

Forrest v Brignolle

2007 NY Slip Op 33038(U)

September 25, 2007

Supreme Court, Nassau County

Docket Number: 5831-06/

Judge: Daniel R. Palmieri

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SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

**HON. DANIEL PALMIERI
Acting Justice Supreme Court**

-----x
DELROY FORREST and MONICA FORREST,

TRIAL TERM PART 50

Plaintiff,

INDEX NO.:5831/06

-against-

**MOTION DATE:7-10-07
SUBMIT DATE: 8-28-07
SEQ. NUMBER - 001**

LAVEAU BRIGNOLLE,

Defendant.

-----x

The following papers have been read on this motion:

- Notice of Motion, dated 6-15-07.....1**
- Affirmation in Opposition, dated 8-23-07.....2**
- Reply Affirmation, dated 8-27-07.....3**

Motion by defendant pursuant to CPLR 3212 for summary judgment dismissing plaintiff's complaint on the grounds that plaintiff did not sustain a serious injury as defined in Insurance Law § 5102(d) is denied.

This is an action to recover damages for injuries allegedly sustained by plaintiff on April 30, 2005 when the vehicle he was operating was struck in the rear by defendant's vehicle.

In automobile accident cases where the plaintiff seeks to recover for pain and suffering, or other non-economic loss, plaintiff must allege and ultimately prove the

existence of a serious injury. *Oberly v Bangs Ambulance Inc.*, 96 NY2d 295 [2001].

§5102(d) of the Insurance Law 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 nonpermanent 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 no less than 90 days during the 180 days immediately following the occurrence of the injury or impairment."

In his Bill of Particulars, Delroy Forrest alleges injuries under the permanent loss of use, permanent consequential limitation, significant limitation and "90/180" categories.

In order to establish a permanent consequential limitation or a significant limitation of use, the medical evidence submitted by plaintiff must contain objective, quantitative evidence with respect to diminished range of motion or a qualitative assessment comparing plaintiff's present limitations to the normal function, purpose and use of the affected organ, member, function or system. *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 353 [2002]. Subjective complaints of pain alone are insufficient to establish a *prima facie* case of serious injury. *Munoz v Hollingsworth*, 18 AD3d 278, 279 [1st Dept. 2005]. The movant has the initial burden of establishing a *prima facie* entitlement to judgment as a matter of law. *Hughes v Cai*, 31 AD3d 385 [2nd Dept. 2006]. The proof must be viewed in a light most favorable to the non-moving party, here the plaintiff.

Perez v Exel Logistics, Inc., 278 AD2d 213, 214 [2nd Dept. 2000]. If the movant meets that burden, the burden shifts to the plaintiff to demonstrate, by the submission of objective proof of the nature and degree of the injury, that he/she sustained a serious injury or that there are questions of fact as to whether the purported injury, in fact, is serious. *Flores v Leslie*, 27 AD3d 220, 221 [1st Dept. 2006].

In support of the dismissal motion, defendant has submitted the affirmation of Harvey Fishman, M.D., who examined plaintiff on December 20, 2006, and states, in pertinent part, that

"[t]here are no objective findings whatsoever of any residual orthopedic permanency"

and opines that claimant sustained a cervical and lumbosacral spine strain or sprain which has fully resolved. In his report, Dr. Fishman sets forth range of motions findings, based on examination of plaintiff's cervical spine/upper extremities and lumbosacral spine/lower extremities, which he states are "completely within normal limits." In doing so, however, he fails to compare any of these numeric findings with what is deemed normal ranges of motion for those regions of plaintiff's body. Absent a comparative quantification of the findings contained in Dr. Fishman's report with what is considered normal, it cannot be concluded that the delineated ranges of motion fall within the normal range or that any limitations are mild, minor or slight so as to be considered insignificant within the meaning of the no-fault statute. *McLaughlin v Rizzo*, 38 AD3d 856, 857 [2nd Dept. 2007]; *Mirochnik v Ostrovskiy*, 35 AD3d 413 [2nd Dept. 2006]; *Mondi v Keahon*, 32 AD3d 506, 507 [2nd Dept. 2006]; *Sullivan v Dawes*, 28 AD3d 472 [2nd Dept. 2006]; *Kennedy v Brown*, 23 AD3d 625, 626 [2nd Dept. 2005].

