

Liebetruth v Salmeron

2007 NY Slip Op 33427(U)

October 16, 2007

Supreme Court, Suffolk County

Docket Number: 0026092/2004

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 5-2-07
ADJ. DATE 6-6-07
Mot. Seq. #001 - MD

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LEWIS LIEBETRUTH,	:	SILVERSTEIN & KAHN
	:	Attorneys for Plaintiff
Plaintiff,	:	1160 E. Jericho Turnpike
	:	Huntington, New York 11743
- against -	:	
	:	ROBERT P. TUSA, ESQ.
PEDRO SALMERON,	:	Attorney for Defendant
	:	898 Veterans Memorial Highway, Suite 320
Defendant.	:	Hauppauge, New York 11788
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Upon the following papers numbered 1 to 18 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 10; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 11 - 16; Replying Affidavits and supporting papers 17 - 18; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant for summary judgment dismissing the complaint is denied.

This action arose from an accident occurring on June 29, 2002 in which the plaintiff allegedly sustained serious personal injuries. The defendant moves for summary judgment dismissing the complaint pursuant to Insurance Law §5102(d). The plaintiff opposes the motion and defendant has submitted a reply affirmation in rebuttal to that opposition.

Under the Insurance Law “[s]erious injury’ means 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” (Insurance Law §5102[d]).

In the context of the plaintiff's claims, the term "significant," as it appears in the statute, has been defined as "something more than a minor limitation of use" (*Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]). For this purpose, the plaintiff must demonstrate not only the extent or degree of the limitation but also its duration (*Beckett v Conte*, 176 AD2d 774, 575 NYS2d 102 [1991], app. den. 79 NY2d 753, 581 NYS2d 281). The duration of the injury must be more than "fleeting" (*Partlow v Meehan*, 155 AD2d 647, 548 NYS2d 239 [1989]). The term "consequential" means important or significant (*Kordana v Pomellito*, 121 AD2d 783, 503 NYS2d 198 [1986], app. dis. 68 NY2d 848, 508 NYS2d 425). A "permanent loss" of use of a body organ, member, function or system must be total (*Oberly v Bangs Ambulance, Inc.*, 96 NY2d 295, 727 NYS2d 378 [2001]). In order to prove the extent or degree of physical limitation, an expert can designate a numeric percentage of a plaintiff's loss of range of motion or give a "qualitative assessment of a plaintiff's condition...provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system" (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 746 NYS2d 865, 868 [2002]; rearg. den. *Manzano v O'Neil*, 98 NY2d 728, 749 NYS2d 478).

Generally, on a motion for summary judgment to dismiss a complaint for failure to set forth a prima facie case of serious injury as defined by Insurance Law §5102(d), 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]). "It is well settled that the proponent of a motion for summary judgment under the no-fault statute must submit admissible evidence demonstrating that a plaintiff did not sustain a serious injury as defined by Insurance Law § 5102[d]" (*Fitzmaurice v Chase*, 288 AD2d 651, 652, 732 NYS2d 690, 691 [2001]; see, *Barbarulo v Allery*, 271 AD2d 897, 707 NYS2d 268 [2000]). Once the defendant has met the burden, the plaintiff must then, by competent proof, establish a *prima facie* case that such serious injury exists (*DeAngelo v Fidel Corp. Services, Inc.*, 171 AD2d 588, 567 NYS2d 454, 455 [1991]). 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 non-moving party, here the plaintiff (*Cammarere v Villanova*, 166 AD2d 760, 562 NYS2d 808, 810 [1990]).

