spine on that date, and his findings include slight narrowing at L5-S1; a small to moderate central disc

herniation at L5-S1; no significant disc herniations at other levels; and no spinal stenosis. Dr. Shapiro opined that these studies showed slight degenerative narrowing as well as a central disc herniation.

In his report dated March 25, 2004, Dr. Shapiro states that he performed an orthopedic examination of plaintiff on that date, and his findings include an intact sensory system; power that was "5/5" in all distributions; and palpable tenderness of the lumbar spine without spasm. He opined that plaintiff had lower back pain due his motor vehicle accident. In his report dated April 22, 2004, Dr. Shapiro states that he performed an orthopedic re-examination of plaintiff on that date, and his findings include dysrhythmia with cervical flexion and extension as well as some spasm. He also observed, however, that motor power was "5/5" in all distributions and that plaintiff's sensory system was intact. Dr. Shapiro opined that plaintiff had sustained a cervical sprain in addition to his low back pain.

In his report dated October 24, 2005, Dr. Khanan states that plaintiff was examined at his office on May 23, 2005, and most recently on September 14, 2005. During his September 2005 exam, Dr. Khanan noted that plaintiff complained of pain radiating into his lower extremities with numbness and tingling sensations in both of his feet. He also noted that plaintiff's muscle strength was "4/5" in both hip flexion and extension, but that his gait was normal and that there was no muscle atrophy. Additionally, Dr. Khanan observed that plaintiff's cervical flexion, extension, right/left lateral flexion and left/right rotation were 28, 38, 28/29 and 61/62 degrees, compared with the normal ranges of 50, 60, 45/45 and 80/80 degrees. Dr. Khanan further noted that plaintiff's lumbar flexion, extension and left/right lateral rotation were 94, 13 and 25/32 degrees, compared with the normal ranges of 60, 25 and 25/25 degrees. Dr. Khanan opined that plaintiff had sustained a causally related central disc herniation and a lower back syndrome which will reduce his ability to perform household duties by 20 percent. He also concluded that the accident caused a permanent and consequential limitation of plaintiff's range of cervical and lumbar spine motion.

In his affidavit, Dr. Alexovitz states that performed an initial examination of plaintiff on January 9, 2004, and his findings include spasm upon palpation of the cervical and lumbar spine; a positive cervical distraction test; and a positive straight leg raising test at 25 degrees, with normal being 90 degrees. According to Dr. Alexovitz, x-rays taken by him on that date showed multiple cervical and lumbar subluxations. He also opined that plaintiff had sustained a lumbar disc syndrome, lumbar radiculitis as well as sprains/strains of the cervical, thoracic and lumbar spine. On January 21, 2004, Dr. Alexovitz determined that plaintiff was totally disabled and he "anticipated" that plaintiff would be out of work for three months. Plaintiff continued his chiropractic treatment until January 21, 2004, at which time he opted to undergo a regiment of physical therapy, however, he resumed treating with Dr. Alexovitz on June 28, 2004. Dr. Alexovitz states that he subsequently re-examined plaintiff on November 22, 2004, and his findings include restrictions in plaintiff's ranges of lumbar and cervical motion; tenderness and spasm in the muscles of the cervical and lumbar spine region; and a positive straight leg raise test. On June 28, 2004, plaintiff treated with his office twice weekly through to August 2004, and then twice monthly through to July 2005. Dr. Alexovitz most recently saw plaintiff on August 16, 2006, at which time he determined that plaintiff had reached maximum medical improvement as there was nothing more he could do to help improve plaintiff's condition. Dr. Alexovitz opined that plaintiff's cervical and lumbar areas have been permanently weakened by the subject accident and that he is subject to further exacerbations. He also concluded that since plaintiff did not have lumbar symptoms prior to the accident, the accident exacerbated his pre-existing condition.

In his affidavit, plaintiff avers that he could not participate in his high school gym classes for approximately six months as a result of the accident. He also had difficulty with his school attendance as his injuries made it more difficult for him to get to class in a timely manner. Furthermore, he was unable to work for about three months. When he returned to his prior job in April 2004, he was restricted to a cashier's position due to his back pain. Moreover, he was unable to engage in his regular program of weight-lifting from the date of the accident until December 2005. Plaintiff injured his neck and left shoulder by twisting the wrong way during a wrestling match in January 2003. He received chiropractic treatment for these prior injuries and for his symptoms of low back pain through to December 2003. He last consulted with his physicians in or about June 2004, at which time he began a course of stretching and strengthening exercises. In April 2005, he consulted with medical staff at Health Care Focus Medical, P.C. but stopped going because he was not able to tolerate the needle EMG/NCV testing and because his no-fault benefits had been denied. Lastly, plaintiff avers that he continued treating with Dr. Alexovits through to July 2005, and that he returned to see him in August 2006.

