

Ventura v Flower

2007 NY Slip Op 33214(U)

September 28, 2007

Supreme Court, Nassau County

Docket Number: 0882-06/

Judge: Karen Veronica Murphy

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 25 NASSAU COUNTY**

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

_____ x

CARLOS VENTURA,

Plaintiff,

Index No. 882/06

-against-

Motion Dated: 5/24/07

Motion Submitted: 7/12/07

Motion Sequence: 001

ALAN FLOWER,

Defendant.

_____ x

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....X
- Answering Papers.....X
- Reply.....X
- Briefs: Plaintiff's/Petitioner's.....
- Defendant's/Respondent's.....

Defendant moves this Court for an Order, pursuant to CPLR §3212, granting summary judgment in his favor and dismissing the complaint in that Plaintiff did not suffer a serious injury as that term is defined in § 5102 of the New York State Insurance Law. Plaintiff opposes the requested relief.

The instant action was the result of an accident wherein Plaintiff, riding a bicycle, was struck by a motor vehicle operated by Defendant on October 10, 2003 in Glen Cove, Nassau County, New York. Liability remains in dispute.

It is well recognized that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact. (*Andre v. Pomeroy*, 35 N.Y.2d 361, 320 N.E.2d 853, 362 N.Y.S.2d 131 [1974]). Summary judgment

should only be granted where the Court finds as a matter of law that there is no genuine issue as to any material fact. (*Nassau Diagnostic Imaging & Radiation Oncology Assoc. v. Winthrop-University Hosp.*, 197 A.D.2d 563, 602 N.Y.S.2d 650 [2d Dept., 1993]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the Plaintiff. (*Makaj v. Metropolitan Transp. Auth.*, 18 A.D.3d 625, 796 N.Y.S.2d 621 [2d Dept., 2005]).

The Defendant must in the first instance establish his *prima facie* entitlement as a matter of law by demonstrating that the Plaintiff did not sustain a serious injury within the meaning of Insurance Law Section 5102(d) as a result of this accident. (*Felix v. New York City Tr. Auth.*, 32 A.D.3d 527, 819 N.Y.S.2d 835 [2d Dept., 2006]). This Court is satisfied that he has done so.

The Insurance Law defines serious injury to mean, in relevant part, a personal injury which results in "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 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 Section 5102(d).

According to his verified bill of particulars, as a result of Defendant's negligence, Plaintiff suffered the following injuries: central disc herniation C 5/6, reversal of the cervical lordosis indicative of reflex muscle spasm, right C6 radiculopathy, left C5 radiculopathy, left knee abrasion, cervical sprain/strain, cervical and thoracolumbar strain with multiple disc herniations and radiculopathy/radiculitis, abnormal sensations with parasthesias in the C5-6 and L4-5, L5-S1 nerve root distributions, tenderness and spasm to inspection of percussion and palpation, restricted ranges of motion, tenderness and spasm along palpation of the cervical spine, diminished right arm sensation, L4/5 posterior disc herniation, disc bulges, L5 radiculopathy, lumbar stenosis with radiculopathy, lumbar spine spasms, lumbar spine tenderness and spasms across the upper trapezius.

According to Plaintiff's deposition, he was struck by a motor vehicle and rendered unconscious. His next memory was waking at Glen Cove Hospital. He was discharged from the hospital and walked home, after having been treated for some abrasions to his head. He did not recall making complaints of pain while at the hospital. The following day he experienced pain in his neck and numbness in both legs. As these symptoms continued,

Plaintiff visited a doctor about a week after the accident. These doctor visits were following his visits to a lawyer and were suggested by the lawyer. Plaintiff was seen by Alliance Physical and Medical Rehabilitation. He was also treated by an acupuncturist and a chiropractor. Plaintiff did not recall the exact type, frequency or length of treatment. However, he estimated the treatments lasted approximately nine months, with improvements, feeling "a little bit" better after five months. As of the date of the deposition, September 20, 2006, Plaintiff continued to feel pain from his injuries, describing his back as "always hurting." As of the date of the deposition Plaintiff was not taking medication and had no further medical appointments scheduled.

