

Murray v Quintalino

2007 NY Slip Op 32186(U)

July 17, 2007

Supreme Court, Suffolk County

Docket Number: 0025024/2005

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 3-30-07
ADJ. DATE 5-31-07
Mot. Seq. # 001 - MG; CASEDISP
002 - XMD

-----X		LITE & RUSSELL
ROBERT A. MURRAY,	:	Attorneys for Plaintiff
	:	212 Higbie Lane
Plaintiff,	:	West Islip, New York 11795
	:	
- against -	:	JAMES P. NUNEMAKER, JR., & ASSOCS.
	:	Attorneys for Defendants
FRANCES QUINTALINO and VINCENT	:	P.O. Box 9040
QUINTALINO,	:	Jericho, New York 11753-9040
Defendants.	:	
-----X		

Upon the following papers numbered 1 to 40 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13; Notice of Cross Motion and supporting papers 14 - 22; Answering Affidavits and supporting papers 23 - 34; Replying Affidavits and supporting papers 38 - 40; Other; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that defendants' motion 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 and the complaint is dismissed in its entirety; and it is further

ORDERED that plaintiff's cross motion for summary judgment on liability grounds is denied as academic.

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 Route 109 at or near the overpass of the Southern State Parkway, County of Suffolk, New York on March 9, 2005. Plaintiff claims in his complaint that he sustained serious permanent injuries as defined in Section 5102 (d) of the Insurance Law and economic loss greater than basic economic loss, as defined in Section 5102 (a) of the Insurance Law. Defendants now move for an order pursuant to CPLR 3212 granting them summary judgment dismissing the complaint on the grounds that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). Plaintiff cross moves for partial summary judgment on liability grounds and for an inquest as to the assessment of damages. Plaintiff opposes defendants' motion, and defendants have filed a reply.

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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 (*Tippling-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 Eycler*, 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 defendants submit, inter alia, the pleadings; the plaintiff's verified bill of particulars; plaintiff's Good Samaritan Hospital emergency department records, including x-ray reports of plaintiff's cervical and thoracic spine; the affirmed report of defendant's examining neurologist, Richard A. Pearl, M.D.; the affirmed report of defendant's examining radiologist, Melissa Sapan Cohn, M.D.; the affirmed report of defendant's examining orthopedist, Jay Nathan, M.D.; plaintiff's Long Island Rail Road employment verification records dated March 1, 2006; and plaintiff's deposition testimony.

Plaintiff's claims in his verified bill of particulars that he sustained, among other things, disc bulges of the cervical spine and ventral cord abutment; a limited range of motion of the cervical spine; weakness in the upper extremities; and lumbar radicular dysfunction. Plaintiff also claims that he sustained scarring, anxiety and mental suffering. Additionally, plaintiff claims that he was totally disabled

for about three weeks and that he remains partially disabled to date. 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.

Plaintiff's Good Samaritan Hospital emergency department records for treatment rendered on the day of the accident show that he complained of pain in his neck and upper back. X-rays of plaintiff's cervical and thoracic spine performed at the hospital that day show no signs of fracture, dislocation, significant subluxation, or soft tissue abnormalities. The hospital radiologist opined that x-rays of plaintiff's thoracic spine taken that day showed mild degenerative changes and minimal biconcave scoliosis of the lower-thoracic-upper lumbar spine. Based on these findings, the attending physician diagnosed plaintiff with neck/back pain, but also found that there were no injuries to his head, shoulder, arm or leg.

In his report dated August 30, 2006, Dr. Pearl states that he performed an independent neurological examination of plaintiff on August 29, 2006, and his findings include a motor examination that was "5/5" in all extremities with normal tone; DTR's that were "2+" and symmetrical; an intact sensory examination; and a normal gait. He also observed that there was a normal range of motion of the cervical and lumbar spine with no paravertebral tenderness or spasm. Dr. Pearl opined that plaintiff had sustained sprains of the cervical and thoracic spine, but that there were no objective findings to indicate a neurological disability. He also concluded that plaintiff had a pre-existing history of a degenerative condition of the spine.

In her report dated September 5, 2006, Dr. Sapan Cohn states that she performed an independent radiological review of the MRI films dated May 5, 2005 of plaintiff's cervical spine on August 29, 2006, and her findings include straightening of the normal cervical lordosis; diffuse disc desiccation; mild disc bulging at C-3/4; circumferential disc bulging at C-4 through C-7/T1; and no spinal cord abnormalities. Dr. Sapan Cohn opined that these studies showed multilevel degenerative disc disease with no evidence of disc herniation or trauma related injury.

