

Roshdy v Bardsley

2008 NY Slip Op 30729(U)

March 12, 2008

Supreme Court, Richmond County

Docket Number: 0100026/2005

Judge: Joseph J. Maltese

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.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No.:100026/2005
Motion No.:003/004**

SHADY D. ROSHDY,

Plaintiff

against

DECISION & ORDER

SUSAN A. BARDSLEY,

HON. JOSEPH J. MALTESE

Defendants

The following items were considered in the review of these motions for summary judgment.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1,2
Order to Show Cause	
Answering Affidavits	3,5
Replying Affidavits	4
Exhibits	Attached to Papers

Defendant's motion for summary judgment on the ground that plaintiff failed to sustain a serious injury pursuant to Insurance Law §§ 5102 and 5104 is denied in its entirety. Plaintiff's cross-motion for summary judgment for liability pursuant to CPLR § 3212 is denied.

This action arises out of a motor vehicle accident on Staten Island, New York on Richmond Terrace where Davis Avenue intersects. It is alleged that defendant struck plaintiff in the rear. The force from the rear impact caused plaintiff to strike the automobile immediately ahead of him. Plaintiff testified in his deposition that as a result of this impact his body impacted the steering column. Defendant now moves for summary judgment alleging that plaintiff did not sustain a serious injury as it is defined by Insurance Law §§ 5102 and 5104 as a result of this accident. In his opposition plaintiff attempts to offer evidence relating to injuries related to his lumbar spine. Pursuant to an order of this court dated June 7, 2007, plaintiff is precluded from offering evidence dealing with these injuries as it is precluded from being offered at trial. Therefore, this court shall not consider this evidence in the motions before it. Plaintiff cross-moves for summary judgment for liability.

Defendant seeks summary judgment on the ground that the plaintiff has not sustained a

“serious injury” as defined in Insurance Law §5102(d).¹ The serious injury threshold set forth in Insurance Law §5104(a) can only be established under these categories.² Thus, the mere fact that one has been injured, even seriously, does not establish that a “serious injury” has been sustained.³ Rather, a plaintiff must show that he or she sustained a personal injury, i.e., bodily injury, sickness or disease,⁴ that results in one of the nine serious injury threshold categories.⁵

It is important to keep in mind the policies underlying the enactment of the No-Fault Law and the law’s structure when litigating no-fault related issues. Courts have consistently held that the No-Fault Law must be interpreted to fulfill the policies the legislature had in mind.⁶ It is for the court to decide in the first instance whether a plaintiff has made a *prima facie* showing of “serious injury.”⁷

A defendant can establish that the plaintiff’s injuries are not serious within the meaning of Insurance Law §5102(d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff’s claim.

¹ A serious injury must be a personal injury, “[W]hich 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 constitutes 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]).

² *Coon v. Brown*, 192 AD2d 908 [3rd Dept 1993]; *Daviero v. Johnson*, 88 AD2d 732 [3rd Dept 1982].

³ *Jones v. Sharpe*, 98 AD2d 859 [3rd Dept 1989], *aff’d* 63 NY2d 645 [1984].

⁴ 11 NYCRR §65-2.1[e]

⁵ *See, Van Norstrand v. Regina*, 212 AD2d 883 [3rd Dept 1995].

⁶ *See, Oberly v. Bangs Ambulance*, 96 NY2d 295 [1991]; *Scheer v. Koubek*, 70 NY2d 678 [1987]; *Maida v. State Farm*, 66 AD2d 852 [2d Dept 1978].

⁷ *See, e.g., Licari v. Elliott*, 57 NY2d 230, 237.

In the case before this court defendant came forward with reports from independent medical exams. Defendant presented the sworn testimony of Dr. Michael J. Katz, an orthopedic surgeon; Dr. Michael J. Carciente, a neurologist; and Dr. Stephen W. Lastig, a radiologist. All three doctors proffered objective evidence that indicates that plaintiff is not injured within the statutory definition.

Where defendant's motion for summary judgment properly raises an issue as to whether a serious injury has been sustained, it is incumbent upon the plaintiff to produce evidentiary proof in admissible form in support of his or her allegations.⁸ The burden, in other words, shifts to plaintiff to come forward with sufficient evidence to demonstrate the existence of an issue of fact as to whether he or she suffered a serious injury.⁹ The plaintiff in such a situation must present objective evidence of the injury.

In order to successfully oppose a motion for summary judgment on the issue of whether an injury is serious within the meaning of Insurance Law §5102 (d), the plaintiff's expert must submit **quantitative objective findings** in addition to an opinion as to the significance of the injury.¹⁰ Plaintiff submits various items of proof in an attempt to meet his burden.

Plaintiff alleges injuries that are consistent with a permanent consequential limitation of his cervical spine. This category of injury involves any "limitation" of use which is more than "minor, mild or slight," as contrasted to the loss-of-use category which requires proof of a "total loss" of use.¹¹ There are, however, differences between them. The "consequential limitation of use" category requires that the limitation be permanent, whereas the "significant limitation of use" category does not require that the limitation be permanent.¹² Furthermore, the

⁸ See, *Kordana v. Pomellito*, 121 AD2d 783, appeal dismissed, 68 NY2d 848.

⁹ See, *Gaddy v. Eyler*, 79 NY2d 955; *Grossman v. Wright* 268 AD2d 79 [2nd Dept 2000]

¹⁰ *Grossman v. Wright* 268 AD2d 79 [2nd Dept 2000].

