Carabajo v Aguilar
2008 NY Slip Op 31733(U)
March 18, 2008
Supreme Court, Suffolk County
Docket Number: 0011286/2006
Judge: Peter Fox Cohalan
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SHORT FORM ORDER

INDEX # 11286-06
RETURN DATE: **8-21-07**
MOT. SEQ. #**001**

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

PRESENT:
Hon. PETER FOX COHALAN

---x
JORGE ALFREDO BRAVO CARABAJO,

Plaintiff,

-against-

OSCAR AGUILAR and MARIA I. AGUILAR,

Defendants.
---x

CALENDAR DATE: November 7, 2007
MNEMONIC: MD

PLTF'S/PET'S ATTORNEY:

Cannon & Acosta
1923 New York Ave.
Huntington Station, NY 11746

DEFT'S/RESP ATTORNEY:

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200 Garden City Plaza
Garden City, NY 11530

Upon the following papers numbered 1 to 16 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 ____________; Other ____________; and after hearing counsel in support of and opposed to the motion it is,

ORDERED that this motion by the defendants, Oscar Aguilar and Maria I. Aguilar, for summary judgment and dismissal of the plaintiff Jorge Alfredo Bravo Carabajo's (hereinafter "Carabajo") complaint pursuant to CPLR §3212 and Insurance Law §5102 and 5104 on the ground that the plaintiff has not sustained a "serious physical injury" as such term is defined in Insurance Law §5102(d) is hereby denied in its entirety.

The plaintiff Carabajo instituted this action for personal injuries allegedly sustained in a motor vehicle accident occurring on November 10, 2005 at approximately 7:30 pm at the intersection of First Street and Third Avenue in Brentwood, Suffolk County on Long Island, New York. The Carabajo vehicle was traveling northbound on Third Avenue at the intersection with First Avenue when the defendants' vehicle driven by Oscar Aguilar traveling southbound on Third Avenue attempted a turn into the intersection in front of the Carabajo vehicle and the Carabajo vehicle struck the defendants' Nissan Pathfinder in the passenger door. Carabajo sustained damage to the front of his vehicle on the driver's side. Carabajo testified that he was driving the vehicle northbound with a green light at the intersection and the defendants' vehicle was in the southbound turn lane. Carabajo was removed from the scene by ambulance. This lawsuit thereafter ensued.

The defendants now move for summary judgment pursuant to CPLR §3212 dismissing the plaintiff's complaint because the plaintiff has not sustained a "serious physical injury" as that term is defined in Insurance Law §5102(d). The plaintiff opposes the motion arguing that the defendants have failed to establish entitlement to summary disposition as a matter of law and that the plaintiff's submissions in opposition to the defendants' motion raise sufficient factual issues requiring a trial on the issue of serious physical injury.

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For the reasons set forth herein, the defendants' motion for summary judgment and dismissal of plaintiff's complaint is denied in its entirety.

The function of the court on a motion for summary judgment is issue finding not issue determination. It is a most drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable. ***Elzer v. Nassau County***, 111 AD2d 212, 489 NYS2d 246 (2nd Dept. 1985); ***Steven v. Parker***, 99 AD2d 649, 472 NYS2d 225 (2nd Dept. 1984); ***Gaeta v. New York News, Inc.***, 95 AD2d 325, 466 NYS2d 321 (1st Dept. 1983). As the New York Court of Appeals noted in ***Sillman v. Twentieth Century Fox***, 3 NY2d 395, 404 (1957):

> "To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***DiMenna & Sons v. City of New York,*** 301 NY 118.). This drastic remedy should not be granted where there is any doubt as to the existence of such issues ***(Braun v. Carey***, 280 App. Div. 1019), or where the issue is `arguable' (***Barnett v. Jacobs***, 255 NY 520, 522); `issue finding, rather than issue determination is the key to the procedure' (***Esteve v. Avad***, 271 App. Div. 725, 727)."

