

Fortunato v Marino

2007 NY Slip Op 31589(U)

June 9, 2007

Supreme Court, Richmond County

Docket Number: 0103240/2005

Judge: Philip G. Minardo

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

-----X **DCM Part 6**
RALPH FORTUNATO, JR.,

Plaintiff,

Present

-against-

HON. PHILIP G. MINARDO

DECISION and ORDER

ROBERT J. MARINO, SR.,

Defendant.

**Index No. 103240-05
Motion No. 3952-003**

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The following papers numbered 1 to 3 were used on this motion the 26th day of April, 2007:

	Papers Numbered
Notice of Motion for Summary Judgment (Affirmation in Support).....	1
Affirmation in Opposition.....	2
Reply Affirmation.....	3

Upon the foregoing papers, defendant’s motion for summary judgment dismissing the complaint on the ground that plaintiff’s injuries fail to meet the statutory threshold of “serious injury” as defined in Insurance Law §5102(d) is granted, and the complaint is dismissed.

This matter arises out of a two vehicle accident which occurred on November 11, 2002, on Hylan Boulevard near the intersection of Poillon Avenue, in Staten Island, New York. Plaintiff, the operator of one of the vehicles, claims to have sustained “serious” personal injuries through “one or more of the

following”: “death; dismemberment; significant disfigurement; a fracture; 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’s usual [sic] 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” (Plaintiff’s June 6, 2006 Verified Bill of Particulars, para 9 [Defendant’s Exhibit C]). More particularly, plaintiff claims to have sustained, *inter alia*, a herniated disc at L5-S1, a left disc herniation at C4-C5, a central disc herniation at C5-C6, and a swollen right wrist requiring a cast (*id.*, para 9).

In support of his motion for summary judgment, defendant has submitted the August 14, 2006 affirmation of an orthopedist, Dr. Jay Nathan, who examined plaintiff and found “no evidence of orthopedic disability or permanency and [found plaintiff] able to work and perform activities of daily living without restriction” (*see* Defendant’s Exhibit D). Also submitted is the April 24, 2003 affirmation of an orthopedic surgeon, Dr. Joseph L. Paul, who concluded after his examination that “no further orthopedic intervention is indicated, and [that] any such treatment would be considered excessive” (*see* Defendant’s Exhibit F). Additionally, defendant attaches the sworn December 4, 2006 radiological report of Dr. Andrew W. Litt, who reviewed plaintiff’s December 5, 2003 MRI study of the cervical spine and found, *inter alia*, “mild degenerative change” related to the cervical spine. Dr. Litt ruled out “disc herniation and spinal cord compression” (*see* Defendant’s Exhibit G). Finally, defendant submits the purported “affirmation” of a chiropractor, Dr. Vincent F. Amato, dated April 24, 2003 (*see* Defendant’s Exhibit E)¹.

¹ The unsworn “affirmation” of Dr. Amato will not be considered since it was not subscribed before a notary or other authorized official (*see* Grasso v. Angerami, 79 NY2d 813, 814-815; Grossman v. Wright, 268 AD2d 79, 85). “CPLR 2106 does not provide that a chiropractor may affirm the truth of his statement with the same force as an affidavit” (Sanchez v. Romano, 292 AD2d 202, 203; *see also* Martin v. Schwartz, 308 AD2d 318).

In opposition, plaintiff argues that the injuries to his spine are “serious” within the meaning of Insurance Law §5102(d), and attaches his own March 19, 2007 affidavit in which he outlines, *inter alia*, his present complaints and the course of treatment which he has pursued (*see* Plaintiff’s Exhibit D). Plaintiff also attaches the March 19, 2007 affidavit of a chiropractor, Dr. William Bongiorno, who began treating plaintiff one year after the accident, and concludes, following a nearly three year hiatus in treatment, that plaintiff’s “multiple functional disabilities” are causally related to the subject accident (*see* Plaintiff’s Exhibit A). Also attached are the affidavits of two radiologists, H. Parekh, M.D., and David Rosenthal, M.D., each of whom attests that the MRIs taken (respectively) of plaintiff’s lumbar and cervical spines reveal herniated discs consistent with plaintiff’s verified bill of particulars (*see* Plaintiff’s Exhibits B, C)²

In the opinion of this Court, defendant has submitted sufficient evidence to demonstrate his right to judgment as a matter of law. Here, the affirmed medical reports of defendant’s orthopedists detailing the objective tests performed upon plaintiff, and demonstrating that he had full range of motion in the affected areas, supports their conclusion that plaintiff has recovered from any sprains or strains that he may have suffered in the collision. Moreover, the foregoing is consistent with the opinion set forth in the affirmation of the radiologist who reviewed plaintiff’s MRI films, i.e., that plaintiff did not sustain a disc injury as a result of the subject accident. Viewed together, these affirmations are clearly sufficient to satisfy defendant’s burden of establishing a *prima facie* case that plaintiff did not suffer a serious injury within the meaning of Insurance Law §5102(d) (*see* Nagbe v. Minigreen Hacking Group, 22 AD3d 326). Consequently, it is plaintiff who bears the burden of adducing sufficient admissible evidence of serious injury to raise a triable issue of fact (*see* Gaddy v. Eyler, 79 NY2d 955).

Plaintiff has failed to meet this burden. Neither the affidavit of plaintiff’s chiropractor, nor the

² Although the opposing papers also contain other unsigned and unsworn medical reports, the Court has declined to consider these inadmissible documents in reaching its determination.

affidavits of plaintiff's radiological experts are sufficient to establish a causal relationship between plaintiff's alleged injuries and the accident of November 11, 2002. In this regard, it is undisputed that plaintiff's initial chiropractic examination by Dr. Bongiorno was not contemporaneous with the accident, but took place nearly one year later. This lack of contemporaneous medical evidence renders Dr. Bongiorno's opinion as to causation speculative, at best (*see Jason v. Danar*, 1 AD3d 398; *Ifrach v. Neiman*, 306 AD2d 380; *Vaughan v. Baez*, 305 AD2d 101; *cf. Shinn v. Catanzaro*, 1 AD3d 195). Moreover, the reports of plaintiff's radiologists make no representations on causation, and limit themselves to the identification of alleged disc herniations. It is well settled that mere proof of a herniated or bulging disc is insufficient to establish the existence of a statutory serious injury in the absence of objective evidence of the extent and duration of the alleged physical limitations resulting therefrom (*Quagliarello v. Paladino*, __AD3d__, 2007 NY Slip Op 4276).

Considered in the light most favorable to the plaintiff, the evidence adduced is insufficient to raise a material issue of fact as to whether he sustained a serious injury as defined in Insurance Law §5102(d).

Accordingly, it is

ORDERED, that defendant's motion for summary judgment is granted, and the complaint is dismissed; and it is further

ORDERED, that the Clerk of the Court enter judgment accordingly.

E N T E R,

Dated: June 9, 2007

s/ Philip G. Minardo
J.S.C.