

Mangual v Anander

2007 NY Slip Op 34026(U)

December 4, 2007

Supreme Court, Nassau County

Docket Number: 1801-06/

Judge: Thomas P. Phelan

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 7
NASSAU COUNTY

RICHARD E. MANGUAL, RUTH MANGUAL and
ELIJAH MANGUAL AN INFANT UNDER THE AGE
OF FOURTEEN BY HIS MOTHER AND NATURAL
GUARDIAN, RUTH MANGUAL,

Plaintiff(s),

-against-

SUSAN ANANDER,

Defendant(s).

ORIGINAL RETURN DATE:08/10/07
SUBMISSION DATE: 10/26/07
INDEX No.: 11801/06

MOTION SEQUENCE #1,2

The following papers read on this motion:

Notice of Motion.....	1
Cross-Motion.....	5
Answering Papers.....	2, 6
Reply.....	3, 4, 7

Motion [sequence #1] by defendant Susan Anander for an order awarding her summary judgment dismissing the claims of plaintiff Ruth Mangual as she did not sustain a serious injury within the meaning of Insurance Law §5102(d) is granted.

Cross-motion [sequence #2] by plaintiff Richard E. Mangual for an order awarding him summary judgment dismissing defendant's counterclaim as defendant was solely liable for the happening of the accident is also granted.

Where, as here, defendant Anander has provided evidence demonstrating the lack of serious injury, the burden shifts to plaintiffs to present sufficient evidence to defeat the motion (see, Gaddy v. Eyeler, 79 NY2d 955; Tabacco v. Kaster, 229 AD2d 526). "To defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial and must make his showing by producing evidentiary proof in admissible form (citation omitted)" (Seyfeid v. Greenspan, 92 AD2d 563; see, Alvarez v. Prospect Hospital, 68 NY2d 320).

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Essentially, in order to satisfy the statutory serious injury threshold, the legislature requires objective proof of a plaintiff's injury. The Court of Appeals in Toure v. Avis Rent A Car Systems, 98 NY2d 345, stated that plaintiff's proof of injury must be supported by objective medical evidence, such as sworn interpretations of MRI and CT scans (Toure v. Avis Rent A Car Systems, supra at 353). However, MRI and CT scan tests and reports also must also be paired with the doctor's observations during his physical examination of plaintiff (*see* Toure v. Avis Rent A Car Systems, supra). Unsworn MRI reports can also constitute competent evidence but only if both sides rely on those reports (*see*, Gonzalez v. Vasquez, 301 AD2d 438 [1st Dept. 2003]).

On the other hand, even where there is ample objective proof of plaintiff's injury, the Court of Appeals held in Pommels v. Perez, supra, that certain factors may nonetheless override a plaintiff's objective medical proof of limitations and permit dismissal of plaintiff's complaint. Specifically, in Pommels v. Perez, the Court of Appeals held that additional contributing factors, such as a gap in treatment, an intervening medical problem, or a preexisting condition, would interrupt the chain of causation between the accident and the claimed injury (Pommels v. Perez, 4 NY3d 566).

A person bringing a claim for damages for personal injuries under the "permanent loss of use of a body organ, member, function or system" category, as in this case, must prove that the permanent loss of use is a total loss of use (Overly v. Bangs Ambulance, Inc., 96 NY2d 295 [2001]).

Further, when, as in this case, a claim is raised under the "significant limitation of use of a body function or system" category, then, in order to prove the extent or degree of the physical limitation, an expert's designation of a numeric percentage of plaintiff's loss of range of motion is acceptable (Toure v. Avis Rent A Car Systems, Inc., supra). In addition, an expert's qualitative assessment of a plaintiff's condition is also probative, provided that: (1) the evaluation has an objective basis, and, (2) the evaluation compares plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system" (*Id.*). A minor, mild or slight limitation is, however, insignificant within the meaning of the statute (Lacera v. Elliot, supra; *see*, also, Grossman v. Wright, supra at 83).

