

Hernandez v Castro

2007 NY Slip Op 32145(U)

July 10, 2007

Supreme Court, Suffolk County

Docket Number: 0002724/2004

Judge: Jeffrey Arlen Spinner

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**SUPREME COURT OF THE STATE OF NEW YORK
IAS PART XXI - COUNTY OF SUFFOLK**

PRESENT:

COPY

HON. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

BRIAN HERNANDEZ , a minor by his uncle and legal guardian, MANUEL DELGADO , <div style="text-align: right;">Plaintiff,</div> <p style="text-align: center;">- against -</p> CARLOS D CASTRO and BERTHA HERNANDEZ , <div style="text-align: right;">Defendants.</div>	
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INDEX NO.:	2004-2724
MOTION SEQ. NO.:	001 - MG
ORIG. MOTION DATE:	03/22/07
MOTION SEQ. NO.:	002 - Mot D
ORIG. MOTION DATE:	03/22/07
FINAL SUBMIT DATE:	06/06/07

UPON the following papers numbered 1 to 49 read on these Motions:

- Defendant HERNANDEZ’s Motion (001) (Pages 1-12 & Exhibits A-D);
- Defendant CASTRO’s Cross-Motion (002) (Pages 13-28 & Exhibits A-E);
- Defendant HERNANDEZ’s Partial Opposition (Pages 29-34);
- Plaintiff’s Opposition(Pages 35-39 & Exhibits A-B);
- Defendant CASTRO’S Reply (Pages 40-49);

it is,

ORDERED, that the application of Defendant HERNANDEZ (001) is hereby granted in all respects; and the application of Defendant CASTRO (002) is hereby granted to the extent set forth herein below.

Defendant HERNANDEZ moves this Court (001) for an Order dismissing Plaintiff’s Complaint, pursuant to CPLR 3212, on the grounds that Plaintiff has not sustained a “serious injury” as defined by New York State Insurance Law § 5102.

Defendant CASTRO moves this Court (002) for an Order:

1. Pursuant to CPLR 3212, granting summary Judgment in his favor, and against Plaintiff, dismissing Plaintiff’s Summons and Complaint in its entirety, on the grounds that no triable issue of fact exists and that as a matter of law Plaintiff has not sustained a “serious injury” as requires by New York State Insurance Law §§ 5102 and 5104; or
2. Alternatively, pursuant to CPLR 3212, granting summary Judgment in his favor, and against Plaintiff, dismissing Plaintiff’s Complaint as against him, on the grounds that no triable issue of fact exists as to liability; and
3. Dismissing the Cross-Claim of Defendant HERNANDEZ as against him.

This action arises from claims to recover damages for personal injuries allegedly sustained by Plaintiff as the result of an automobile accident that occurred on January 11, 2003, when Plaintiff was a passenger in Defendant HERNANDEZ’s vehicle, which was involved in a collision with Defendant CASTRO’s vehicle,

at the intersection of Washington Avenue and Heyward Street, in the Hamlet of Brentwood, Town of Islip, County of Suffolk, State of New York, when traveling in opposite direction Defendant CASTRO's vehicle came into contact with Defendant HERNANDEZ's vehicle as she turn in front of him onto Heyward Street.

In order for the Court to grant such relief, it must clearly appear that there are no material issues of fact (*Sillman v Twentieth Century-Fox Film Corp*, 3 NY2d 395 [1957]). The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*Zuckerman v City of New York*, 49 NY2d 557, 404 NE2d 718 [1980]; *Sillman v Twentieth Century-Fox Film Corp*, *supra*).

Once a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact is shown, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial of the action (*Zuckerman v City of New York*, *supra*).

As to those parts of both Motions regarding summary Judgment on the issue of serious injury, Insurance Law § 5102(d) sets forth nine specific ways in which Plaintiff can establish that she suffered such an injury, as defined therein:

“ “Serious injury” means 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 term “significant”, as it appears in the statute, has been defined to mean “something more than a minor limitation of use” (*Licari v Elliot*, 57 NY2d 230 [1982]). The Plaintiff must demonstrate not only the extent or degree of limitation, but also its duration (*Beckett v Conte*, 176 AD2d 774 [1991], *app. Den.* 79 NY2d 753). The duration of the injury must be more than “fleeting” (*Partlow v Meehan*, 155 AD2d 647 [1989], *lv. App. Dis.* 76 NY2d 770). The term “consequential” has been defined to mean important or significant (*Kordana v Pomelitto*, 121 AD2d 783 [1986], *app. Dis.* 68 NY2d 848). A “permanent loss” of use of a body organ, member, function or system must be total (*Oberly v Bangs Ambulance, Inc*, 96 NY2d 295 [2001]). In order to prove the extent or degree of physical limitation, an expert can designate a numeric percentage of a plaintiff's loss of range of motion or give a “qualitative assessment of a plaintiff's condition ...provided that the evaluation has 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 Sys*, 98 NY2d 345 [2002]; *rearg den Manzano v O'Neil*, 98 NY2d 728).

That leaves the ninth and final category with which to sustain his claim for serious injury: 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 their usual and customary daily activities for not less than 90 days during the 180 days immediately following occurrence of the injury or impairment.

In order to prosecute a claim for serious injury pursuant to this category under Insurance Law § 5102(d), Plaintiff is required to show something more than slight curtailment of the material acts which constitute their usual and customary daily activities, and must support that claim with medical proof attributing such impairment to a ‘medically determined’ injury (*Giaddy v Eyler*, 79 NY2d 955 [1992] (Plaintiff must prove they were “curtailed from performing... usual activities to a great extent rather than some light curtailment”); *Thompson v Abasi*, 788 NYS2d 48, 2005 NY App Div LEXIS 23 [1 Dpt 2005] (“When construing the statutory definition of a 90/180-day claim, the words ‘substantially all’ should be construed to mean that the person has been prevented from performing his usual activities to a great extent, rather than some slight curtailment”); *Sigona v New York City Transit Authority*, 255 AD2d 231 [1 Dpt 1998]).

