Hanafy v Hardney
2007 NY Slip Op 32844(U)
September 10, 2007
Supreme Court, Richmond County
Docket Number: 0100827/2005
Judge: Joseph J. Maltese
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND PART DCM 3

Index No.: 100827/2005
Motion No.: 1

HATEM EL SAYED HANAFY,

Plaintiff

against

DECISION & ORDER

HON. JOSEPH J. MALTESE

RONALD E. HARDNEY and 804 CORP.,

Defendants

The following items were considered in the review of this motion for summary judgment

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2
Replying Papers	3
Exhibits	Attached to Papers
Memorandum of Law	

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The defendants seek summary judgment on the ground that the plaintiff has not sustained a "serious injury" as defined in Insurance Law §5102(d).[1] The serious injury threshold set forth in Insurance Law §5104(a) can only be established under these categories. (*Coon v. Brown*, 192 AD2d 908 [3rd Dept 1993]; *Daviero v. Johnson*, 88 AD2d 732 [3rd Dept 1982].) Thus, the mere fact that one has been injured, even seriously, does not establish that a "serious injury" has been sustained. (*Jones v. Sharpe*, 98 AD2d 859 [3rd Dept 1989], *aff'd* 63 NY2d 645 [1984].) Rather, a plaintiff

[1] A serious injury must be a personal injury, "[W]hich 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 constitutes 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" (Insurance Law *§5102* [d]).

must show that he or she sustained a personal injury, i.e., bodily injury, sickness or disease (11 NYCRR §65-2.1[e]), that results in one of the nine serious injury threshold categories. (*See, Van Norstrand v. Regina*, 212 AD2d 883 [3rd Dept 1995].)

It is important to keep in mind the policies underlying the enactment of the No-Fault Law and the law's structure when litigating no-fault related issues. Courts have consistently held that the No-Fault Law must be interpreted to fulfill the policies the legislature had in mind. (*See, Oberly v. Bangs Ambulance*, 96 NY2d 295 [1991]; *Scheer v. Koubek*, 70 NY2d 678 [1987]; *Maida v. State Farm*, 66 AD2d 852 [2d Dept 1978].) It is for the court to decide in the first instance whether a plaintiff has made a *prima facie* showing of "serious injury" (*see*, e.g., *Licari v. Elliott*, 57 NY2d 230, 237).

A defendant can establish that the plaintiff's injuries are not serious within the meaning of Insurance Law *§5102*(d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim. Where defendant's motion for summary judgment properly raises an issue as to whether a serious injury has been sustained, it is incumbent upon the plaintiff to produce evidentiary proof in admissible form in support of his or her allegations (*see*, *Kordana v. Pomellito*, 121 AD2d 783, appeal dismissed, 68 NY2d 848). The burden, in other words, shifts to plaintiff to come forward with sufficient evidence to demonstrate the existence of an issue of fact as to whether he or she suffered a serious injury (*see*, *Gaddy v. Eyler*, 79 NY2d 955; *Grossman v. Wright* 268 AD2d 79 [2nd Dept 2000]). The plaintiff in such a situation must present objective evidence of the injury. The mere parroting of language tailored to meet statutory requirements is insufficient (*id*). Additionally, a plaintiff's subjective claim of pain and limitation of motion must be sustained by verified objective medical findings which are based on a recent examination of the plaintiff.

Here, the defendant relies upon the affirmed medical report of Sarasavani Jayaram, M.D., a board certified neurologist. Dr. Jayaram examined the plaintiff on January 20, 2006 found that the plaintiff's range of motion in both her cervical spine and elbow were 100 % as compared to normal with any minor restriction being self imposed by the claimant. The same results were indicated when

the range of motion of the plaintiff's wrists, hips, thoracic spine, and lumbar spine was conducted. The specific ranges of motion are contained in the doctor's affirmed report in detail.

The plaintiff was also examined by Wayne Kerness, M.D., the defendant's Board Certified Orthopaedic Surgeon. In his affirmed to report, Dr. Kerness states that all of the plaintiff's range of motion in her cervical spine, shoulders, hips, and lumbar spine were 100% as compared to normal. The specific ranges of motion are contained in the doctor's affirmed report in detail.

In order to successfully oppose a motion for summary judgment on the issue of whether an injury is serious within the meaning of Insurance Law *§5102* (d), the plaintiff's expert must submit quantitative objective findings in addition to an opinion as to the significance of the injury. *(Grossman v. Wright* 268 AD2d 79 [2d Dept 2000].) Here, the plaintiff relies upon the chiropractic affidavit of Ronald Porcello, D.C. Dr. Procello, the plaintiff's treating chiropractor states that with respect to lumbar range of motion, the plaintiff has flexion 60 degrees out of 75 degrees; extension 10 degrees out of 30 degrees and there is palpable tenderness at the L5 and left sacroctiac joint and spasm of bilateral erector spine and quadratus lumboram muscles. When supported by objective evidence, an expert's qualitative assessment of the seriousness of a plaintiff's injuries can be tested during cross-examination, challenged by another expert and weighed by the trier of fact. By contrast, an expert's opinion unsupported by an objective basis may be wholly speculative, thereby frustrating the legislative intent of the No-Fault Law to eliminate statutorily-insignificant injuries or frivolous claims. (*Toure v. Avis Rent A Car Systems, Inc.*, 98 NY2d 345 [2002]). The presence of spasms, as detected by the medical expert, will constitute an objective finding, provided they are objectively ascertained or measured. (*Id.*).

A motion for summary judgment must be denied if there are "facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. "Moreover, the parties competing contentions must be viewed in a light most favorable to the party opposing the motion" (*Marine Midland Bank, N.A., v. Dino*, et al., 168 AD2d 610 [2nd Dept 1990]). Summary judgment should not be granted where there is any doubt as to the existence of a triable

issue or where the existence of an issue is arguable (*American Home Assurance Co., v. Amerford International Corp.*, 200 AD2d 472 [1st Dept 1994]).

Here there is an issue of fact as to whether or not the plaintiff has suffered a "serious injury" as defined in Insurance Law §5102(d) requiring the defendants' motion to be denied.

Accordingly, it is hereby:

ORDERED, that the defendants' motion for summary judgment is denied; and it is further

ORDERED, that all parties return to DCM 3 at 9:30AM on **November 26, 2007** for a pre-trial conference.

ENTER,

DATED: September 10, 2007

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Joseph J. Maltese
Justice of the Supreme Court