

Soriano v Darrell

2007 NY Slip Op 31893(U)

June 25, 2007

Supreme Court, Suffolk County

Docket Number: 0015770/2004

Judge: Robert W. Doyle

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

PRESENT:

Hon ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 1-9-07
ADJ. DATE 3-30-07
Mot. Seq. # 001 - MG; CASEDISP

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JOSEPH A. SORIANO, :
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 Plaintiffs, :
 :
 :
 - against - :
 :
 TIMOTHY J. DARRELL and KAREN A. :
 ROACH, :
 :
 Defendants. :
-----X

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Upon the following papers numbered 1 to 71 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 51; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 52 - 69; Replying Affidavits and supporting papers 70 - 71; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendants, Timothy J. Darrell and Karen A. Roach (“Defendants”), for an order pursuant to CPLR 3212, granting them summary judgment dismissing the plaintiff’s complaint is granted.

Plaintiff, Joseph A Soriano, and defendant Darrell, on June 20, 2002, were involved in a motor vehicle accident on Old Nichols Road, at or near its intersection with Mumford Avenue, Ronkonkoma, Town of Islip, County of Suffolk, New York. Plaintiff was traveling north on Old Nichols Road and defendant Darrell was proceeding south on Old Nichols Road when defendant Darrell crossed over the solid double yellow lines into the plaintiff’s lane of travel. Defendant Darrell was the operator of the vehicle that he and defendant Roach owned. Subsequently, plaintiff brought an action to recover damages for injuries he allegedly sustained from the subject accident. Defendants Darrell and Roach have admitted liability for the subject accident’s happening.

Plaintiff’s injuries, as outlined in his bill of particulars, alleges that he sustained a distal flap tear of the tibial surface of the body of the left knee meniscus that required a partial medial meniscectomy,

chondromalacia patella, large fibrous medial plica impinging on the medial femoral condyle that required a resection of the medial plica and medial femoral condyle, loose cartilaginous bodies that required surgical removal a synovectomy, exacerbation and activation of medial compartment degenerative joint disease, exacerbation and activation of C4-C5 and C5-C6 disc herniations with severe foraminal narrowing, first degree burns to the left clavicle, multiple burns and abrasions to volar aspect of the left forearm with swelling, large hematoma and effusion to the right knee with prepatellar bursitis and extensive subcutaneous edema in prepatellar bursa region, left leg and shin abrasions, left elbow lateral epicondylitis, cervical sprain/strain with underlying spondylosis, swelling, tenderness, impairment of function of the skin, bones, muscles, cartilage, ligaments, tendons, joints and other tissues of the surrounding areas. Plaintiff also alleges that his lifestyle was severely altered and he suffers from periods of anxiety and stress.

Defendants now move for summary judgment on the basis that plaintiff has failed to sustain a serious injury within the meaning of Insurance Law § 5102 (d). Defendants also contend that plaintiff suffers from a degenerative condition that was pre-existing and is not causally related to the subject accident. Defendants, submit, the pleadings, copies of the deposition testimony of plaintiff, unsworn copies of plaintiff's medical records and the affirmed report of Michael J. Katz, M.D.

Plaintiff opposes the instant motion on the grounds that he continues to have significant pain, which has been objectively supported by examinations, MRIs and other diagnostic testing. Plaintiff also asserts that even though he did not begin experiencing pain to his left knee until several months after the accident, his left knee injury is causally related to the subject accident because there have not been any intervening events since the accident and the onset of the pain in plaintiff's left knee. Plaintiff, submits, the affirmed medical report of Stanley Cherney, MD, PC, plaintiff's MRI report, copies of plaintiff's medical records and plaintiff's affidavit.

On a motion for summary judgment where the proponent of the motion has presented a prima facie case that the plaintiff's claimed injury is not a "serious injury" by the statutory definition, the burden then shifts to the plaintiff to demonstrate that a "serious injury" was sustained by the plaintiff or that questions of fact exist as to whether the injury sustained was "serious" (*Martin v Schwartz*, 308 AD2d 318, 766 NYS2d 13 [2003]; *Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692 [1992]; *Lowe v Bennett*, 122 AD2d 728, 511 NYS2d 603 [1986]). A defendant seeking summary judgment based on lack of a serious injury, relying on the findings of the defendant's own witnesses, must submit those findings in admissible form, such as, affidavits and affirmations, and not unsworn reports, in order to demonstrate entitlement to judgment as a matter of law (*Pagano v Kingsbury, supra*). A defendant may also establish entitlement to summary judgment using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (*see, Fragale v Geiger*, 288 AD2d 431, 733 NYS2d 901 [2001]; *Vignola v Varrichio*, 243 AD2d 464, 662 NYS2d 831 [1997]; *Torres v Micheletti*, 208 AD2d 519, 616 NYS2d 1006 [1994]; *Pagano v Kingsbury, supra*). Once defendant has met this burden, plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard for "serious injury" under New York's No-Fault Insurance Law (*Tornabene v Pawlewski*, 305 AD2d 1025, 758 NYS2d 593 [2003]; *Dufel v Green*, 84 NY2d 795, 622 NYS2d 900 [1995]; *Pagano v Kingsbury, supra*).

Insurance Law § 5102 (d) defines a "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."

