

Morrell v Helfrich

2007 NY Slip Op 32676(U)

August 23, 2007

Supreme Court, Suffolk County

Docket Number: 0024971/2005

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 4-27-07
ADJ. DATE 7-20-07
Mot. Seq. # 001 - MD
002 - XMG; CASEDISP

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SEAN M. MORRELL,	:	KEITH A. LAVALLEE, ESQ., P.C.	
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	:	Farmingdale, New York 11735	
	:		
- against -	:	RICHARD T. LAU & ASSOCIATES	
	:	Attorneys for Defendant	
ANTHONY L. HELFRICH,	:	P.O. Box 9040	
	:	Jericho, New York 11753-9040	
	:		
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Upon the following papers numbered 1 to 36 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 - 21; Answering Affidavits and supporting papers 22 - 33; Replying Affidavits and supporting papers 34 -36; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that plaintiff's motion for summary judgment on liability grounds is denied; and it is further

ORDERED that defendant's 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.

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 Pulaski Road approximately one-quarter mile east of Bread and Cheese Hollow Road in the Town of Smithtown, New York on February 28, 2005. The accident allegedly happened when the defendant drove his truck across the double yellow lines on Pulaski Road in an effort to overtake the slower moving vehicles in front of him. While attempting this maneuver, defendant's truck struck the automobile operated by the plaintiff which was proceeding in the opposite lane of travel. Plaintiff now moves for summary judgment on liability grounds and defendant cross moves for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d).

Turning to the issues raised in the cross motion, 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 (*Tipping-Cestari v Killhenny*, 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 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 [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 the cross motion, defendants submit, inter alia, the pleadings; the plaintiff's verified bill of particulars; plaintiff's St. Catherine of Siena Medical Center Emergency Department records; the affirmed report of plaintiff's no-fault examining orthopedist, Jay Nathan, M.D.; the affirmed report of defendant's other examining orthopedist, Craig B. Ordway, M.D.; the affirmed report of defendant's examining radiologist, Stephen W. Lastig, M.D.; and plaintiff's deposition testimony. Plaintiff claims, in his bill of particulars, that he sustained a left shoulder separation; cervical, thoracic and lumbar disc herniations; a left C-7 nerve root compression; hypertrophy/mild foraminal narrowing in the cervical spine; and mild multilevel osteopathy in the lumbar spine. Plaintiff also claims that he was totally disabled from February 28, 2005 through to March 5, 2005, and that he has been partially disabled from February 28, 2005 through to the present time. Moreover, plaintiff claims that he sustained a permanent loss of use, a permanent consequential limitation, a significant limitation and a non-permanent injury.

Plaintiff's Emergency Department records from St. Catherine of Siena Medical Center for the day of the accident show that he did not report a loss of consciousness. The attending physician at the hospital examined him and reported that his musculoskeletal system, gait and back/spine were normal. The attending physician also noted that plaintiff demonstrated full strength and range of motion of the extremities, specifically the upper extremities. Plaintiff's neurological examination was also normal.

After a final diagnosis of neck pain and a headache was made and plaintiff was discharged.

In his report dated July 18, 2005, Dr. Nathan states that he performed a no-fault orthopedic examination of plaintiff on that date, and his findings include motor strength that was "5/5" bilaterally in all muscle groups with no atrophy; reflexes that were "2+" and equal bilaterally; a normal straight leg raising test; a negative shoulder impingement test bilaterally; and a normal gait. He also found that there was a normal/full range of motion of the cervical/thoracolumbar spine with no paravertebral spasm, as well as a normal/full range of motion of the hips. In addition, he observed that there was a normal/full range of motion of the shoulders with no effusion bilaterally. Dr. Nathan opined that plaintiff had sustained sprains of the cervical and lumbar spine, but that he was able to perform the activities of his daily living without restriction.

In his report dated December 20, 2006, Dr. Ordway states that he performed an independent orthopedic/neurologic examination of the plaintiff on that date, and his findings include an excellent range of motion of the cervical spine, mid and lower back with no spasm in the paravertebral musculature; DTR's that were "- 2" and negative; a normal sensory exam; and negative test results for evocative foraminal closure/nerve root irritation. Dr. Ordway opined that plaintiff had a normal orthopedic/neurologic examination with no evidence of any post-traumatic neurologic deficits or deformities secondary to the accident.

