

Krystalis v Luc

2008 NY Slip Op 32505(U)

September 16, 2008

Supreme Court, Greene County

Docket Number: 0020060/4721

Judge: Joseph C. Teresi

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.

STATE OF NEW YORK
SUPREME COURT
BILL KRYSTALIS,

COUNTY OF GREENE

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 06-0472
RJI No. 19-07-2826

THOAN V. LUC,

Defendant.

Supreme Court Greene County, All Purpose Term, September 5, 2008
Assigned to Justice Joseph C. Teresi

APPEARANCES:

Ioannou & Associates
John M. Ioannou, Esq.
Attorneys for Plaintiff
414 East 59th Street
New York, New York 10022

Law Offices of Mary A. Bjork
Louise E. Dunn, Esq.
Attorneys for Defendant
500 New Karner Road, 3rd Floor
Albany, New York 12205

TERESI, J.:

On Thanksgiving day, as plaintiff was driving through a controlled intersection in Rochester, New York, his vehicle was hit by defendant’s vehicle. Plaintiff commenced this action alleging he sustained a “serious injury” as a result, and seeks to recover for such injury. Issue was joined and discovery is complete. Defendant now moves for summary judgment dismissing plaintiff’s complaint, which is opposed by plaintiff. Because defendant met his initial burden of proof in demonstrating that plaintiff suffered no “serious injury”, and plaintiff failed to raise a genuine issue of fact, plaintiff’s complaint is dismissed.

“Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue.” (Napierski v. Finn, 229 AD2d 869, 870 [3d Dept. 1996]). On a motion on for summary judgment, the movant must establish by admissible proof, the right to judgment as a matter of law. (Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; Gilbert Frank Corp. v. Federal Insurance Co., 70 NY2d 966 [1988]). If the movant establishes their right to judgment as a matter of law, the burden then shifts to the opponent of the motion to establish by admissible proof, the existence of genuine issues of fact. (Zuckerman v. City of New York, 49 NY2d 557 [1980]). In opposing a motion for summary judgment, one must produce “evidentiary proof in admissible form. . . mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient.” (Id. at 562).

The “No-Fault Law”, Insurance Law Article 18, precludes an individual from seeking compensation for non-economic losses caused by a motor vehicle accident, unless a “serious injury” is suffered. (Insurance Law §5104[a]). “To establish entitlement to summary judgment, defendant must submit competent medical evidence that plaintiff did not sustain a serious injury”. (Motrie v. Reid, 45 AD3d 941, 942 [3d Dept. 2007]). A “serious injury” is defined, in part relevant to this action, as: “personal injury which results in... [1] permanent consequential limitation of use of a body organ or member; [2] significant limitation of use of a body function or system; or [3] 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]).

Defendant met his burden of proof by demonstrating that plaintiff did not suffer a serious injury. In support of his motion, defendant properly offered the plaintiff's deposition testimony, plaintiff's treating physician's reports and notes, and an examination of plaintiff by defendant's medical expert which was duly affirmed by the examining doctor. (Tuna v. Babendererde, 32 AD3d 574, 575 [3d Dept. 2006], CPLR §2106.). From such documentation defendant established that after the accident plaintiff continued on his journey to his son's in-laws' home and had Thanksgiving dinner there. On the day of the accident, plaintiff refused an ambulance offered to him at the scene, did not go to a doctor nor did he take any medication for his injuries. He stayed overnight at his son's in-laws' home. In the morning, he fixed his car by inserting plexiglass in the broken windows and drove himself, unaccompanied, from Rochester, New York back to his home in Windham, New York. He had to stop "more than a couple" of times to refill the radiator with fluid because it was leaking so much. He waited four days before first seeing a doctor and took a trip to Greece within three months of the accident. Moreover, plaintiff testified that within two years and three months of the accident he had traveled to New York City numerous times by bus and car, and had traveled to Rio de Janeiro and Greece two times each. While in Greece he would swim and plant flowers and would do landscaping around his own home in Windham, New York. Such physical activity demonstrates the lack of a serious injury cognizable under Insurance Law §5102(d).

The medical evidence also demonstrates that plaintiff did not suffer a "serious injury". Two x-rays were taken of plaintiff's back within two months of the accident and both revealed that plaintiff sustained no fractures. The x-rays demonstrated that the "lumbar vertebral bodies", "disk spaces" and "sacroiliac joints" all appeared normal. One x-ray noted minimal osteopenia

which is not alleged to, nor could have, been caused by the accident. The above sufficiently met defendant's burden of proof to demonstrate, with competent medical proof, that plaintiff did not sustain a "serious injury" as a matter of law. (Pugh v. DeSantis, 37 AD3d 1026 [3d Dept. 2007], Motrie, supra).

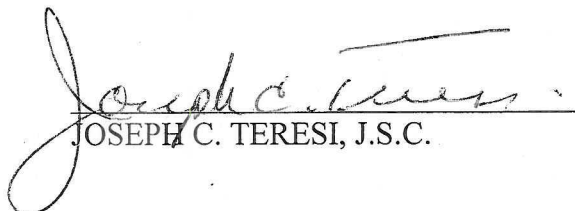
With the burden shifted to plaintiff, it was incumbent upon him to demonstrate the existence of a genuine issue of fact. In opposition, plaintiff submits only his attorney's affidavit which is wholly inadequate to create an issue of fact or rebut defendant's showing. (Ribaudo v. Delaney Const. Corp., 44 AD3 1143, 1145 [3d Dept. 2007]). While plaintiff did testify at his deposition that he still suffered pain over two years after the accident and no longer works at his seasonal part time employment (a job he had taken after retiring), plaintiff submitted no "objective, quantitative evidence" to substantiate his claimed "serious injury". (Pugh, supra at 1028).

Accordingly, the defendant's motion for summary judgment is granted and plaintiff's complaint is dismissed.

All papers, including this Decision and Order, are being returned to the attorney for the defendant. The signing of this Decision and Order shall not constitute entry or filing under CPLR § 2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: September 16, 2008
Albany, New York


JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated June 16, 2008, with attached Affirmation in Support of Louise Dunn, dated June 16, 2008, and attached Exhibits A - I.
2. Affirmation in Opposition of John Ioannou, dated August 22, 2008, with attached Exhibits A - C.
3. Reply Affirmation of Louise Dunn, dated August 28, 2008.