

Virgilio v Amendolare

2007 NY Slip Op 32997(U)

September 12, 2007

Supreme Court, Nassau County

Docket Number: 9831-06/

Judge: James P. McCormack

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL/IAS TERM, PART 51 NASSAU COUNTY**

PRESENT:

**Honorable James P. McCormack
Acting Justice of the Supreme Court**

_____ x

JOSEPH VIRGILIO,

Plaintiff(s),

Index No. 9831/06

-against-

Motion Seq. No.: 001
Motion Submitted: 7/17/07

DOMINICK AMENDOLARE and JOYCE M.
AMENDOLARE,

Defendant(s).

_____ x

The following papers read on this motion:

- Notice of Motion/Supporting Exhibits.....X
- Affirmation in Opposition.....X
- Reply Affirmation.....X

Motion by defendants Dominick Amendolare and Joyce Amendolare for an order pursuant to CPLR §3212 granting summary judgment dismissing the complaint on the grounds that plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102 (d) is decided a hereinafter provided.

This action is brought by plaintiff Joseph Virgilio to recover money damages for what are alleged to be serious injuries sustained by him in a automobile accident which

occurred December 6, 2005 when the vehicle he was operating was struck by defendants' vehicle on Hicksville Road near Dogwood Lane, Massapequa, New York. Plaintiff's bill of particulars alleges, inter alia, a herniated disc at the L5-S1 level per an M. R. I. study conducted on January 27, 2006 and straightening of the upper cervical curvature of the cervical spine. Plaintiff, who was approximately forty-six years old at the time of the accident, was treated and released at Winthrop University Hospital's emergency room and was confined to his home approximately one week after the accident. Thereafter, plaintiff underwent a course of treatment with a chiropractor three times a week from the date of accident to present as well as treatment with a neurologist.

In support of the motion for summary judgment, defendants' submit the affirmed reports of three physicians. Dr. S. Farkas, an orthopedist, examined plaintiff on February 14, 2007 who diagnosed plaintiff with resolved cervical and lumbar spine with no orthopedic disability with no objective findings. Dr. Stephen Newman, a neurologist, examined plaintiff on February 19, 2007. During this exam, plaintiff complained of low-back pain radiating down both legs and intermittent neck pain. Upon examination, Dr. Newman found "no objective abnormalities" with "no neurologic injury or disability" related to the automobile accident of December 6, 2005. Dr. Melissa Cohn, a radiologist, reviewed the lumbar M. R. I. film taken of plaintiff's lumbar spine on January 27, 2006 and found disc desiccation at the L5-S1 level with a central disc herniation which effected the ventral thecal sac. Dr. Cohn, however, found

that the disc herniation was associated with underlying degenerative changes which were chronic in nature and not as a result of an acute herniation. Further, in support of its motion, defendants point to excerpts of plaintiff's examination before trial wherein plaintiff stated he missed no time from work, was not recommended for surgery by any medical provider, received no spinal or epidural injections and had injured his back in a prior automobile accident in 1995.

On a motion for summary judgement, it is defendant's burden to present a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102(d) as a matter of law. (Schultz v. Von Voight, 86 NY 2d 865 [1995]). If defendant makes that showing the burden shifts to plaintiff to come forward with sufficient evidence to overcome defendant's motion by demonstrating that he sustained a serious injury the No-Fault Law. (Gaddy v. Eyler, 79 NY 2d 955 [1992]). The defendants here have established, through the affirmed reports of the aforementioned physicians, a prima facie case that plaintiff's injuries were not serious within the meaning of Insurance Law §5102. (Chatah v. Iglesias, 5 AD 3d 160 [1st Dept. 2004]; Ziegler v. Ramadhan, 5 AD 3d 1080 [4th Dept. 2004]). Accordingly, the burden now shifts to the plaintiff to demonstrate a serious injury. (Attanasio v. Lashley, 233 AD 2d 614 [2d dept. 1996]).