In his report dated April 6, 2006, Dr. Lastig states that he performed an independent radiological review of the MRI studies of plaintiff's lumbar spine dated April 14, 2005, the x-ray studies of plaintiff's left shoulder dated March 1, 2005, the x-ray studies of plaintiff's cervical spine dated February 28, 2005, and the MRI studies of plaintiff's cervical spine dated March 23, 2005. Dr. Lastig's findings with respect to the MRI studies of plaintiff's lumbar spine include mild hypertrophic changes within the lumbar facet joints; disc dessication/smooth annular bulging at various levels; and a paracentral disc herniation at T11-12. He opined that these studies showed multi-level degenerative disc disease which was most likely unrelated to the accident, as well as a T11-12 disc herniation, the etiology of which could not be determined. Dr. Lastig's findings with respect to the x-ray studies of plaintiff's left shoulder include hypertrophic changes in the acromioclavicular joint with bony spurring, but no evidence of an acute dislocation. He opined that these studies showed osteoarthritis of the acromioclavicular joint which was causally unrelated to the accident. Dr. Lastig's findings with respect to the x-ray studies of plaintiff's cervical spine include mild degenerative spondylosis which he opined was unrelated to the accident. Dr. Lastig's findings with respect to the MRI studies of plaintiff's cervical spine include normal prevertebral soft tissues; mild spondylosis with anterior osteophyte formation; disc dessication with mild disc space narrowing; and disc protrusions at C3-4 as well as C6-7. He opined that these studies showed degenerative disc disease/spondylosis which was long-standing in nature and which pre-existed the accident. Dr. Lastig also concluded that the etiology of the small cervical disc protrusions could not be determined on the basis of this single image study.

Plaintiff testified to the effect that, at the time of the accident, he worked as an executive chef for Aramark on a full-time basis fifty hours per week. After the accident, he missed two days from work. His responsibilities at that time included feeding staff/students, designing menus and coordinating special events at a local university campus. In January 2006, he switched to another employer because he wanted a more administrative role and because he needed to remove himself from kitchen duties. He also

admitted, however, that the transfer was “mutual” and that his salary increased three percent subsequent to his transfer. He stopped medical treatment about four months after the accident because his no-fault benefits were terminated and because additional treatment would have been at his own expense. Plaintiff further testified that he no longer plays softball or skis and that he has difficulty exercising, as a result of his injuries.

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]; *Faroze v Kamran*, 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]; *Teodoro v Conway Transp. Serv.*, 19 AD3d 479, 798 NYS2d 466 [2d Dept 2005]; *Khan v Hamid*, 19 AD3d 460, 798 NYS2d 444 [2d Dept 2005]). Plaintiff’s hospital records for the day of the accident show that he demonstrated full strength and range of motion of the extremities and that his back/spine was normal. Dr. Nathan found, upon an examination performed approximately five months after the accident, that plaintiff had a normal/full range of motion of the cervical/thoracolumbar spine with no paravertebral spasm, as well as a normal/full range of motion of the hips. He also observed that there was a normal/full range of motion of the shoulders with no effusion bilaterally. Similarly, Dr. Ordway found, upon a recent examination, that plaintiff had an excellent range of motion of the cervical spine, mid and lower back with no spasm in the paravertebral musculature. Additionally, defendant’s examining radiologist opined that there were preexisting degenerative changes to plaintiff’s left shoulder, cervical spine, and lumbar spine which were unrelated to trauma (*see, Pommells v Perez*, 4 NY3d 566, 797 NYS2d 380 [2005]). Defendant’s remaining evidence, including plaintiff’s deposition testimony, also supports a finding that he did not sustain a serious injury. As defendant has met his burden as to all categories of serious injury alleged, 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 the cross motion, plaintiff submits, among other things, the two affirmed reports of plaintiff’s treating radiologist, Alvand Hassankhani, M.D. In his report dated March 23, 2005, Dr. Hassankhani states that he performed MRI studies of plaintiff’s cervical spine on that date, and his findings include a mild disc protrusion at C3-4 and endplate hypertrophy resulting in mild foraminal narrowing; a mild disc bulge at C5-6 with no root compression or canal stenosis; and a disc herniation at C6-7 resulting in mild deformity of the ventral subarachnoid space. He opined that these studies showed, inter alia, facet hypertrophy and degenerative disc disease in addition to a disc protrusion, a mild bulge and a herniation. In his report dated April 15, 2005, Dr. Hassankhani states that he performed MRI studies of plaintiff’s lumbar spine on that date, and his findings include normal height/alignment of the vertebral bodies; mild disc desiccation and degenerative changes of the L5-S1 intervertebral discs; small disc herniations at T11-12 and L5-S1; and no root compression or canal stenosis. He opined that these studies showed two small disc herniations without evidence of root compression as well as mild, multi-level facet osteoarthropathy.