In his report dated October 23, 2006, Dr. Nathan states that he performed an independent orthopedic examination of plaintiff on that date, and his findings include no muscle atrophy; a negative straight leg raising test; and motor strength that was "5/5." His testing also showed a normal range of motion of the cervical spine, thoracic spine, shoulders, elbows, wrists and hands as well as no tenderness, heat, swelling, erythema or effusion of the upper or lower extremities. Additionally, he noted that plaintiff's medical history included a prior neck and back injury. Dr. Nathan opined that plaintiff had sustained sprains of the cervical and lumbar spine which exacerbated pre-existing injuries.

Plaintiff's Long Island Rail Road Employment Verification records show that he was employed continuously with the LIRR from April 20, 1998 until the date of the verification, March 1, 2006. These records also show that plaintiff was paid in full from an LIRR sick bank from March 11, 2005 through to March 15, 2005, and from March 21, 2005 through to March 31, 2005, and that he worked on March 16 and April 1, 2005.

Plaintiff testified that he was employed on a full-time basis as a plumber for the MTA/Long Island

Rail Road at the time of the accident. His duties included maintaining the plumbing systems at different stations and outlying buildings. He went to work the Friday after the accident, but he was sent home after a few hours. In total, he missed approximately three weeks of work as a result of his injuries. Upon his return, he performed the same duties as before, except that he was unable to lift heavy equipment or materials. He also has difficulty gardening and engaging in various sporting activities such as waterskiing. In addition, he restricts himself to a 40-hour week and has turned down available overtime since the accident. Plaintiff further testified that he was injured in a prior motor vehicle accident about 20 to 25 years ago, at which time he received some chiropractic treatment to his back.

By their submissions, defendants 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]; *Edwards v DeHaven*, 155 AD2d 757, 547 NYS2d 462 [3d Dept 1989]). Defendants' examining orthopedist found, upon a recent examination, that plaintiff had a normal range of motion of the upper extremities with no atrophy. Similarly, defendants' examining neurologist, found, upon a recent examination, that plaintiff had normal range of motion of the cervical and lumbar spine, with no paravertebral tenderness or spasm. Furthermore, defendants' examining radiologist opined, based upon his review of plaintiff's MRI studies, that plaintiff had a multilevel preexisting degenerative condition of the cervical spine, but that there was no evidence of any causally related injuries (*see, Pommels v Perez*, 4 NY3d 566, 797 NYS2d 380 [2005]). Defendants' remaining evidence, including plaintiff's deposition testimony, also supports a finding that he did not sustain a serious injury. As defendants have met his 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 this motion, plaintiff submits, among other things, the unaffirmed report of plaintiff's treating radiologist, Robert Diamond, M.D.; and the affirmed report of plaintiff's treating osteopath, Mike Pappas, D.O. Initially, the unsworn report of Dr. Diamond, that was discussed in detail by defendant's examining orthopedist, has been considered as it is admissible (*see, Flores v Stankiewicz*, 35 AD3d 804, 827 NYS2d 281 [2d Dept 2006]; *Kearse v NY City Transit Auth.*, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]; *Ayzen v Melendez*, 299 AD2d 381, 749 NYS2d 445 [2d Dept 2002]).

In his report dated May 6, 2005, Dr. Diamond states that he performed MRI studies of plaintiff's cervical spine on May 5, 2005, and his findings include straightening of cervical lordosis; diffuse disc dehydration; and posterior disc bulges. While he observed a ventral cord abutment at C-4/5 through C-6/7, he also noted that there were no significant protrusions into the neural canal, recesses or foramina. Dr. Diamond opined that these studies showed no focal prevertebral or posterior paraspinal abnormal masses.