In opposing the motion, plaintiff has submitted the affirmed report of radiologist, Dr. Harvey Lefkowitz, who conducted the lumbar and cervical M. R. I. on January 25th and 27th, 2006, with findings of a disc herniation at L5-S1 midline and

straightening of the upper cervical curvature of the cervical spine and the affirmed report of Dr. Kerin Hausknecht, a neurologist, who examined plaintiff on May 9, 2007, and Nicholas Waslyn, D. C., plaintiff's treating chiropractor. Plaintiff's chiropractor, in his sworn affidavit, outlined plaintiff's restrictions in his cervical and lumbar spine noting the degrees of restriction vis-a-vis normal ranges of motion upon his initial examination as well as positive orthopedic findings revealing disc and nerve root compression in the neck and low back. He noted also that plaintiff had begun treatment with him on December 7, 2005 and continues to on a basis of two to three times a week to present. In his opinion, as a chiropractor, plaintiff sustained a permanent partial disability to the region of the lumbar spine with additional cervical radiculopathy which are causally related to the accident of December 6, 2005 and which cause plaintiff to have pain with sitting, standing lifting and resting comfortably.

More significantly, however, Dr. Hausknecht, a neurologist, who recently examined plaintiff on May 9, 2007, and had reviewed plaintiff's prior medical records, found continued restriction in plaintiff's range of motion in the lumbar spine which he quantified by use of a goniometer and compared plaintiff's restriction with that of normal degrees of range of motion. He further noted a positive straight leg raise testing sign on the left side at forty five (45) degrees. Dr. Hausknecht diagnosed plaintiff with, inter alia, traumatic lumbar spine disc herniation with discogenic and mechanical low back pain which were causally related to the December 6, 2005 with the recommendation for future aggressive treatment and potential for surgery.

Plaintiff submitted a sworn affidavit indicating he can no longer bend down as far as he use to, experiences difficulty lifting his children or heavy objects, and, after his no-fault benefits were denied, used his personal health insurance to cover his medical cost of treatment.

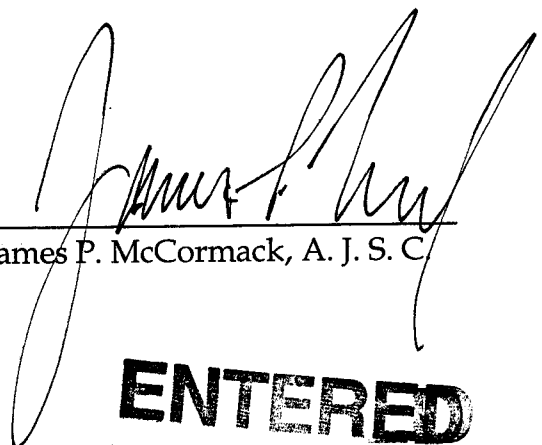
With regard to the statutory categories under Insurance Law §5102(d) of “permanent consequential limitation” and significant limitation of use,” the Court of Appeals stated that whether a limitation of use of function is “consequential” or “significant” relates to “medical significance” and involves a “comparative determination of the degree or qualitative nature function, purpose and use of the boday part.” (Toure v. Avis Rent A Car Systems, 98 NY 2d 345, 353 [2002]). Additionally, the doctor’s opinion as to the medical significance must be supported by objective medical evidence such as an M. R. I. or CT scan, or the observation of muscle spasms during the physical examination (Id.). The plaintiff herein has submitted objective medical evidence of a herniated disc together with objective tests showing a decreased range of motion in the lumbar spine of a sufficient quality as to preclude summary judgment. (Salomon v. Hadco, 1 AD 3d 426[2d Dept. 2003]; Espinoza v. Dinicola, 8 AD 3d 225 [2d Dept. 2004]; Ejzerman v. Cruz, 309 AD 2d 893[2d Dept. 2003]).

Specifically, this Court concludes that plaintiff has presented sufficient evidence as to two of the No-Fault thresholds: 1) permanent consequential limitation of use of a body organ or member, and 2) significant limitation of use of a body function or system.

Accordingly, the defendant's motions denied in a respects.

This constitutes the Decision and Order of the Court.

Dated: September 12, 2007
Mineola, N.Y.



Hon. James P. McCormack, A. J. S. C.

ENTERED
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NASSAU COUNTY
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