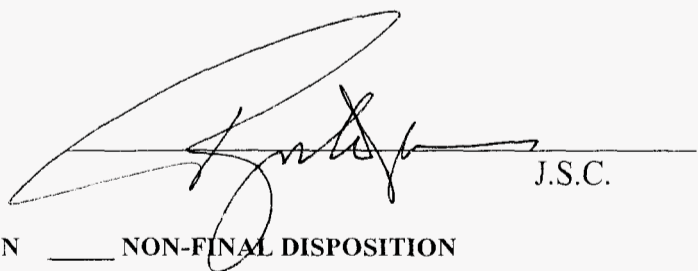
Plaintiff has provided insufficient medical proof to raise an issue of fact that he sustained a serious injury under the no-fault law (*see, Ali v Mirshah*, 41 AD3d 748, ___ NYS2d ___ [2d Dept 2007]; *Picott v Lewis*, 26 AD3d 319, 809 NYS2d 541 [2d Dept 2006]; *Paton v Weltman*, 23 AD3d 895, 804 NYS2d 129 [3d Dept 2005]). At the outset, plaintiff has failed to present any admissible medical proof that was contemporaneous with the accident showing any initial range of motion restrictions for the affected body parts (*see, Ramirez v Parache*, 31 AD3d 415, 818 NYS2d 238 [2d Dept 2006]; *Yeung v Rojas*, 18 AD3d

863, 796 NYS2d 661 [2d Dept 2005]), or any objective medical evidence based upon a recent examination verifying his subjective complaints of limitation of movement (*see, Tudisco v James*, 28 AD3d 536, 813 NYS2d 482 [2d Dept 2006]). While a disc herniation may constitute a serious injury, the cervical and lumbar MRI reports of Dr. Hassankhani are not probative for the purposes of demonstrating a serious injury because they contain no opinion as to causation (*see, Collins v Stone*, 8 AD3d 321, 778 NYS2d 79 [2d Dept 2004]), and do not establish the extent or duration of any physical limitations resulting from the alleged disc injuries (*see, Yakubov v CG Trans Corp.*, 30 AD3d 509, 817 NYS2d 353 [2d Dept 2006]). Additionally, plaintiff has failed to present any objective medical evidence addressing the pre-existing degenerative condition of his cervical and lumbar spine as diagnosed by defendant's examining radiologist as well his own treating radiologist (*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]). In any event, plaintiff has not proffered any explanation by way of objective medical proof for the cessation of the medical treatment to his spine approximately two years ago (*see, Teodoru v Conway Transp. Serv.*, 19 AD3d 479, 798 NYS2d 466 [2d Dept 2005]; *Vallejo v Builders for the Family Youth, Diocese of Brooklyn, Inc.*, 18 AD3d 741, 795 NYS2d 712 [2d Dept 2005]).

Plaintiff also failed to proffer any competent medical evidence that he was unable to perform substantially all of his daily activities for not less than 90 of the first 180 days subsequent to the accident (*see, Mercado v Garbacz*, 16 AD3d 631, 792 NYS2d 519 [2d Dept 2005]; *Omar v Goodman*, 295 AD2d 413, 743 NYS2d 568 [2d Dept 2002]; *Barbarulo v Allery*, 271 AD2d 897, 707 NYS2d 268 [3d Dept 2000]). While plaintiff testified that he no longer plays certain sports and that he has difficulty exercising, he did not submit an affidavit detailing the particulars of same (*see, Jean-Mehu, Berbec*, 215 AD2d 440, 626 NYS2d 274 [2d Dept 1995]), and the record otherwise lacks objective proof of any substantial curtailment of his activities within the relevant time period after the accident (*see, McNeil v Dixon*, 9 AD3d 481, 780 NYS2d 635 [2d Dept 2004]). In any event, plaintiff admitted that he only missed two days from his employment due to his injuries, and that he continued to work at his usual occupation on a full-time basis (*see, Lalli v Tamasi*, 266 AD2d 266, 698 NYS2d 276 [2d Dept 1999]). 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, defendant's 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 light of the above determination, plaintiff's motion for summary judgment on liability grounds is denied as academic.

Dated: AUG 23 2007


J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION