

**Batista v Developmental Disabilities Inst.**

2007 NY Slip Op 32928(U)

September 13, 2007

Supreme Court, Suffolk County

Docket Number: 0000909/2005

Judge: Robert W. Doyle

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(d). In support, defendants submit the pleadings; a bill of particulars; the medical report dated December 6, 2004 of no-fault carrier's physician, Dr. Joseph Sanelli; the medical report dated November 22, 2004 of no-fault carrier's physician, Dr. Gerard D'Ariano; two MRI reports dated November 10, 2004 of plaintiff's physician, Dr. Alvand Hassankhani, concerning plaintiff's thoracic and cervical spine; the medical record of St. Catherine of Siena Medical Center; the affirmed report dated January 17, 2007 of defendants' examining orthopedist, Dr. Craig Ordway; the affirmed report of defendants' examining neurologist, Dr. Frederick Mortati, based on an examination of plaintiff on January 15, 2007; and the MRI report dated May 15, 2006 of defendants' physician, Dr. Joseph Macy, based on his review of the MRI examinations of plaintiff's cervical and thoracic spine, taken on November 10, 2004, and left knee, taken on July 8, 2005.

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*, 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 Sys.*, 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 Kilhenny*, 174 AD2d 663, 571 NYS2d 525 [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 [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 [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 [1990]).

Here, defendants failed to make a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) (*see, Nembhard v Delatorre*, 16 AD3d 390, 791 NYS2d 144 [2005]). Dr. Hassankhani's MRI report of plaintiff's thoracic and cervical spine, taken on November 10, 2004, revealed that he had a focal broad-based left posterolateral C5-C6 disc herniation;

moderate bilateral foraminal narrowing of the cervical spine; broad-based central disc herniation at C6-C7; mild left paracentral disc osteophytosis at T5-T6 and T6-T7; and mild disc degenerative disease at T7-T8 and T9-T10. For a herniated or bulging disc to constitute a serious injury, there must be objective evidence of the extent or degree of the alleged limitation resulting from the injury and its duration (*see, Guzman v Paul Michael Mgt.*, 266 AD2d 508, 698 NYS2d 719 [1999]).

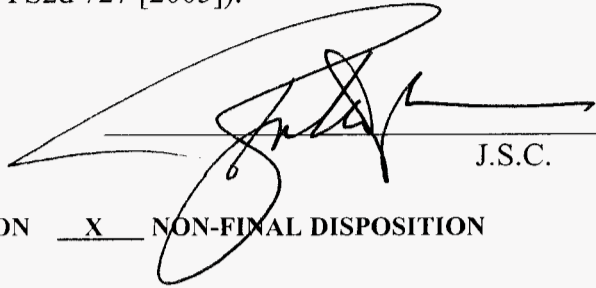
On November 22, 2004, approximately four weeks after the subject accident, no-fault carrier's physician, Dr. D'Ariano, examined plaintiff, using certain orthopedic and neurological tests and found that there was tenderness in his cervical and thoracic spine. Dr. D'Ariano reported his findings with respect to the various ranges of motion of plaintiff's cervical spine and compared those findings to the normal ranges of motion. Although Dr. D'Ariano found that plaintiff had a full range of motion in his cervical spine and upper and lower extremities, he failed to set forth any objective tests (*see, Vazquez v Basso*, 27 AD3d 728, 815 NYS2d 626 [2006]; *Kennedy v Brown*, 23 AD3d 625, 805 NYS2d 408 [2005]; *Nembhard v Delatorre*, *supra*). Dr. D'Ariano also failed to discuss the range of motion of plaintiff's lumbar spine (*compare, Kerzhner v N.Y. Ubu Taxi Corp.*, 17 AD3d 410, 792 NYS2d 622 [2005]). On December 6, 2004, approximately six weeks after the subject accident, no-fault carrier's physician, Dr. Sanelli, examined plaintiff, using certain orthopedic and neurological tests and found that there was tenderness and spasm in his cervical and thoracic spine. Dr. Sanelli found that plaintiff had a normal range of motion in his lumbar spine. Nevertheless, he failed to set forth any objective tests. Moreover, Dr. Sanelli failed to specify the degree of range of motion in extension, lateral bending and rotation of plaintiff's cervical spine in support of his conclusion that plaintiff did not sustain a serious injury (*see, Browdame v Candura*, 25 AD3d 747, 807 NYS2d 658 [2006]).

On January 17, 2007, approximately two years and three months after the subject accident, defendants' examining orthopedist, Dr. Ordway, examined plaintiff, using certain orthopedic and neurologic test and found that there was no spasm in his back. Although Dr. Ordway reported his findings with respect to the various ranges of motion of plaintiff's cervical spine and merely stated that "[plaintiff's] chin is brought to the chest," he failed to specify the degree of range of motion in forward flexion of plaintiff's cervical spine (*see, Browdame v Candura*, *supra*). Moreover, Dr. Ordway also failed to compare his findings with a normal range of motion (*see, Baudillo v Pam Car & Truck Rental*, 23 AD3d 420, 803 NYS2d 922 [2005]; *Aronov v Leybovich*, 3 AD3d 511, 770 NYS2d 741 [2004]). Furthermore, he failed to set forth any objective tests. On January 15, 2007, defendants' examining neurologist, Dr. Mortati, examined plaintiff, using certain neurological tests and found that straight leg raising was negative and that there was no spasm in plaintiff's neck and back. Dr. Mortati concluded that plaintiff's neurological testing results were normal and that he did not sustain a serious injury. Nevertheless, Dr. Mortati failed to discuss the range of motion of plaintiff's cervical and lumbar spine (*compare, Kerzhner v N.Y. Ubu Taxi Corp.*, *supra*). Based on the review of the MRI examinations of plaintiff's cervical and thoracic spine, taken on November 10, 2004, and left knee, taken on July 8, 2005, Dr. Macy opined that there were moderate degenerative arthritic changes in plaintiff's cervical and thoracic spine; that there were "posterior spurs and spurs from the zygapophyseal joints at C5-C6 and C6-C7"; and that "early degenerative changes involving the posterior horn of the medial meniscus with a small joint effusion." Dr. Macy also failed to submit evidence to support his conclusion that plaintiff's injuries were not causally related to the accident, or that they were not serious, within the meaning of Insurance Law § 5102 (d) (*see, Tricarico v Vicale*, *supra*).

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Thus, defendants failed to objectively demonstrate that plaintiff's injuries were not casually related to the subject accident or that they were not serious within the meaning of Insurance Law § 5102 (d) (see, *Browdame v Candura, supra*; *Zavala v DeSantis*, 1 AD3d 354, 766 NYS2d 598 [2003]). Accordingly, defendants failed to establish, prima facie, their entitlement to judgment as a matter of law. Under the circumstances, it is unnecessary to consider the sufficiency of plaintiffs' opposition papers (see, *Barrett v Jeannot*, 18 AD3d 679, 795 NYS2d 727 [2005]).

Dated: SEP 13 2007

  
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J.S.C.

         FINAL DISPOSITION      X   NON-FINAL DISPOSITION