Finally, to prevail under the "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", a plaintiff must again provide competent, objective medical proof causing the alleged limitations on plaintiff's daily activities (Monk v. Deepest, 287 AD2d 187, 191 [3rd Dept. 2001]). Plaintiff must demonstrate that he has been "curtailed from performing his usual activities to a great extent rather than some slight curtailment" (Lacera v. Elliott, supra at 236; *see*, also Sands v. Stark, 299 AD2d 642 [2nd Dept. 2002]). Unlike a claim of serious injury under "significant limitation of use of a body function or system" category, a gap or cessation in treatment is irrelevant as to whether plaintiff satisfied the 90/180 definition of serious injury (Gomez v. Ford Motor Credit Co., 10 Misc. 3d 900, 904 [Sup. Ct. Bronx 2005]).

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Plaintiff Ruth Mangual's claims of injury resulting from the underlying motor vehicle accident relate to her left knee.

In opposition to defendant's motion, plaintiff Ruth Mangual provides her own affidavit, an affirmation of her treating neurologist dated October 16, 2007 and an affirmation of her radiologist interpreting the MRI of plaintiff's left knee taken on June 1, 2006.

No evidence is, however, provided in support of a total loss of use of her knee.

Regarding plaintiff's claims of significant limitation of use, the affirmations of her treating neurologist and radiologist, while containing objective findings of some injury, include no range of motion or other findings so as to suffice in demonstrating a material issue of fact on plaintiff's alleged "significant limitation of use" (Toure v. Avis Rent-A-Car Systems, Inc., *supra*). Moreover, plaintiff's proffered explanation for her gap/cessation of treatment -- that her no fault benefits had run out -- is legally insufficient without additionally demonstrating that her personal financial circumstances precluded further treatment otherwise (see, Valletta v. Shelter, 273 AD2d 299; Mohammed v. Saffron, 19 AD3d 561; cf., Black v. Robinson, 305 AD2d 438; Francois v. Senecas Cab Corp., 41 AD3d 643).

Nor has plaintiff created a triable issue of fact regarding the seriousness of her injury during 90 of the first 180 days following the accident. Plaintiff Ruth Mangual's deposition testimony read in conjunction with her bill of particulars indicates that she does not claim her injuries prevented her from employment for more than one week post-accident. Plaintiff's attempt to claim otherwise by now submitting an affidavit containing inconsistent allegations is rejected as an attempt to raise a feigned issue of fact (see, Richter v. Collier, 5 AD3d 1003).

Defendant's motion is accordingly granted and the personal injury claims of plaintiff Ruth Mangual are dismissed without costs.

Consistent with the foregoing, the title of this action is amended to read as follows:

"RICHARD E. MANGUAL and ELIJAH MANGUAL,
AN INFANT UNDER THE AGE OF FOURTEEN,
BY HIS MOTHER AND NATURAL GUARDIAN,
RUTH MANGUAL,

Plaintiffs,

-against-

SUSAN ANANDER,

Defendant."

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Plaintiff Richard E. Mangual's cross-motion for summary judgment is also granted.

Viewing the evidence most favorably to defendant, it is nevertheless uncontroverted that the impact between the vehicle driven by plaintiff Richard E. Mangual and the vehicle driven by defendant Susan Anander took place while plaintiff was stopped and waiting to cross over the double yellow lines to turn into his own driveway (defendant's deposition testimony at p.16). Moreover, defendant was concededly drinking prior to the accident (Id., at pp.10-11), arrested following the accident (Id., at p.24), plead guilty to "DWI" (Id., at p.26) and was traveling at approximately 20 miles per hour with her foot on the gas at the time of impact (Id., at pp. 19-20). At best, defendant struck plaintiff's vehicle without crossing over the double yellow lines into plaintiff's lane and instead struck plaintiff's stopped vehicle while both vehicles "were pretty much right on the line" (Id., at p.19).

Under such circumstances, the presence of plaintiff's stopped vehicle on the roadway was not a proximate cause of the impact "but merely furnished the conditions for the accident to occur (citations omitted)" (Pironti v. Leary, 42 AD3d 487, 490; see, also, Wechter v. Kelner, 40 AD3d 747; Katz v. Klagsburn, 299 AD2d 317). Defendant Anander was accordingly solely responsible for the happening of the subject accident.

This decision constitutes the order of the court.

Dated: 12-04-07

HON THOMAS P. PHELAN

Thomas P. Phelan

J.S.C.

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