The purpose of New York State's No-Fault Insurance Law is to "assure prompt and full compensation for economic loss by curtailing costly and time-consuming court trial[s]" (*Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]), and requiring every case, even those with minor injuries, to be decided by a jury would defeat the statute's effectiveness (*Licari v Elliott, supra*). Therefore, the No-Fault Insurance law precludes the right of recovery for any "non-economic loss, except in the case of serious injury, or for basic economic loss" (*see*, Insurance Law § 5104 [a]; *Martin v Schwartz, supra*). Any injury not falling within the definition of "serious injury" is classified as an insignificant injury, and a trial is not allowed under the No-Fault statute (*Pommells v Perez*, 4 NY3d 566, 797 NYS2d 380 [2005]; *Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]; *Martin v Schwartz, supra*). Where a defendant raises the issue of whether a plaintiff has sustained a serious injury, the issue is for the court's determination (*Cowan v Fish*, 2 Misc3d 1008A, 784 NYS2d 919 [2004]). A plaintiff may establish that a serious injury was sustained by use of an expert's qualitative assessment of the plaintiff's injury, so long as the qualitative assessment is based upon 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 System, Inc.*, 98 NY2d 345, 746 NYS2d 865 [1994]).

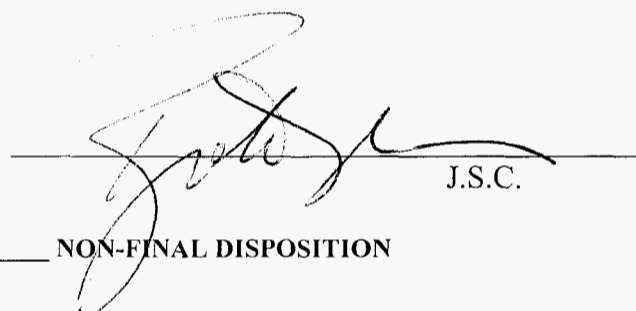
In the instant matter, the defendants have established their entitlement to judgment as a matter of law by showing that the plaintiff has failed to meet the "serious injury" threshold (*Toure v Avis Rent A Car System, Inc., supra*; *Gaddy v Eyler, supra*; *Pagano v Kingsbury, supra*). Plaintiff testified that he resumed all of his normal activities approximately 30 days after the accident occurred and that the bruises to his face, knees and shoulders were healed in about one to two months. The radiological report from the X-rays taken of plaintiff's left clavicle immediately following the accident states that plaintiff's left clavicle is normal and no significant soft tissue abnormalities were present. Moreover, the affirmed report of Dr. Katz, dated April 26, 2006, states that the plaintiff had no tenderness in his left elbow, no swelling, erythema or induration in his left shoulder and there were no gross deformities in his left shoulder, left wrist or forearm. Dr. Katz also explained that the plaintiff's range of motion in his right and left knees was normal and that the normal valgus attitude about the knees in the standing position was normal. Dr. Katz concluded after his examination of the plaintiff that the left elbow contusion, left wrist contusion, left shoulder contusion, right knee contusion and cervical strain were resolved. Dr. Katz further stated that the plaintiff's post arthroscopy left knee status was successful and that the faint changes in the anterior of the plaintiff's right knee were suggestive of psoriasis. In addition, defendants have offered admissible evidence demonstrating that although the plaintiff may still suffer from pain in his knees, elbow and neck, which may be of a permanent and continuous nature, that type of pain does not come within the realm of Insurance Law § 5102 (9)'s definition of a serious injury (*Locatelli v Blanchard*, 108 AD2d 1032, 485 NYS2d 603 [1985]). Insurance Law § 5102 (9) presupposes a limitation in the use of a body organ or system in order to satisfy its statutory definition and as noted above the plaintiff has not sustained an injury of this magnitude (*Licari v Elliott, supra*; *Martin v*

Schwartz, supra; Tornabene v Pawlewski). Furthermore, plaintiff's treating physician, Stanley Cherney, M.D., stated in his report of September 23, 2002, that due to the plaintiff's substantial improvement, no additional treatment was necessary, although he was advised to avoid heavy lifting and working with his head in awkward positions.

Plaintiff, in opposition, has failed to raise an issue of fact regarding whether he sustained an injury within in the statutory definition. Plaintiff has failed to come forth with objective medical proof that he sustained an injury of a permanent consequential limitation or of a significant limitation, based upon a recent examination (*McKinney v Lane*, 288 AD2d 274, 733 NYS2d 456 [2001], *Frier v Teague*, 288 AD2d 177, 732 NYS2d 428 [2001], *Letellier v Walker*, 222 AD2d 658, 635 NYS2d 682 [1995]). The report submitted by plaintiff's orthopedist, Dr. Stanley Cherney, dated February 5, 2007, in which Dr. Cherney explains that the plaintiff was diagnosed with right knee contusion with prepatellar bursitis, left elbow lateral epicondylitis, cervical sprain/strain with underlying spondylosis and possible left knee medial meniscus tear, was based on his examinations of the plaintiff that were conducted almost four years before the date of his report and therefore, the projections of permanent limitations have no probative value in the absence of any recent examinations (*Tobiolo v Friedman*, 283 AD2d 483, 724 NYS2d 651 [2001]; *Bidetto v Williams*, 276 AD2d 516, 713 NYS2d 764 [2000]). Additionally, plaintiff's only explanation for his cessation in treatment is his own affidavit, in which he states, that he received physical therapy for over a year and received the maximum benefit from said treatment. Plaintiff has failed to offer any objective medical evidence or reasonable excuse for his cessation in treatment (*Pommells v Perez, supra; Franchini v Palmieri*, 1 NY3d 536, 775 NYS2d 232 [2003]). Under these circumstances, plaintiff has failed to make a sufficient showing to defeat defendants' motion for summary judgment.

Accordingly, defendants' motion for summary judgment is granted.

Dated: JUN 25 2007



J.S.C.

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