

Scudero v Hernandez
2007 NY Slip Op 33858(U)
November 26, 2007
Supreme Court, Nassau County
Docket Number: 1393-04/
Judge: Kenneth A. Davis
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SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK

Present:

HON. KENNETH A. DAVIS,

Justice

TRIAL/IAS, PART 5
NASSAU COUNTY

LAUREN SCUDERO,

Plaintiff,

SUBMISSION DATE: 8/29/07
INDEX No.: 11393/04

-against-

RAMON J. HERNANDEZ and EDGAR A. OROZCO,

MOTION SEQUENCE # 2

Defendants.

The following papers read on this motion:

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

Upon the foregoing papers, this motion by defendant Ramon Hernandez for summary judgment dismissing the complaint is denied.

This is an action for personal injury arising from a motor vehicle accident. On September 10, 2001 at approximately 5:30 a.m., plaintiff Lauren Scudero was operating a motor vehicle and traveling southbound on Babylon Turnpike. As plaintiff was crossing the intersection with Merrick Road, a vehicle driven by defendant Edgar Orozco collided with plaintiff's vehicle on the driver's side. Plaintiff alleges that Orozco went through a red light and was intoxicated. The vehicle driven by Orozco was owned by defendant Ramon Hernandez.

After the accident, plaintiff was taken by ambulance to South Nassau Communities Hospital. At South Nassau, plaintiff complained of pain in her back, neck, chest, and shoulder. The emergency room doctor diagnosed plaintiff with a sprain, prescribed pain medication, and discharged her. Later that day, plaintiff went to see Dr. Jones, a chiropractor. On his examination, Dr. Jones observed tenderness, spasm, and restricted range of motion in the cervical spine. Plaintiff was 22 years of age at the time and had no prior history of a neck or back condition. Although plaintiff was able to return to work approximately two weeks after the accident, she continued to experience persistent neck pain and intermittent pain in her lower back. Plaintiff received chiropractic treatment and physical therapy until her No Fault benefits terminated about a year after the accident.

An MRI of plaintiff's cervical spine was performed on September 29, 2001, which her radiologist, Dr. Rizzuti, interpreted as showing posterior disc bulges at C3-4, C4-5, and C5-6. On October 6, 2001, an MRI of the lumbar spine was performed, which Dr. Rizzuti interpreted as showing posterior disc herniations at L4-5 and L5-S1. On February 19, 2002, an MRI of the thoracic spine was performed, which Dr. Rizzuti interpreted as showing a posterior disc bulge at T6-7.

The action was commenced around November 4, 2003. Defendant Hernandez is moving for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury

within the meaning of the Insurance Law. Orozco, the driver of defendant's vehicle, has never appeared in the action.

Insurance Law § 5102(d) defines "serious injury" as a personal injury which results in among other things "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."

The legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries (*Dufel v. Green*, 84 NY2d 795, 798 [1995]). Thus, objective proof of plaintiff's injury is required to satisfy the statutory serious injury threshold (*Toure v. Avis Rent a Car Systems*, 98 N.Y.2d 345, 350 [2002]). Subjective complaints alone are not sufficient (*Gaddy v. Eyler*, 79 NY2d 955, 957-58 [1992]).

"In order to prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion can be used to substantiate a claim of serious injury" (*Toure v. Avis Rent a Car Systems*, supra, 98 N.Y.2d at 350). Whether a limitation of use or body function is

"consequential" or "significant" 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"(Id at 353). A doctor's opinion as to the medical significance of the injury must be supported by objective medical evidence, such as an MRI or CT scan, or the observation of muscle spasms during the physical examination(Id). The doctor must also indicate what test, if any, was performed to induce the spasm(Id at 357). A diagnosis of a bulging or herniated disc, by itself, does not constitute a serious injury(Id at 353 n.4).

On a motion for summary judgment, 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 N.Y.2d 865 [1995]). If defendant makes that showing, the burden shifts to plaintiff to come forward with sufficient evidence to overcome defendants' motion by demonstrating that she sustained a serious injury under the No-Fault Law (*Gaddy v. Eyler*, 79 NY2d 955 [1992]). The question of whether plaintiff suffered a serious injury is not always a question of fact which requires a jury trial(*Licari v. Elliot*, 57 N.Y.2d 230, 237 [1982]). Conclusory assertions of serious injury, including subjective complaints of pain, will not fulfill the statutory definition. However, where plaintiff submits objective evidence as to "the extent of the limitation of

movement," a factual issue will be presented (Id at 238-39 [emphasis in original]).