The defendant submits in support of his motion, inter alia, the affirmation of his attorney, copies of the parties' pleadings, the verified bill of particulars, an unsworn report from Good Samaritan Hospital Emergency Room (hospital report) dated June 29, 2002, an unsworn application for motor vehicle no-fault benefits signed by the plaintiff on July 24, 2002 (no-fault application), two unsworn reports of the plaintiff's treating chiropractor, Dr. William F. Palmer (Dr. Palmer) both dated November 12, 2002, two unsworn reports of the plaintiff's treating physician, Dr. K.R. Shetty (Dr. Shetty), dated July 2, 2002 and July 9, 2002, respectively and the sworn reports of the defendant's experts, Doctors Michael J Katz (Dr. Katz) and Mark J. Zuckerman (Dr. Zuckerman), dated September 5, 2006 and September 19, 2006, respectively.

The hospital report, the three page report of Dr. Palmer and the report of Dr. Shetty, although unsworn, are admissible (*Abrahamson v Premier Car Rental of Smithtown*, 261 AD2d 562, 691 NYS2d 83 [1999]; *Pagano v Kingsbury*, supra). The one page report of Dr. Palmer, although otherwise admissible (see, *Pagano v Kingsbury*, supra) is inadmissible in that it is unsigned (*Pagan v Gondola Cab Corp.*, 235 AD2d 251, 652 NYS2d 277 [1997]). The no-fault application being neither sworn (see, CPLR 2106) nor admissible as an unsworn report of the plaintiff's treating physician (see, *Pagano v Kingsbury*, supra) is inadmissible.

The defendant's attorney, quoting from excerpts of the plaintiff's deposition testimony, stated in his affirmation that the plaintiff testified that as a result of the accident he lost only one day from work and was confined to his bed and home for one day. The plaintiff alleges in his complaint that the subject accident occurred on June 29, 2002 and that he sustained serious personal injuries pursuant to Section 5102 of the Insurance Law "or economic loss greater than basic economic loss...." (Motion, Exhibit A).

The plaintiff avers in his bill of particulars that he sustained, as a result of the accident, inter alia, a disc bulge at C3-4, cervicocranial syndrome, cervicobrachial syndrome, cervical disc syndrome, thoracic myalgia, post traumatic headaches, cervical and lumbar radiculitis. The plaintiff further avers that these injuries are permanent and accompanied by pain, limitation of motion and loss of function. The plaintiff also alleges that since the subject accident he has been confined to bed and home for fourteen weeks except for trips to his place of employment and to obtain medical treatment, has been "incapacitated" from pursuing his usual recreational activities, has been "incapacitated" from doing household duties for fourteen weeks and has been "incapacitated" from employment for two days, and after the two days, has been on light duty for ninety days. The plaintiff also avers in his bill of particulars that he sustained transportation expenses of \$200 and no expenses for medical supplies, loss of earnings and nursing services. The plaintiff does not assert any specific expenses for physicians' and hospital services. The plaintiff avers that he is claiming the serious injury categories of significant disfigurement, permanent loss, non-permanent injury and permanent consequential limitation¹.

The hospital report indicates that the plaintiff was treated and released on the day of the accident. The plaintiff complained of lower neck and back pain and tenderness was found in the cervical spine and upper thoracic spine. X-rays of the cervical spine taken at the hospital demonstrated anatomic alignment with no evidence of fracture or subluxation. The cervical x-ray report indicated that the vertebral body heights and intervertebral disc spaces were well maintained. X-rays taken at the hospital of the thoracic spine showed that there was anatomic alignment and that the vertebral bodies and intervertebral disc spaces were maintained. The physician preparing the report concluded that there was no evidence of thoracic spine fracture.

