

King v Salinas

2007 NY Slip Op 31824(U)

June 14, 2007

Supreme Court, Suffolk County

Docket Number: 0010997/2003

Judge: Robert W. Doyle

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 4-5-07
ADJ. DATE 5-10-07
Mot. Seq. # 001 - MG CASEDISP

-----X			
ERNEST KING,	:	SURIS & ASSOCIATES, P.C.	
	:	Attorneys for Plaintiff	
	:	999 Walt Whitman Road, Suite 201	
	:	Melville, New York 11747	
	:		
- against -	:		
	:	BURRELL, REGENSTREICH & BOOKER, LLC	
SERGIO SALINAS,	:	Attorneys for Defendant	
	:	67 Wall Street, Twenty Second Floor	
	:	New York, New York 10005	
	:		
-----X			

Upon the following papers numbered 1 to 24 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 18; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 19 - 24; Replying Affidavits and supporting papers ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant for summary judgment dismissing the complaint against him 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 personal injuries allegedly sustained by plaintiff Ernest King when his vehicle collided with a vehicle owned and operated by defendant Sergio Salinas at the intersection of Flanders Road and Bayview Lane in the Town of Southampton, New York, on August 24, 2004.

By his bill of particulars, plaintiff alleges that, as a result of the subject accident, he sustained serious injuries including disc space narrowing at multi levels, most pronounced in C3-C4 through C5-C6; cervical, thoracic and lumbar spine sprain/strain; disc narrowing at L5-S1; prominent annulus at L3-L4, L4-L5 and L5-S1; lumbar disc displacement; chest wall and sternal pain, tenderness and contusions; abnormal myccardial perfusion findings; and spasm, tenderness and trigger points in the cervical, thoracic

and lumbar spine.¹ In addition, plaintiff claims that, following the subject accident, he was confined to bed for approximately one week and to home for approximately two weeks.

Defendant now moves for summary judgment in his favor dismissing the complaint against him on the ground that plaintiff has not sustained a serious injury as defined in Insurance Law § 5102 (d). In support, defendant submits, *inter alia*, the pleadings; a bill of particulars; the affirmed report dated July 24, 2006 of his examining neurologist, Dr. Richard Pearl; the affirmed report dated July 24, 2006 of his examining orthopedist, Dr. Joseph Stubel; the affirmed report dated July 24, 2006 of his examining cardiologist, Dr. Michael Matilsky, the unsworn MRI report dated March 1, 2005 of plaintiff's lumbar spine, based on the review of the MRI examinations performed on November 22, 2000.

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*, 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 Sys.*, 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 [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 [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 Eyley*, 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 [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 [1990]).

¹ Plaintiff does not allege in his complaint or bill of particulars any claim under the 90/180 category of serious injury, and never moved to amend his bill of particulars.

Here, defendant made a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) through the affirmed reports of his examining physicians and plaintiff's bill of particulars (*see, Thompson v Abbasi*, 15 AD3d 95, 788 NYS2d 48 [2005]). On July 24, 2006, approximately one year and eleven months after the subject accident, defendant's examining neurologist, Dr. Pearl, examined plaintiff, using certain orthopedic and neurological tests including Babinski sign, Romberg test, Tinel's sign and Straight Leg Raising test. All the test results were negative. Dr. Pearl reported his findings with respect to the various ranges of motion of plaintiff's cervical and lumbar spine and compared those findings to the normal ranges of motion. Dr. Pearl found that there was no tenderness or spasm in the cervical or lumbosacral spine and opined that plaintiff had no neurological disability related to the subject accident at the time of the examination (*see, Willis v New York City Tr. Auth.*, 14 AD3d 696, 789 NYS2d 223 [2005]; *compare, Christman v Cueva*, 6 AD3d 375, 773 NYS2d 903 [2004]). On July 24, 2006, defendant's examining orthopedist, Dr. Stubel, examined plaintiff, using certain orthopedic and neurological tests including Tinel's sign and Straight Leg Raising test. Dr. Stubel found that all the test results were negative and that there was no spasm or tenderness around plaintiff's cervical, thoracic and lumbar spine. Dr. Stubel reported his findings with respect to the various ranges of motion of plaintiff's cervical, thoracic and lumbar spine and compared those findings to the normal ranges of motion. Dr. Stubel opined that plaintiff had no disability or restrictions related to the subject accident at the time of the examination; that there was no need for further treatment; and that he was capable of performing his normal activities of daily living (*see, Willis v New York City Tr. Auth., supra*). On July 24, 2006, defendant's examining cardiologist, Dr. Matilsky, examined plaintiff and opined that plaintiff "exhibits no evidence of active ischemia or congestive heart failure. He manifests no evidence of cardiovascular disability nor does he manifest any cardiovascular symptoms referable to" the subject accident.

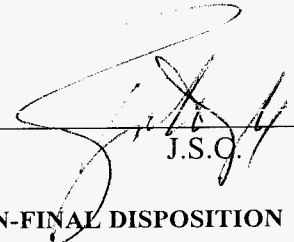
In opposition, plaintiff contends that he did sustain a serious injury within the meaning of Insurance Law § 5102 (d). In support, plaintiff submits, *inter alia*, his own affidavit; the medical record of Central Suffolk Hospital, Family Medical Center, Eastern Suffolk Cardiology, PC, Mark Jones, DC, and Long Island Diagnostic Imaging, including numerous reports, notes and test results; and the sworn affirmation dated May 2, 2007 of his treating chiropractor, Dr. Mark Jones, based on an examination of plaintiff on September 15, 2000, September 20, 2000, September 22, 2000, September 27, 2000, September 29, 2000, October 6, 2000, October 13, 2000, October 25, 2000, November 6, 2000, November 17, 2000, November 25, 2000, December 4, 2000, December 13, 2000, December 29, 2000, January 8, 2001, February 12, 2000, March 5, 2000, and March 10, 2001.

Plaintiff's treating chiropractor, Dr. Jones, had treated plaintiff for approximately six months after the subject accident. During the treatment, Dr. Jones administered certain orthopedic and neurological tests including Lasegue's test, Braggard's test, Millgram's test and Straight Leg Raising test. All the test results were positive. On September 15, 2000, approximately three weeks after the subject accident, Dr. Jones administered range of motion tests of plaintiff's lumbar spine and reported his findings with respect to the various ranges of motion of plaintiff's lumbar spine; 45 degrees forward flexion and 15 degrees backward extension. Nevertheless, Dr. Jones failed to specify the degree of range of motion in lateral bending of plaintiff's lumbar spine. He also failed to compare his findings to the normal ranges of motion (*see, Caracci v Miller*, 34 AD3d 515, 823 NYS2d 681 [2006]). Moreover, plaintiff failed to submit any medical evidence based on a recent examination in admissible form (*see, Oliva v Gross*, 29 AD3d 551, 816 NYS2d 110 [2006]; *Farozes v Kamran*, 22 AD3d 458, 802 NYS2d 706 [2005]).

King v Salinas
Index No. 03- 0997
Page No. 4

Under the circumstances, this Court notes that plaintiff failed to raise a triable issue of fact that he had sustained a "serious injury" under Insurance Law § 5102 (d) as a result of the subject accident. Thus, defendant's motion for summary judgment dismissing the complaint is granted.

Dated: JUN 14 2007



J.S.C.

 X FINAL DISPOSITION NON-FINAL DISPOSITION