Plaintiff has provided insufficient medical proof to raise an issue of fact that he sustained a serious injury under the no-fault law (*see*, ***Burke v Galli***, 242 AD2d 595, 664 NYS2d 742 [2d Dept 1997], *lv denied* 91 NY2d 806, 669 NYS2d 1 [1998]; ***Picott v Lewis***, 26 AD3d 319, 809 NYS2d 541 [2d Dept 2006]). Initially, it is noted that plaintiff failed to submit sufficient medical proof addressing his prior wrestling-related spinal injuries and his condition relative to thereto (*see*, ***Luckey v Bauch***, 17 AD3d 411, 792 NYS2d 624 [2d Dept 2005]; ***Grant v Fofana***, 10 AD3d 446, 781 NYS2d 160 [2d Dept 2004]). In this regard, Dr. Khanan failed to indicate an awareness that plaintiff had previously injured his neck and back, therefore, any conclusion on his part that plaintiff's claimed injuries were causally related to the subject incident was mere speculation (*see*, ***D'Alba v Choi***, 33 AD3d 650, 823 NYS2d 423 [2d Dept 2006]). Doctors Khanan and Alexovitz also failed to adequately address the pre-existing degenerative condition of his lumbar spine as diagnosed by his own treating radiologist only five days after the accident, as they did not provide a sufficient foundation or objective medical basis supporting the conclusions which they reached, namely, that the alleged conditions were causally related to or exacerbated by the accident (*see*, ***Knoll v Seafood Express***, 5 NY3d 817, 803 NYS2d 25 [2005]; ***Gomez v Epstein***, 29 AD3d 950, 818 NYS2d 101 [2d Dept, 2006]; ***Flores v Leslie***, 27 AD3d 220, 810 NYS2d 464 [1st Dept 2006]). Additionally, the reports of plaintiff's treating orthopedist tend to show that plaintiff's injuries, which consisted of a cervical sprain/strain and low back pain, were mild, minor or slight (*see*, ***Gonzalez v Green***, 24 AD3d 939, 805 NYS2d 450 [3d Dept 2005]; ***Moore v County of Suffolk***, 6 AD3d 408, 774 NYS2d 375 [2d Dept 2004]). In any event, plaintiff's approximate one-year gap in treatment was, in essence, a cessation of treatment which is not adequately addressed by his medical experts (*see*, ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]). Moreover, plaintiff's subjective complaints of pain to his health care providers do not constitute a significant injury within the meaning of the statute (*see*, ***Feliz v New York City Tr. Auth.***, 32 AD3d 527, 819 NYS2d 835 [2d Dept 2006]; ***Ali v Vasquez***, 19 AD3d 520, 797 NYS2d 528 [2d Dept 2005]).

Additionally, the proof submitted by plaintiff is insufficient to raise a triable issue of fact that he sustained a medically determined injury or impairment rendering him unable to substantially perform all

of his usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident (*see*, ***Bycinthe v Combos***, 29 AD3d 845, 815 NYS2d 693 [2d Dept 2006]; ***Magarin v Kropf***, 24 AD3d 733, 807 NYS2d 398 [2d Dept 2005]; ***Gjelaj v Ludde***, 281 AD2d 211, 721 NYS2d 643 [1st Dept 2001]). Although plaintiff claims that he missed gym classes for six months and that he was unable to regularly attend school for about one month, the record lacks objective proof of any substantial curtailment of his activities within the relevant time period after the accident (*see*, ***Nelson v Distant***, 308 AD2d 338, 764 NYS2d 258 [1st Dept 2003]; ***Keena v Trappen***, 294 AD2d 405, 742 NYS2d 344 [2d Dept 2002]).

Accordingly, this motion for summary judgment is granted and, upon searching the record, the complaint is dismissed in its entirety as to all defendants in this action (CPLR 3212 [b]).

Dated: MAY 3 1 2007

J.S.C.

X FINAL DISPOSITION ____ **NON-FINAL DISPOSITION**