¹¹ See, *Oberly v. Bangs Ambulance Inc.*, 96 NY2d 295 [2001]; *Gaddy v. Eyler*, 79 NY2d 955 [1992].

¹² See, *Lopez v. Senatore*, 65 NY2d 1017 [1985]; *Lanuto v. Constantine*, 192 AD2d 989 [3rd Dept 1993]; *Decker v. Rassaert*, 131 AD2d 626 [2nd Dept 1987].

“consequential limitation of use” must be with respect to a body organ or member, whereas the “significant limitation of use” must be with respect to a body function or system.

A designation set forth by medical proof of a numeric percentage or degree of a plaintiff’s loss of range of motion can be used to establish a limitation of use.¹³ An unspecified percentage or degree of restricted range of motion is not enough.¹⁴

Alternatively, medical proof of a functional impairment not involving a loss of range of motion can suffice. This will involve a medical expert’s qualitative assessment of the plaintiff’s condition which will compare the plaintiff’s impairment or limitation to the normal function, purpose and use of the affected body organ, member, function or system.¹⁵

Where it is claimed that the limitation of use is “consequential” or “significant,” which terms are synonymous, it is required that there must be proof that the limitation is more than a “minor, mild or slight” limitation of use.¹⁶ It must be “important” or “meaningful.”

This requirement relates to the medical significance of the claimed limitation of use. The analysis involves a comparative determination of the degree or qualitative nature of the limitation based on the normal function, purpose and use of the affected body part.¹⁷ In other words, a medical expert must describe the qualitative nature of plaintiff’s limitation based on the normal function, purpose or use of plaintiff’s affected body part.¹⁸

As to the causation element, it will be necessary for the plaintiff to establish this element

¹³ *Toure v. Avis Rent a Car Systems*, 98 NY2d 345 [2002]; *Molina v. Nosa Choi*, 298 AD2d 508 [2nd Dept 2002].

¹⁴ *See, Herman v. Church*, 276 AD2d 471 [2nd Dept 2000]; *Barbarulo v. Allery*, 271 AD2d 897 [3rd Dept 2000]; *Owens v. Nolan*, 269 AD2d 794 [4th Dept 2000].

¹⁵ *Toure v. Avis Rent A Car Systems, supra*; *Dutel v. Green*, 84 NY2d 795 [1985]; *June v. Gonet*, 298 AD 2d 811, [3rd Dept 2002].

¹⁶ *See, Toure v. Avis Rent A Car, supra*; *Gaddy v. Eyler, supra*; *Nolan v. Ford*, 64 NY2d 681 [1984]; *Licari v. Elliott*, 57 NY2d 230, 235 [1982].

¹⁷ *See, Route v. Avis Rent A Car System*, 98 NY2d at 353, *supra*.

¹⁸ *Id.* at 355.

by expert opinion, namely, that the specified degree or percentage of loss of range of motion or limitations in plaintiff's physical activities are a natural and expected medical consequence of plaintiff's injuries, which injuries are demonstrated by competent medical proof.¹⁹

Plaintiff submits the sworn affidavit of Dr. Donald P. Milione, a chiropractor. In his affidavit Dr. Milione avers that he began treating the plaintiff at his Brooklyn office on October 9, 2002. Dr. Milione further avers that the plaintiff has been under his care from that time to the present. In his affidavit Dr. Milione states that the plaintiff underwent:

. . . an aggressive course of chiropractic therapy consisting of chiropractic adjustments, heat therapy, electrical stimulation and massages from October 9, 2002 through September 20, 2004. At that time the patient was advised that he had a permanent spinal condition and that further care would be palliative only. He has been seen for palliative care since that time and he remains a patient of mine. He has been seen at a frequency of approximately every four months.²⁰

Contrary to defendant's assertions, plaintiff has adequately explained the supposed gap in treatment.

The contents and credibility of the medical opinions rendered in this matter are questions of fact best decided by a jury.

Plaintiff cross-moves this court for a summary judgment order for liability. Plaintiff filed his Note of Issue on September 12, 2007, and therefore had sixty days from that date to bring a summary judgment motion. Plaintiff brought his summary judgment motion on January 7, 2008. It is therefore dismissed as untimely.

Conclusion

Defendant's motion for summary judgment is denied. A motion for summary judgment must be denied if there are "facts sufficient to require a trial of any issue of fact."²¹ Granting

¹⁹ See, *Toure v. Avis Rent A Car System*, 98 NY2d at 353, 355, *supra*.

²⁰ Affidavit of Donald P. Milione, D.C. at 3, ¶ 4.

²¹ CPLR §3212[b].

summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. “Moreover, the parties competing contentions must be viewed in a light most favorable to the party opposing the motion.”²²

Summary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable.²³ Here there is an issue of fact as to whether or not the plaintiff has suffered a “serious injury” as defined in Insurance Law §5102(d).

Plaintiff’s cross motion for summary judgment is dismissed as being untimely.

Accordingly, it is hereby:

ORDERED, that defendant’s motion for summary judgment is denied;

ORDERED, that plaintiff’s motion for summary judgment for liability is denied; and it is

ORDERED, that the parties appear for a final conference at **DCM Part 3** on **April 1, 2008 at 9:30 A.M.**

ENTER,

DATED: March 12, 2008

Joseph J. Maltese
Justice of the Supreme Court

²² *Marine Midland Bank, N.A., v. Dino, et al.*, 168 AD2d 610 [2nd Dept 1990].

²³ *American Home Assurance Co., v. Amerford International Corp.*, 200 AD2d 472 [1st Dept 1994].