Alzate-Ramirez v Haynes
2008 NY Slip Op 30214(U)
January 23, 2008
Supreme Court, Suffolk County
Docket Number: 0008321/2005
Judge: Joseph Farneti
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SHORT FORM ORDER **INDEX NO. 8321/2005**

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:
HON. JOSEPH FARNETI
Acting Justice Supreme Court

ALEJANDRO ALZATE-RAMIREZ,

Plaintiff,

-against-

RONALD K. HAYNES, HUNTINGTON ORANGE & WHITE TRANS. CORP.,

Defendants.

ORIG. RETURN DATE: AUGUST 22, 2007
FINAL SUBMISSION DATE: NOVEMBER 1, 2007
MTN. SEQ. #: 003
MOTION: MD

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Upon the following papers numbered 1 to 5 read on this motion FOR SUMMARY JUDGMENT. Notice of Motion and supporting papers 1-3 ; Answering Affidavits and supporting papers 4, 5 ; it is,

ORDERED that this motion by defendants for an Order, pursuant to CPLR 3211 and 3212, granting summary judgment in favor of defendants dismissing plaintiff's complaint, on the grounds that plaintiff did not suffer a "serious injury" as that term is defined by Insurance Law § 5102(d), is hereby **DENIED** for the reasons set forth herein.

This action was commenced to recover for personal injuries allegedly sustained by plaintiff as a result of a motor vehicle accident that occurred on or about October 20, 2004. On that date, plaintiff was riding his bicycle when a taxi cab owned and operated by defendants allegedly hit the rear tire of plaintiff's bicycle.

Defendants have now moved for summary judgment, arguing that plaintiff has not met the serious injury threshold as set forth in Insurance Law § 5102(d). In support thereof, defendants have submitted, among other things, an affirmation of counsel, plaintiff's verified bill of particulars, plaintiff's deposition testimony, a report from a radiologist who reviewed an MRI examination of plaintiff, and a report from a neurologist who conducted an independent medical examination of plaintiff.

Plaintiff served a verified bill of particulars, dated June 13, 2006, which alleged that he suffered numerous injuries as a result of the accident, including disc herniation at C6/7 with flattening of the left ventral margin of the cord and left foraminal stenosis; cervical radiculopathy; right shoulder contusion; and right elbow contusion. Each injury was claimed by plaintiff to be of a permanent nature.

Plaintiff was physically examined, on or about October 24, 2006, by EDWARD M. WEILAND, M.D., a neurologist designated by defendants. Dr. Weiland found, as indicated in his sworn report of even date, that plaintiff exhibited no signs of any lateralizing neurological deficits. Further, Dr. Weiland found no neurologic residual or permanency based upon his examination. Dr. Weiland concluded that any head trauma and/or spinal sprains/strains had resolved, and that plaintiff was capable of performing normal activities of daily living, including gainful employment activities, without restrictions.

In addition, on or about August 31, 2006, AUDREY EISENSTADT, M.D., reviewed the MRI film of plaintiff's cervical spine performed on December 8, 2004, approximately eight weeks after the accident, and found evidence of degenerative disc disease centered at the C6-7 intervertebral disc level. However, Dr. Eisenstadt opined that such degeneration could not have occurred in less than six months time. Dr. Eisenstadt also found bulging at the C6-7 intervertebral disc level, but stated that the bulging was related to ligamentous laxity and was degenerative in origin. Based upon the foregoing findings, as well as the assertion that plaintiff missed only two days of work as a result of the accident, defendants argue that plaintiff has not satisfied the "serious injury" threshold set forth in Insurance Law § 5102(d). Defendants contend that plaintiff's alleged soft tissue injuries do not constitute a serious injury.

In opposition to the application, plaintiff has provided recent medical evidence of plaintiff's limitations. Since the accident, plaintiff has been regularly treated by JOSEPH PEREZ, M.D., who performed a complete re-examination of plaintiff on August 7, 2007, and has also received chiropractic care, physical therapy, and pain management. Plaintiff submitted an affirmation of Dr. Perez, dated October 9, 2007, wherein he opines that plaintiff sustained cervical herniation at C6-C7, and that based upon the examination of August 7, 2007, plaintiff has severely restricted cervical range of motion of a permanent nature. Dr. Perez attributes the foregoing trauma to the injuries plaintiff suffered in the accident on or about October 20, 2004.