Plaintiff must demonstrate that the motor vehicle accident prevented him from performing a substantial part of his usual and customary daily routine for 90 out of the 180 days immediately following the accident (*see: Pierre v Nanton*, 279 AD2d 621 [2 Dpt 2001] (ruling that although Plaintiff claimed he did not work for almost four months after the accident, there was no serious injury because he was not ordered by a doctor to stay home); *Curry v Velez*, 243 AD2d 442 [2 Dpt 1997]. Furthermore, in order to sustain a claim for serious injury, Plaintiff is required to establish “competent proof connecting the condition to the accident” (*Rose v Furgerson*, 281 AD2d 857 [3 Dpt 2001]; *see also Ceglian v Chan*, 283 AD2d 536 [2 Dpt 2001] (holding that objective proof is required that the subject accident was the cause of the disc injuries).

To avoid summary judgment and prove serious injury, Plaintiff must submit objective evidence of the extent and degree of alleged limitation and its duration (See: *Williams v Tillak*, 251 AD2d 657 [2 Dept 1998]; *Virgilio v Santivaschi*, 715 NYS2d 322 [2 Dept 2000]; *Foley v Karvelis*, 714 NYS2d 337 [2 Dept 2000]; *Greene v Miranda*, 708 NYS2d 310 [2 Dept 2000]; *Guzman v Paul Michael Management*, 698 NYS2d 19 [2 Dept 1999]); self-serving proclamations, without objective medical support, cannot be used to prove a claim for serious injury (*Zhu v Lin*, 1 AD3d 416 [2 Dept 2003]; *Rum v Pam Transport*, 673 NYS2d 178 [2 Dept 1998]); Plaintiff must submit medical evidence connecting inability to perform daily activities with alleged accident related injuries (*Howell v Reupke*, 16 AD3d 377 [2 Dept 2005]; *DiNunzio v Suffolk*, 256 AD2d 498 [2 Dept 1998]; *Lebreton v NYCTA*, 267 AD2d 211 [2 Dept 1999]; *Andrews v Nachman*, 258 AD2d 607 [2 Dept 1999]; *Abrahamson v Premier Car Rental*, 261 AD2d 562 [2 Dept 1999]).

As pointed out by Counsel for Defendant HERNANDEZ, Plaintiff testified that he went to Southside Hospital and was treated in the emergency room and released, being given no medication or devices; was treated by a chiropractor for a few months, and doesn’t remember receiving any other treatment relating to the accident; received no treatment for complaints relating to his knee, and missed a few days from school. Furthermore, Dr. Joseph P. Stubel’s affirmed independent orthopedic examination concludes that Plaintiff exhibits no signs of disability, and can perform his usual activities of daily living and his usual work..

In conclusion, Plaintiff cannot sustain his burden of proof of serious injury pursuant to Insurance Law, in law or in fact (*Savattere v Barnathan*, 720 NYS2d 386 [2 Dept 2001]; *Kauderer v Penta*, 689 NYS2d 190 [2 Dept 1999]; *Yagliyan v Gun Shik Yang*, 663 NYS2d 991 [2 Dept 2000]), and therefore the Complaint must be dismissed herein. Absent a sustainable claim by Plaintiff against Defendants, Cross-Claims between Defendants cannot be maintained, and same must also be dismissed.

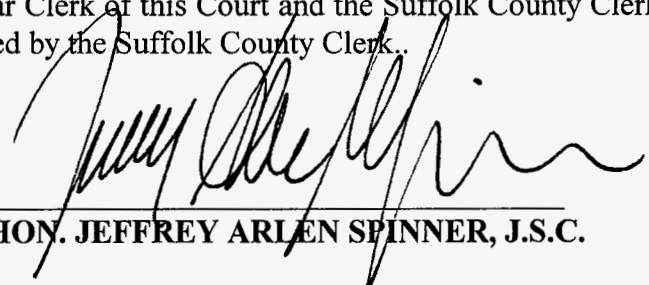
For all the reasons stated herein above and in the totality of the papers submitted herein, it is, therefore,

ORDERED, that the application of Defendant HERNANDEZ (001) for an Order dismissing Plaintiff's Complaint on the grounds that Plaintiff has not sustained a serious injury, as defined by Insurance Law, is hereby granted in all respects, Plaintiff's Complaint is hereby dismissed and this action is hereby disposed of; and it is further

ORDERED, that the application of Defendant CASTRO (002) for an Order granting summary Judgment, dismissing Plaintiff's Complaint, on the grounds that no triable issue of fact exists and that as a matter of law Plaintiff has not sustained a serious injury as requires by Insurance; or alternatively, on the grounds that no triable issue of fact exists as to liability; and dismissing Defendant HERNANDEZ's Cross-Claim as against him, is hereby granted to the extent that Plaintiff's Complaint is hereby dismissed on the grounds that Plaintiff has not sustained a serious injury, and Defendant HERNANDEZ's Cross-Claim is hereby dismissed; and this action is hereby disposed of; and it is further

ORDERED, that Counsel for either Defendant is hereby directed to serve a copy of this order, with Notice of Entry, upon all other parties and upon the Calendar Clerk of this Court and the Suffolk County Clerk within twenty (20) days of the date this order is entered by the Suffolk County Clerk.

**Dated: Riverhead, New York
July 10, 2007**


HON. JEFFREY ARLEN SPINNER, J.S.C.

✓ FINAL DISPOSITION	NON-FINAL DISPOSITION
✓ SCAN	DO NOT SCAN

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