Although the question of the existence of a "serious injury" is often left to the jury, where properly raised, the issue of whether a plaintiff is barred from recovery in a judicial forum for want of a "serious injury" is, in the first instance, for the Court's determination. ***Zoldas v. Louis Cab Corp.***, 108 AD2d 378, 489 NYS2d 468 (1st Dept. 1985); ***Dwyer v. Tracy***, 105 AD2d 476, 480 NYS2d 781 (3rd Dept. 1984). If it can be said, as a matter of law, that the plaintiff suffered no serious injury within the meaning of the Insurance Law, then the plaintiff has no claim to assert and there is nothing for the jury to decide. ***Licari v. Elliott***, 57 NY2d 230, 455 NYS2d 570 (1982).

Section 5104 of the Insurance Law provides that an individual injured in an automobile accident may bring a negligence cause of action only upon a showing that the individual has incurred a "serious injury" within the meaning of the no-fault law. Insurance Law §5102(d) defines "serious injury" as a personal injury which results in death; dismemberment, significant disfigurement and 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.

A defendant can establish that a 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 concluded that no objective medical findings support the plaintiff's claim. ***Turchuk v. Town of Walkill***, 55 AD2d 576, 681 NYS2d 72 (2nd Dept. 1998). With this established, the burden shifts to the plaintiff to come forward with admissible evidence to overcome the defendants' submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law. ***Gaddy v. Eyler***, 79 NY2d 955, 582 NYS2d 990 (1992). In this situation, the plaintiff must present objective medical evidence of the injury based upon a recent examination of the plaintiff. ***Grossman v. Wright***, 268 AD2d 79, 707 NYS2d 233 (2nd Dept. 2000).

Furthermore, the New York Court of Appeals stated in an opinion issued on July 9, 2002 in ***Toure v. Avis Rent A Car***, 98 NY2d 345, 746 NYS2d 865 (2002) that a sufficiently described opinion by a doctor on the "qualitative nature of the plaintiff's limitations based upon the normal function, purpose and use" of that body part is sufficient even without specific degrees of limitation or an arbitrary cutoff of degree. Unless the alleged limitations are as a matter of law so "minor, mild or slight" as to be considered insignificant, the defendant's motion for summary judgment, considered in a light most favorable to plaintiff, must be denied. ***Toure v. Avis Rent A Car***, supra. Here, in the case at bar, the defendants in support of their motion for summary judgment dismissing the plaintiff's action because he did not sustain a serious physical injury proffer a report of Arthur M. Bernhang M.D. (hereinafter "Bernhang") who examined the plaintiff on April 20, 2007. However, the defendants' proof through Bernhang substantiates a limitation of movement in a number of areas.

Bernhang notes in his report dated April 20, 2007, the same date of the examination that:

> "Cervical extension is 35 degrees (average 38 degrees), cervical flexion is 20 degrees (average 38 degrees), lateral flexion is 35/30 (average 43 degrees) and cervical rotation is 45/20 (average 45 degrees). ...
>
> Active shoulder abduction is 140/155 degrees (average 170 degrees), forward flexion is 135/60 degrees (average 158 degrees), external rotation is 90/90 degrees (average 90 degrees) and internal rotation is 30/30 degrees (average 70 degrees)... While this claimant presents with extensive subjective complaints and **restrictions on examination today of the cervical spine, left shoulder** it is my opinion this complaints (sic) and restrictions are not substantiated by and do not correlate with objective findings..."

A simple review of Bernhang's report of his examination of the plaintiff fails to disprove a serious physical injury and notes limitations and restrictions in movement from the norm or average. Thus the defendants have failed to establish their prima facie entitlement to judgment as a matter of law. ***Hypolite v. International Logistics Management, Inc.***, 43 AD3d 461, 842 NYS2d 453 (2nd Dept. 2007). In that the report of the defendants' examining physician does not exclude the possibility that the plaintiff suffered a "serious injury" in the accident, the defendants are not entitled to summary judgment. ***Peschanker v. Loporto***, 252 AD2d 485, 675 NYS2d 363 (2nd Dept. 1998).