In addition, plaintiff has submitted an MRI report of a radiologist, ROBERT WAXMAN, M.D., dated December 9, 2004, who interpreted a December 8, 2004 MRI of plaintiff's cervical spine. Dr. Waxman found that plaintiff suffered disc herniation at C6/7 with flattening of the left, ventral margin of the cord and left foraminal stenosis. By affirmation dated September 21, 2007, Dr. Waxman indicates that if called as a witness, he would testify in conformance with his report. Plaintiff argues that the foregoing submissions establish that plaintiff has suffered a serious injury, in that the medical records and reports, which are based upon objective tests and diagnostic studies, show that plaintiff has sustained a significant limitation to his cervical spine as a direct result of the injuries suffered in the subject accident.

New York's No-Fault Insurance Law precludes recovery for any "non-economic loss, except in the case of serious injury, or for basic economic loss" arising out of the negligent use or operation of a motor vehicle (Insurance Law § 5104[a]). As recognized by the Court of Appeals, 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 [1995]; *see also Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Licari v Elliott*, 57 NY2d 230 [1982]). The Legislature also intended that the issue of whether a plaintiff sustained a "serious injury" could be determined by the courts as a matter of law on a motion for summary judgment (*see Licari v Elliott*, 57 NY2d 230, *supra*).

Insurance Law § 5102(d) 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 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]).

To establish a permanent consequential limitation or a significant limitation of use, the medical evidence submitted by a plaintiff must include objective, quantitative evidence with respect to diminished range of motion or a qualitative assessment, based on objective findings, comparing the plaintiff's present limitations to the normal function, purpose and use of the affected body, organ, member or function (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, *supra*). "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, *supra*; *see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, *supra*). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*see Licari v Elliott*, 57 NY2d 230, *supra*). Further, subjective claims of pain and limitation of movement must be verified by objective medical findings that are based on a recent examination of the plaintiff (*see Ali v Vasquez*, 19 AD3d 520 [2005]; *Batista v Olivo*, 17 AD3d 494 [2005]; *Grossman v Wright*, 268 AD2d 79 [2000]).

A movant seeking summary judgment on the ground that a plaintiff's negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a *prima facie* case that the plaintiff did not sustain a "serious injury" (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, *supra*; *Gaddy v Eyler*, 79 NY2d 955 [1992]; *Pagano v Kingsbury*, 182 AD2d 268 [1992]). Once a movant meets this burden, the plaintiff must present proof in admissible form showing that a serious injury exists or demonstrate an acceptable excuse for failing to meet the requirement of tender in admissible form (*Gaddy v Eyler*, 79 NY2d 955, *supra*; *Pagano v Kingsbury*, 182 AD2d 268, *supra*; *Grasso v Angerami*, 79 NY2d 813 [1991]; *see generally Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Gong v Joni*, 294 AD2d 648 [2002]; *Romano v St. Vincent's Med. Ctr.*, 178 AD2d 467 [1991]; *Commrs. of the State Ins. Fund v Photocircuits Corp.*, 2 Misc 3d 300 [Sup Ct, NY County 2003]).

In the case at bar, the Court finds that defendants' submission was sufficient to establish that plaintiff did not sustain a "serious injury" as a result of

the accident (*see Hernandez v DIVA Cab Corp.*, 22 AD3d 722 [2005]; *Khan v Hamid*, 19 AD3d 460 [2005]; *Luckey v Bauch*, 17 AD3d 411 [2005]. The burden, therefore, shifted to plaintiff to raise a triable issue of fact. In opposition, plaintiff presented competent evidence, including the affirmation of Dr. Perez dated October 9, 2007, substantiating his claim that his injuries caused a significant limitation in the use of his cervical spine. The Court finds that such submission was sufficient to rebut defendants' *prima facie* showing of no serious injury (*see Gordover v Balandina*, 41 AD3d 537 [2007]; *Paz v Wydrzynski*, 41 AD3d 453 [2007]; *Dickie v Pei Xiang Shi*, 304 AD2d 786 [2003]).

Accordingly, this motion by defendants for summary judgment dismissing plaintiff's complaint on the grounds that plaintiff failed to sustain a "serious injury" as that term is defined by Insurance Law § 5102(d), is **DENIED**.

The foregoing constitutes the decision and Order of the Court.

Dated: January 23, 2008

HON. JOSEPH FARNETI
Acting Justice Supreme Court