Dr. Palmer stated in his report dated November 12, 2002 that the plaintiff's chief complaints were of neck pain and spasms. The plaintiff also complained of upper and mid-back pain, spasms and decrease in range of motion of the head and neck. Dr. Palmer indicated, based upon his examination of the plaintiff's cervical spine, that "range of motion of the cervical spine demonstrated a marked decrease in flexion/extension of the cervical spine with a moderate decrease in all other ranges" (Motion, Exhibit F). He also found that palpation of the cervical spine demonstrated a "palpable tenderness" with spasms and active trigger points of both right and left side trapezius muscles and that Lindner's test, Soto-Halls test, Foramina Compression test and Shoulder Compression test on the right side, were positive. His

¹ The plaintiff specifically claimed in his bill of particulars the serious injury categories of significant disfigurement, permanent loss, non-permanent injury and alluded to paragraphs 11 through 14 of the bill of particulars. Since the plaintiff in paragraph 11 refers to his injuries as "permanent" the court construed these paragraphs as also asserting a claim under the serious injury category of permanent consequential limitation.

examination of the thoracic spine revealed palpable spasticity with marked tenderness of both right and left para thoracic musculature and positive results for the Spinous Percussion and right lateral compression tests. With regard to diagnostic studies, Dr. Palmer found that "AP/LAT" views of the cervical spine taken on July 1, 2002 demonstrated a straightening of the normal cervical curve and an MRI conducted of the cervical spine dated September 28, 2002 revealed a bulging disc at C3-C4 without cord compression. His diagnosis was that the plaintiff had sustained cervical sprain, cervical disc syndrome, thoracic sprain and thoracic myalgia. Dr. Palmer's assessment was that these injuries were caused by the subject accident. He further opined that the bulging disc sustained in the subject accident would lead to advanced deteriorative changes at C3-C4 and make the plaintiff more susceptible to a rupture or herniation of the disc. He recommended continued chiropractic treatment to enable the bulging disc to heal more efficiently. Dr. Palmer's prognosis was that the plaintiff had suffered a partial permanent injury to the cervical spine and a permanent loss of range of motion in flexion and extension at C3-C4. Dr. Palmer concluded that the plaintiff "will continue to experience periods of exacerbations of the above residuals based on his occupation duties and his activities of daily living" (Motion, Exhibit F).

Dr. Shetty stated in his report dated July 2, 2002 that the plaintiff complained of headaches and pain in his neck and back. Upon conducting a neurological examination of the plaintiff, Dr. Shetty found that carotid pulsations on both sides of the neck were normal and that finger to nose testing was within normal limits. He also found limitations of movement of the back and positive straight leg raising at thirty degrees. Dr. Shetty observed pin prick, light touch, vibration and position were all within normal limits. He concluded the plaintiff had sustained post-traumatic headaches and cervical and lumbar radiculitis. Dr. Shetty recommended that an electroencephalogram be performed and that the plaintiff return for "followup" care. Dr. Shetty, in his report dated July 9, 2002, noted that the electroencephalogram was within normal limits.

Dr. Katz, an orthopedist, averred in his report dated September 5, 2006 that he examined the plaintiff on that date. The plaintiff complained to Dr. Katz that as a result of the accident he sustained injuries to his neck and back. He also informed Dr. Katz that he had been in another motor vehicle accident in 1998 in which he injured his lower back. The plaintiff's current complaint was that he had pain in his lower back when bending. Dr. Katz's examination of the plaintiff's cervical spine showed ranges of motion to be within normal limits and Adson's test as negative. Dr. Katz's examination of the plaintiff's thoracolumbar spine revealed normal ranges of motion, normal gait, no paravertebral muscle spasm and negative Babinski and Patrick tests. Dr. Katz's diagnosis was resolved cervical and thoracolumbar strains. He concluded that there were no signs or symptoms of permanence referable to the musculoskeletal system and "6/29/02" (Motion, Exhibit G). Dr. Katz also concluded that the plaintiff was not currently disabled, was capable of gainful employment in his occupation as an electrician and was capable of activities of daily living. He opined that, with regard to cause, "the mechanism of injury is consistent with the injuries described" (Motion, Exhibit G).