Additionally, defendant submitted the affirmations of radiologist Stanley Sprecher, M.D., who performed a review of the MRI scans of plaintiff's cervical and lumbar spines and found "no post-traumatic abnormalities that could be referred to the accident of 4/30/05." With respect to the MRI scan of the lumbar spine Dr. Sprecher's impression is of disc space narrowing as well as anterior bony spondylosis and diffuse annular bulging at the L5-S1 level which he considers "most consistent with a chronic, degenerative process of longstanding duration, predating and unrelated to the accident of 4/30/05." His impression with respect to plaintiff's cervical spine is of disc space narrowing as well as anterior and posterior bony spondylosis and diffuse annular bulging at C3-4, C4-5, C5-6, C6-7, T1-2 and T3-4 levels which he considers

"consistent with a chronic degenerative process of longstanding duration, predating and unrelated to the accident of 4/30/05."

Dr. Sprecher has carefully couched his opinion *vis a vis* the degenerative nature of plaintiff's disabilities in language that is at best equivocal, and somewhat confusing, when he states that his findings are "consistent with" or "more consistent with" the degenerative process. These statements by defendant's expert are insufficient to establish, *prima facie*, that plaintiff's injuries are degenerative in nature.

As previously noted, a defendant who seeks summary dismissal of plaintiff's complaint has the initial burden of presenting evidence, in competent form, showing that plaintiff did not sustain a serious injury and, therefore, has no cause of action. *Toure v Avis Rent A Car Sys., Inc.*, *supra* at p. 353; *Gaddy v Eyster*, 79 NY2d 955, 957 [1992]. The

Court of Appeals has held that whether a limitation of use or function is significant or consequential relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part. *Dufel v Green*, 84 NY2d 795, 798 [1995]. Where the defendant fails to meet the initial burden of establishing *prima facie* entitlement to judgment as a matter of law, the court need not consider whether the opposition papers are sufficient to raise a factual issue. *Kouros v Mendez*, 41 AD3d 786, 788 [2nd Dept. 2007]; *Nembhard v Delatorre*, 16 AD3d 390, 391 [2nd Dept. 2005]; *McDowall v Abreu*, 11 AD3d 590 [2nd Dept. 2004].

Even if the Court were to find that defendant has met his burden, albeit barely, summary dismissal of the complaint must be denied as plaintiff has raised issues of fact concerning whether he sustained serious injury. Although the magnetic resonance images of plaintiff's cervical and lumbar spines, which show respectively:

central herniation at C3-4, right paracentral herniation at C6-7;

significant right paracentral herniation at L5-S1

are not, in themselves, evidence of a serious injury (*Gordon-Silvera v Long Island R.R.*, 41 AD3d 431, 432 [2nd Dept. 2007]), the affidavit of plaintiff's treating chiropractor, who re-examined plaintiff on August 8, 2007, documents objective evidence of the extent of plaintiff's alleged injuries and specifically quantifies the loss of motion in both the cervical and lumbar spines. Dr. Sosnik explains that plaintiff underwent treatment under his direction on a continuous basis for approximately five months and was discharged from therapy when his no-fault benefits were denied and no further benefit could be


derived from further treatment. Plaintiff was advised, however, to seek treatment periodically as needed.

Under the circumstances extant, where defendant has failed to meet the initial burden of establishing a *prima facie* case that plaintiff did not sustain serious injury, the CPLR 3212 motion for summary judgment dismissing plaintiff's complaint must be denied.¹

This shall constitute the Decision and Order of this Court.

ENTER

DATED: September 25, 2007


HON. DANIEL PALMIERI
Acting Supreme Court Justice

**TO: Law Offices of Mark Silverman
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ENTERED
SEP 27 2007
NASSAU COUNTY
COUNTY CLERK'S OFFICE

¹ The Court notes that in view of this determination it need not address the "90/180" and permanent loss of use categories of injury.