In support of his motion for summary judgment, defendant submits the affirmation of Dr. Leon Sultan, an orthopedist who examined plaintiff on September 14, 2006. Dr. Sultan found that plaintiff's cervical spine range of motion was within normal limits as to extension, flexion, head tilting, and head and neck rotation. Bilateral shoulder movements were within normal limits as to abduction and forward elevation. Internal and external shoulder rotation were within normal limits, as was adduction and posterior extension. Dr. Sultan found that plaintiff's range of motion of the thoracic spine was within normal limits as to forward flexion, lumbar extension, tilting, and trunk rotation. Extension and flexion of both knees was also normal. Dr. Sultan concluded that plaintiff was orthopedically stable and neurologically intact. Dr. Sultan noted that the September 29, 2001 MRI of plaintiff's cervical spine had shown bulging discs, and the October 6, 2001 MRI of plaintiff's lumbar spine had shown herniations. However, Dr. Sultan also noted that Dr. Berkowitz, defendant's radiologist, had reviewed both MRI's and concluded that no disc bulges or herniations were present. Based upon his own examination and the MRI studies, Dr. Sultan could not confirm any "ongoing disability" or "orthopedic impairment" as a result of the accident.

Defendant also submits the affirmation of Dr. Frederick Mortati, a neurologist who examined plaintiff on January 30, 2007.

Dr. Mortati found that plaintiff's muscle strength and tone were normal. Dr. Mortati found no spasm of the posterior cervical or lumbosacral paraspinal muscles. From a standing position, plaintiff was able to bend forward to a point where her fingertips touched her toes. Dr. Mortati concluded that plaintiff had a normal neurological examination and did not sustain any "neurological pathology" as a result of the accident.

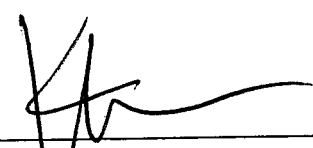
Based upon the reports of Dr. Sultan and Dr. Mortati, the court concludes that defendant has established prima facie that plaintiff did not suffer a serious injury within the meaning of § 5102 of the Insurance Law. Accordingly, the burden shifts to plaintiff to demonstrate that she sustained a serious injury.

In opposition to the summary judgment motion, plaintiff submits an affirmation from Dr. Jones, her treating chiropractor. At an examination conducted on June 20, 2007, Dr. Jones evaluated plaintiff's range of motion using a computerized "dual inclinometer system." According to Dr. Jones, the system is specifically designed to quantify an individual's spinal range of motion in the cervical, thoracic, and lumbar regions and to compare range of motion values to recognized norms for the population. Based upon this testing, Dr. Jones found that plaintiff suffered from a significant limitation of the range of motion of her cervical and lumbar spine in a number of areas. For present purposes, only four of the findings need be mentioned. Plaintiff's range of motion for extension of the cervical spine was 35 degrees as

compared to a normal of 60 degrees. For cervical lateral flexion to the left and the right, plaintiff's range of motion was 26 degrees as compared to 45 degrees, which is normal. Plaintiff's range of motion for lumbar extension was 17 degrees as compared to 25 degrees, which is normal. These findings are perhaps even more significant when it is considered that plaintiff's range of motion for lumbar lateral flexion was above normal. The above normal readings for left and right lateral flexion suggest a physically fit young woman whose cervical and lumbar range of motion would have been greater but for the accident. Based upon the range of motion study and other tests, Dr. Jones was of the opinion that plaintiff sustained a permanent consequential limitation of use of her cervical and lumbosacral spine. The court concludes that plaintiff has carried her burden of showing a permanent consequential limitation of use of a body organ or member. Defendant's motion for summary judgment dismissing the complaint is denied.

This shall constitute the decision and order of the court.

Dated: NOV 26 2007



 KENNETH A. DAVIS J.S.C.

ENTERED
 NOV 27 2007
 NASSAU COUNTY
 COUNTY CLERK'S OFFICE