Dr. Zuckerman, a neurologist, averred in his report dated September 19, 2006 that he examined the plaintiff on the same date. The plaintiff complained of lingering right upper back discomfort and soreness in his neck and back. He indicated to Dr. Zuckerman that he had no change in his daily living activities. Although he is currently able to perform his work as an electrician, after the accident he was on light duty without lifting for approximately ninety days and missed one to two days of work. He also informed Dr. Zuckerman, that while he had injured his lower back approximately six years prior to the

Liebetruth v Salmeron

Index No. 04-26092

Page No. 5

subject accident, he had not previously injured his cervical area. Dr. Zuckerman averred that motor examination showed no focal weakness in the upper or lower extremities and no atrophy wasting or fasciculations. His musculoskeletal examination showed full range of motion except for a slight deficiency of lateral flexion to the left, no lumbar tenderness or spasm, a slight deficiency of cervical range of motion to the right and left, full cervical range of motion for flexion and extension, cervical lateral flexion forty five degrees to the left and right and no cervical tenderness or spasm. Dr. Zuckerman's diagnosis was that the plaintiff had a normal neurological examination and that the plaintiff had resolved cervical and lumbosacral sprains. He opined that there was a causal relationship between his diagnosis and the subject accident and that the plaintiff had no neurological disability.

With regard to the serious injury category of non-permanent injury, the plaintiff has alleged in his bill of particulars that he was confined to bed and home for fourteen weeks (98 days), has been incapacitated from pursuing his usual recreational activities, has been incapacitated from doing household duties for fourteen weeks and, although having returned to work after two days, was restricted to light duty for ninety days. According to the defendant's attorney, the plaintiff testified at his deposition that as a result of the accident he lost only one day from work and was confined to his bed and home for one day. The emergency room hospital report indicated that the plaintiff was treated and released on the day of the accident and hospital x-rays indicated anatomic alignment and the absence of fractures in the cervical and thoracic spines. Dr. Shetty, although noting in his report of July 9, 2002 that the plaintiff's electroencephalogram was within normal limits, also noted in his report of July 2, 2002 that he found limitations of movement of the plaintiff's back and positive straight leg raising at thirty degrees. He concluded that the plaintiff had sustained lumbar and cervical radiculitis. Dr. Palmer's examination, conducted only four and one half months after the accident, revealed a significant decrease in flexion and extension of the cervical spine together with spasms and active trigger points. He also noted that an MRI taken on September 28, 2002 revealed a bulging disc at C3-C4 and diagnosed the plaintiff as having cervical disc syndrome. He concluded that the plaintiff's injuries were caused by the subject accident and that the plaintiff could experience exacerbation of injuries related to his occupational duties and other activities of daily living. Dr. Zuckerman stated in his report that the plaintiff informed him that, although he returned to work one to two days after the accident, upon his return he was restricted to light duty without lifting for ninety days.

These submissions considered collectively tend to establish rather than negate triable issues of fact as to whether the plaintiff sustained a non-permanent injury (*Cebularz v Diorio*, 32 AD3d 975, 822 NYS2d 118 [2006]; see, *Pagels v P.V.S. Chemicals, Inc.*, 266 AD2d 819, 698 NYS2d 368 [1999]). Moreover, the defendant's experts' reports are deficient in that neither doctor addressed the plaintiff's condition following the accident or the plaintiff's statement to Dr. Zuckerman that for at least 90 days following the accident his duties as an electrician were restricted to light duty without lifting (see, *Nembhard v Delatorre*, 16 AD3d 290, 791 NYS2d 144 [2005]; *DeSimone v Mejia*, 283 AD2d 454, 724 NYS2d 630 [2001]). The defendant having failed to demonstrate that the plaintiff did not sustain a serious injury pursuant to Insurance Law 5102[d], his motion for summary judgment dismissing the complaint is denied (*Greenidge v Righton Limo*, 2007 N.Y. Slip Op. 06952, 2007 WL 2782985 [App. Div., Second Dept.], see *Loesburg v Jovanovic*, 264 AD2d 301, 694 NYS2d 362 [1999]).

Dated: OCT 16 2007

____ FINAL DISPOSITION NON-FINAL DISPOSITION



J.S.C.