In his report dated May 10, 2007, Dr. Pappas states that he performed an initial medical examination of plaintiff on January 19, 2005, a date which preceded the accident. To the extent that the remainder of his report and plaintiff's other submissions indicate that Dr. Pappas initially examined plaintiff on January 19, 2006, this portion of his report has been considered. Dr. Pappas' findings for this examination include motor strength that was "5/5"; reflexes that were "2+" and symmetric in the upper

extremities; a negative Spurling's test; and a normal gait. While he observed that there was decreased sensation to light touch throughout the left hand, he also noted that plaintiff's sensory system was intact throughout the remainder of the upper extremities. Dr. Pappas re-examined plaintiff on February 2, 2006, and performed a trigger point injection in plaintiff's mid-thoracic paraspinal musculature between T3 and T4. During his next exam on March 30, 2006, he observed that plaintiff's upper extremity reflexes were "2+" and symmetric. On that date, plaintiff reported to him that his pain had resolved for about four or five weeks. Dr. Pappas examined plaintiff most recently on May 3, 2007, and the findings of his examination include strength that was "5/5"; an intact sensory system; and reflexes that were "2+"/symmetric. He also observed that plaintiff's cervical right/left rotation were 72/64 degrees with normal being 80/80 degrees. Additionally, he noted that cervical flexion and extension were full. Based upon his findings, Dr. Pappas opined that plaintiff had sustained cervical disc bulging with resulting cervical and thoracic myofascial pain. He also concluded that plaintiff may continue to suffer pain and marked limitation of his activities and that his prognosis is guarded.

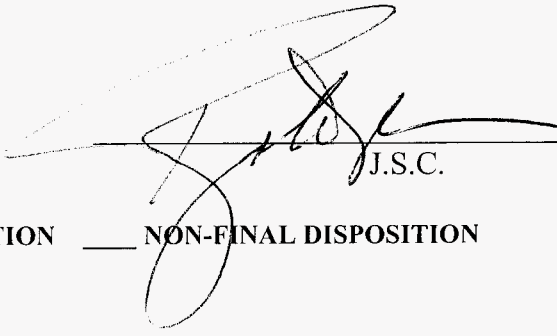
Plaintiff has provided insufficient medical proof to raise an issue of fact that he sustained a serious injury under the no-fault law (see, *Burke v Galli*, 242 AD2d 595, 664 NYS2d 742 [2d Dept 1997], *lv denied* 91 NY2d 806, 669 NYS2d 1 [1998]; *Taranto v McCaffrey*, ___AD3d___, 835 NYS2d 365 [2d Dept 2007]; *Picott v Lewis*, 26 AD3d 319, 809 NYS2d 541 [2d Dept 2006]). Initially, it is noted that plaintiff failed to submit any medical proof addressing his prior neck/back injuries as well as 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. Pappas failed to indicate an awareness that plaintiff had previously injured his neck/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]). Dr. Pappas also failed to adequately address the pre-existing degenerative condition of plaintiff's cervical spine as diagnosed by his own treating radiologist only two months after the accident, as he did not provide a sufficient foundation or objective medical basis supporting the conclusion which he 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]). Further, while Dr. Pappas records plaintiff's complaints of pain, he has failed to present medical proof that was contemporaneous with the accident showing any initial range of motion restrictions for the affected body parts (see, *Berkas v McMillan*, ___AD3d___, 835 NYS2d 388 [2d Dept 2007]; *Ramirez v Parache*, 31 AD3d 415, 818 NYS2d 238 [2d Dept 2006]). Additionally, the report of Dr. Pappas tends to show that plaintiff's injuries, which consisted of a cervical and thoracic sprains/strains and myofascial derangements, 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, Dr. Pappas has not adequately explained the approximate 14-month gap in treatment between the conclusion of plaintiff's last exam on March 30, 2006 and his most recent examination of plaintiff in May 3, 2007, shortly after the filing of defendants' motion (see, *Phillips v Zilinsky*, 39 AD3d 728, 834 NYS2d 299 [2d Dept 2007]). Thus, plaintiff's unexplained gap in medical treatment, was in essence, a cessation of treatment that is not addressed by competent proof (see, *Caracci v Miller*, 34 AD3d 515, 823 NYS2d 681 [2d Dept 2006]).

Additionally, the proof submitted by the plaintiff is insufficient to raise a triable issue of fact that

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Moreover, since there is no evidence in the record demonstrating that plaintiff's alleged economic loss exceeded the statutory amount of basic economic loss, his claim in this regard must be dismissed (see, CPLR 3212 [b]; see, *Watford v Boolukos*, 5 AD3d 475, 772 NYS2d 566 [2d Dept 2004]; *Rulison v Zanella*, 119 AD2d 957, 501 NYS2d 487 [3d Dept 1986]). Accordingly, this motion for summary judgment is granted and plaintiff's cross motion is denied as moot.

Dated: JUL 17 2007



J.S.C.

 X FINAL DISPOSITION NON-FINAL DISPOSITION