

Dhanjal v Mosqueira

2007 NY Slip Op 32846(U)

September 6, 2007

Supreme Court, Nassau County

Docket Number: 3358-06/

Judge: Thomas P. Phelan

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 7
NASSAU COUNTY

SATBACHAN DHANJAL,

Plaintiff(s),

-against-

JUAN S. MOSQUEIRA,

Defendant(s).

ORIGINAL RETURN DATE: 07/06/07
SUBMISSION DATE: 08/03/07
INDEX No.: 3358/06

MOTION SEQUENCE #1

The following papers read on this motion:

Notice of Motion.....	1
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Motion by defendant Juan S. Mosqueira for an order pursuant to CPLR Rule 3212 and Article 51 of the Insurance Law of the State of New York awarding him summary judgment dismissing plaintiff's complaint on the ground that the injuries alleged by plaintiff do not satisfy the "serious injury" threshold requirement of Section 5102(d) of the Insurance Law is granted.

This is an action for personal injuries allegedly sustained by plaintiff Satbachan Dhanjal when he was involved in a motor vehicle accident on October 31, 2003.

In support of his motion, defendant submits the affirmations of Dr. Ira M. Turner, a board-certified neurologist, who examined plaintiff on January 21, 2004 on defendant's behalf; Dr. Isaac Cohen, a board-certified orthopedic surgeon, who examined plaintiff on March 16, 2007 on defendant's behalf; and Dr. Steven Ender, a board-certified neurologist, who examined plaintiff on March 9, 2007 on defendant's behalf, all of whom found an absence of objective evidence of disability or limitations.

In addition, defendant submitted the findings and opinion of Dr. Paul Schoen, plaintiff's own radiologist, who conducted a film review of plaintiff's cervical spine MRI one month after the accident in which he essentially found everything "normal" with "minimal scattered degenerative changes". Defendant also submitted the results of a study performed by Dr. Carlisle Saint

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Martin, plaintiff's own neurologist, who conducted an electromyography and nerve conduction studies of plaintiff's extremities on December 19, 2003 and concluded plaintiff exhibited normal nerve conduction in the upper extremities two months after the accident. At his deposition, plaintiff testified that at the time of the subject accident he was working as a physician and missed no time from work following the accident. Plaintiff also testified that as a consequence of this accident he sought and received three-and-a-half months of physical therapy that ended over three years ago. Plaintiff acknowledged that he commenced another lawsuit in regard to a prior accident in which he was involved and from which he sustained injuries to his neck and other body parts.

On a motion for summary judgment, the Court's function is to decide whether there is a material factual issue to be tried, not to resolve it (*Sillman v Twentieth Century Fox Films Corp.*, 3 NY2d 395, 404). A *prima facie* showing of a right to judgment is required before summary judgment can be granted to a movant (*Alvarez v Prospect Hospital*, 66 NY2d 320; *Winegrad v New York University Medical Center*, 64 NY2d 851; *Fox v Wyeth Laboratories, Inc.*, 129 AD2d 611; *Royal v Brooklyn Union Gas Co.*, 122 AD2d 133). Here, defendant has made an adequate *prima facie* show of entitlement to summary judgment thereby shifting to plaintiff the burden of presenting sufficient evidence to defeat defendant's motion by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law (see, *Gaddy v. Eyeler*, 79 NY2d 955; *Grossman v. Wright*, 268 AD2d 79, 84).

In opposition to defendant's motion for summary judgment, plaintiff submits the affirmation of his physician, Dr. Carlisle St. Martin, who examined plaintiff on July 8, 2007. Dr. St. Martin also treated plaintiff after the subject accident on October 31, 2003. As reported by Dr. St. Martin, he "administered a full 'range of motion' study of the plaintiff's cervical spine and lumbar spine, in order to assess [plaintiff's] condition." Dr. St. Martin's affirmation includes a chart showing the generally accepted "normative" range of motion for various movements along with his findings for plaintiff. The chart, however, purportedly identifies the restrictions of plaintiff's range of motion by providing a range to identify what is normal (e.g., "0-50-deg") but a fraction followed by a whole number to identify the results of his examination of plaintiff (e.g., "3/5 (20)").

Based on his examination, Dr. St. Martin found that plaintiff suffered a "'loss' of the normal and expected range of motion in his cervical and lumbar spine due to his car accident". Dr. Carlisle St. Martin opined that as a result of the motor vehicle accident on October 31, 2003 plaintiff suffered the following injuries: cervical radiculopathy; restricted range of motion of the cervical spine; paresthesias of the left hand/digits; restricted range of motion of the left hand/digits; weakness of the left hand/digits; numbness of the right upper extremity; restricted range of motion of the right upper extremity; headaches.

Plaintiff failed to raise a triable issue of fact as to whether he sustained a serious injury. While the affirmed medical report of plaintiff's examining physician purports to show limitations in the range of motion of plaintiff's cervical and lumbar spines based on the recent examination, the discrepancy in reporting methodology between what is normal and what plaintiff's July 18, 2007

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examination revealed renders the results incomprehensible, especially since, using example from above, a "3/5 [limitation]" is not "20[%]" of anything.

In any event, assuming arguendo Dr. St. Martin's chart reveals various quantified limitations in range of motion, plaintiff failed to offer any medical evidence that was contemporaneous with the subject accident that showed a limitation in his range of motion (*Bestman v Seymour*, 41 AD3d 629; *Borgella v D & L Taxi Corp.*, 38 AD3d 701; *Iusmen v Konopka*, 38 AD3d 608; *Earl v Chapple*, 37 AD3d 520; *Zinger v Zylberberg*, 35 AD3d 851, 828). Further, "[i]t is well established that to satisfy the statutory serious injury threshold, plaintiff must have sustained an injury that is identifiable by objective proof; plaintiff's subjective complaints of pain do not qualify as a serious injury within the meaning of Insurance Law §5102(d)" (*Tuna v Babendererde*, 32 AD3d 574). Dr. St. Martin's affirmation fails to identify any of the orthopedic tests performed and their results. The findings of limited range of motion for the cervical and lumbar spine do not relate to any diagnostic tests or other medical evidence. His expert report was tailored to meet the statutory threshold and was dependent solely on information supplied by the plaintiff, including references to plaintiff's subjective complaints of pain and discomfort, all of which are insufficient to support a claim for serious injury (*Lopez v Senatore*, 65 NY2d 1017; *Burford v Fabrizio*, 8 AD3d 784).

Moreover, plaintiff did not present competent medical evidence to support his claim that he was unable to perform substantially all of his daily activities for not less than 90 of the first 180 days following the subject accident (*Jackson v Colvert*, 24 AD3d 420). Plaintiff's deposition testimony establishes that he did not suffer an injury that prevented him from performing substantially all of his customary daily activities for at least 90 days of the 180 days immediately after the accident. In ¶ 13 of his affidavit plaintiff states "[a]t the time of the accident. . . I did not miss any time from work." (*See also* Dhanjal deposition, p. 9).

Defendant's motion for summary judgment is granted.

Plaintiff's complaint is dismissed without costs.

This decision constitutes the order and judgment of the court.

Dated: 9-6-07

HON THOMAS P. PHELAN

[Signature]

J.S.C.

ENTERED

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NASSAU COUNTY
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