The plaintiff also sets forth his own proof through Michele Rubin, M.D. showing that the plaintiff sustained a central disc herniation at C6-C7 and a lumbar disc herniation at L5-S1. The plaintiff also includes an examination by Nicholas Martin, D.C. who quantifies through objective testing of the plaintiff, restrictions and limitations in movement in the cervical and lumbar regions and that the symptoms exhibited are the direct result of the trauma sustained as a result of the accident.

Although a minor limitation of movement is not consistent with the threshold (***Gaddy v. Eyler***, 79 NY2d 955, 582 NYS2d 990), the Second Department has held that a 10% restriction or more in the movement of the lumbar spine is sufficient to establish a significant permanent limitation of a bodily function. (***Schwartz v. New York City Housing***, 646 NYS2d 30). See, ***Lazarre v. Kopczynski***, 160 AD2d 772, 553 NYS2d 488 (2nd Dept. 1990); ***Parker v. Smith***, 242 AD2d 374, 664 NYS2d 374 (2nd Dept. 1997).

"The limitation or use of a body member or organ must be permanent and consequential but the limitation need not be total." ***Savage v. Delacruz***, 200 AD2d 707, 474 NYS2d 850 (1984). A `serious injury' definition should be construed to mean that a person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment. ***Sole v. Kurnik***, 119 AD2d 974, 500 NYS2d 872 (4th Dept. 1986)

While permanent loss does not necessitate proof of a total loss of the "organ, member, function or system", it must establish operating in some limited way or only with pain. ***Dwyer v. Tracey***, 105 AD2d 4767, 480 NYS2d 781 (3rd Dept. 1984). "It is well settled that pain can form the basis of a serious injury." ***Ottavio v. Moore***, 141 AD2d 806, 529 NYS2d 876 (2nd Dept. 1978), appeal denied 73 NY2d 704, 537 NYS2d 492 (1989). See also, ***Butchino v. Bush***, 109 AD2d 1001, 486 NYS2d 478 (3rd Dept. 1985).

On a motion for summary judgment the Court must consider all the facts in a light most favorable to the party opposing the motion, ***Thomas v. Drake***, 145 AD2d 687, 535 NYS2d 229 (3rd Dept. 1988) and to determine whether there are any material and triable issues of fact presented. The key is issue finding, not issue determination, and the court should not attempt to determine questions of credibility. ***S.J. Capelin Assoc. v. Globe***, 34 NY2d 338, 357 NYS2d 478 (1974). Questions of credibility between experts on behalf of plaintiff and defendant are for the jury and not the court to determine. Here, in the case at

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bar, after considering the failure of the defendants' examining physician to establish the defendants' entitlement to summary disposition [***Salina v. Joseph***, 26 AD3d 487, 809 NYS2d 464 (2nd Dept. 2006)] and looking at the medical evidence offered by both sides, a question of fact is raised when weighing the differing medical authorities opinions on the issue of a restriction and/or limitation of motion on the question of a serious injury. The Court views the discrepancies between the medical reports and affidavits submitted on behalf of the parties to involve issues of credibility for resolution by the jury. ***Moreno v. Chemtob***, 271 AD2d 585, 706 NYS2d 150 (2nd Dept. 2000); ***Vasilatos v. Chatertonon***, 135 AD2d 1073, 523 NYS2d 211 (3rd Dept. 1987).

Accordingly, the defendants' motion for summary judgment and dismissal of plaintiff's action pursuant to CPLR §3212 on the ground that the plaintiff has failed to reach the threshold of a serious physical injury as defined in Insurance Law §5104 is hereby denied in its entirety.

The foregoing constitutes the decision of the Court.

Dated: March 18, 2008

S/ Hon. Peter Fox Cohalan
J.S.C.