Defense expert Dr. Alan P. Wolf, Board Certified in Physical Medicine and Rehabilitation, examined Plaintiff on May 18, 2004. In his sworn report prepared following a review of medical reports and a physical examination of Plaintiff, Dr. Wolf diagnosed Plaintiff with resolved cervical lumbar strain. He further found no objective evidence of disability in relationship to the subject accident and found no need for follow up treatment or diagnostic testing. He found the Plaintiff capable of returning to work and capable of performing his normal activities of daily living. Dr. Wolf found no evidence of permanency with respect to these injuries. Dr. Wolf's report described the objective testing used to reach his conclusions.

Plaintiff was also seen by defense expert Dr. A. Rimalovski, a psychiatrist and neurologist. Dr. Rimalovski examined Plaintiff on May 3, 2004. After reviewing various medical reports and examining Plaintiff, Dr. Rimalovski opined that a causal relationship between the accident and soft tissue injury of the back in the form of sprain and strain had been established. He found Plaintiff's neurological and physical examinations to be normal. He found no disability or permanent injury inflicted by the subject accident. He found no need for further treatment, supplies or assistance. He concluded Plaintiff was able to work full time and conduct his activities of daily living without limitations.

Finally, on January 9, 2007, Plaintiff was examined by Dr. Leon Sultan, an orthopaedic and reconstructive surgeon. Following his examination of Plaintiff and a review of medical records, he was of the opinion that as of that date, there were no residual orthopedic or neurological impairments as a result of the subject accident.

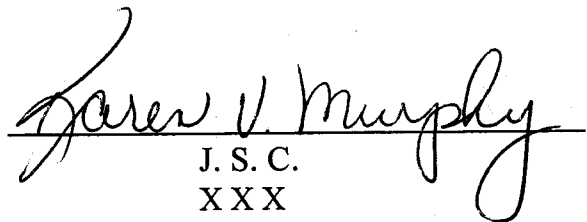
Defendant having established his entitlement as a matter of law, the burden shifts to the Plaintiff to demonstrate the existence of a triable issue of fact. (See, *Kaplan v. Hamilton Med. Assoc.*, 262 A.D.2d 609, 692 N.Y.S.2d 674 [2d Dept., 1999]). This Court does not find Plaintiff has raised an issue of fact.

To begin with, Plaintiff's self-serving deposition does little to overcome his burden of proving a triable issue of fact. (See *Fisher v. Williams*, 289 A.D.2d 288, 734 N.Y.S.2d 497 [2d Dept., 2001]). Moreover, the affirmation of Plaintiff's Dr. Joseph Gregorace dated June 28, 2007, prepared following his examination of Plaintiff on May 24, 2007, is not in the proper form. It does not swear to the truth of the statement, but merely that he is a medical doctor. While the report of Dr. Gregorace dated May 24, 2007 is properly affirmed, and makes reference to then-existing symptoms from the accident in question, it does not adequately explain the gap in treatment for approximately three years, the time between the current examination and Dr. Gregorace's prior examination of Plaintiff. Unlike *Wadford v. Gruz*, 35 A.D.3d 258, 826 N.Y.S.2d 57 (1st Dept., 2006), wherein the Court found Plaintiff's testimony that he stopped attending therapy due to insurance limitations a sufficient explanation, no such evidence in admissible form is before this Court. This Court is not persuaded by Dr. Gregorace's characterization of the no fault system as probative to the issues at hand.

The motion for summary judgment is granted and the complaint is dismissed.

The foregoing constitutes the Order of this Court.

Dated: September 28, 2007
Mineola, N.Y.


J. S. C.
XXX

ENTERED

OCT 05 2007

NEW YORK COUNTY CLERK'S OFFICE