

Gayle v Singh

2008 NY Slip Op 32925(U)

October 23, 2008

Supreme Court, Suffolk County

Docket Number: 07-1701

Judge: Thomas F. Whelan

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT :

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 7-18-08
ADJ. DATE 8-29-08
Mot. Seq. # 003 - MG
004 - XMG; CASEDISP

-----X		STEVEN D. DOLLINGER & ASSOCIATES
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Plaintiff,	:	Melville, New York 11747
	:	
	:	RUSSO & APOZNANSKI
- against -	:	Attorneys for Defendants Singh
	:	875 Merrick Avenue
	:	Westbury, New York 11590
JULIEAN SINGH, SAMANTHA S. SINGH,	:	
SHELSTON A. BOYCE and ESTHER KYIN,	:	JOHN P. HUMPHREYS, ESQ.
	:	Attorney for Defendants Boyce & Kyin
Defendants.	:	3 Huntington Quadrangle, Ste. 102S, P.O. Box 9028
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Upon the following papers numbered 1 to 30 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 8; Notice of Cross Motion and supporting papers 9 - 13; Answering Affidavits and supporting papers 14 - 18; 19 - 20; Replying Affidavits and supporting papers 21 - 30; Other _____; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that this motion (#003) by defendants, Juliean Singh and Samantha Singh, and the cross motion (#004) by defendants, Shelston Boyce and Esther Kyin, for summary judgment dismissing the complaint against them on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102(d) are considered thereunder and under CPLR 3212 and are granted.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff, Leslie Carl Gayle, when his vehicle collided with a vehicle operated by defendant, Shelston A. Boyce (hereinafter "Boyce"), and owned by defendant, Esther Kyin, in the entrance lane of the Southern State Parkway in the Town of Hempstead, Nassau County, New York, on June 19, 2005. By his complaint, plaintiff alleges,

among other things, that at the time of the accident, a vehicle operated by defendant, Juliean Singh, and owned by defendant, Samantha Singh, collided with the Boyce vehicle, which, in turn, hit the plaintiff's vehicle.

By his bill of particulars, plaintiff alleges that, as a result of the subject accident, he sustained serious injuries including insult to the neuroperipheral and muscular skeletal system of both the cervical and lumbar spine; post-concussion syndrome; headaches; radiculitis throughout the entire spine; bulging discs at L1-L2 and L2-L3; herniated discs at L3-L4, L4-L5 and L5-S1; and aggravation of any prior injuries. In addition, plaintiff claims that, following the subject accident, he was confined to bed and home for approximately three days. The plaintiff reserved the right to rely upon each of the nine categories of serious injury set forth in Insurance Law § 5102(d).

In cases involving claims of serious injury, it is the court's obligation to determine, in the first instance, whether a prima facie showing of "serious injury" has been made out (*see Tipping-Cestari v Kilhenny*, 174 AD2d 663, 571 NYS2d 525 [2d Dept 1991]). The initial burden is on the defendant "to present evidence, in competent form, showing that the plaintiff has no cause of action" (*Rodriguez v Goldstein*, 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once defendant has met the burden, plaintiff must then, by competent proof, establish a prima facie case that such serious injury exists (*see Gaddy v Eycler*, 79 NY2d 955, 582 NYS2d 990 [1992]). Such proof, in order to be in a competent or admissible form, shall consist of affidavits or affirmations (*see Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]) and must be viewed in a light most favorable to the nonmoving party (*see Cammarere v Villanova*, 166 AD2d 760, 562 NYS2d 808 [3d Dept 1990]).

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.

To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" under Insurance Law § 5102(d)(vii) or a "significant limitation of use of a body function or system" under Insurance Law § 5102(d)(viii), either a specific percentage of the loss of range of motion must be ascribed or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 746 NYS2d

865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (see *Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]).

In support of their respective motion and cross motion, the defendants rely upon the pleadings, the deposition testimony of the plaintiff and affirmed report of Dr. Zimmerman, a physician retained by the plaintiff's no-fault carrier who examined the plaintiff on January 22, 2008, some two years and seven months after the subject accident, Dr. Zimmerman's report reveals that he examined the plaintiff, using certain orthopedic and neurological tests including the Lasegue test, supine and reverse seated Straight Leg Raising test, Fabere test and shoulder abduction test. Dr. Zimmerman found that all of the test results were negative and that there was no tenderness or spasm in plaintiff's shoulder and cervical and lumbar spine. He reported his findings with respect to the various ranges of motion of plaintiff's shoulder and cervical and lumbar spine and compared those findings to the normal ranges of motion. Dr. Zimmerman also found that plaintiff had normal ranges of motion in his cervical and lumbar spine and shoulder and opined, based on his examination, that the plaintiff had no disability or restrictions related to the subject accident nor was there any aggravation of any prior injuries (see *Willis v New York City Tr. Auth.*, 14 AD3d 696, 789 NYS2d 223 [2d Dept 2005]). Such proof was sufficient to demonstrate, prima facie, the absence of a serious injury under subparagraphs (vii) and (viii) of § 5102(d) of the Insurance Law (see *Toure v Avis Rent-a- Car Sys.*, 98 NY2d 345, *supra*; *Mager v Cooney*, 50 AD3d 648, 853 NYS2d 920 [2d Dept 2008]).

The defendants also established, prima facie, that the plaintiff's claim that he sustained a medically determined injury or impairment of a non-permanent nature, which prevented him from performing substantially all of the material acts which constitute his usual and customary activities for not less than 90 out of the 180 days immediately following the accident is without merit. At his examination before trial, the plaintiff testified that he is an employee of MTA Long Island Bus Co.; that he did not miss any time from work as a result of the accident; and that he had received chiropractic treatment three days a week for the first three months and two days a week for the following two months. Plaintiff also testified that there is no activity that he is unable to perform except "painting the walls." While the plaintiff complained that he had difficulty lifting and bending, he admitted that he could lift items weighing up to 40 pounds. His deposition testimony thus revealed that his injuries did not prevent him from performing "substantially all" of the material acts which constituted his customary daily activities during at least 90 out of the first 180 days following the accident (see *Zinger v Zylberberg*, 35 AD3d 851, 828 NYS2d 128 [2d Dept 2006]; *Porto v Blum*, 39 AD3d 614, 833 NYS2d 245 [2d Dept 2007]; *Curry v Velez*, 243 AD2d 442, 663 NYS2d 63 [2d Dept 1997]). Such testimony was sufficient to establish, prima facie, the absence of a serious injury under Insurance Law § 5102(d)(ix).

In opposition, plaintiff contends that he did sustain a serious injury within the meaning of Insurance Law § 5102(d). In support of such contentions, the plaintiff relies upon the sworn affidavit of his treating chiropractor, Dr. Walter Priestley, dated June 12, 2008 and the affirmation of his treating radiologist, Dr. Robert Diamond, dated June 11, 2008. The plaintiff claims that such proof is sufficient to establish that, as a result of the subject accident, he sustained injuries to his lumbar spine, including disc herniations and bulges, resulting in restrictions and/or limitations in the range of motion in his back and in other parts of body that are actionable under Insurance Law § 5102(d) (vii), (viii) and (ix).

It is well established that the existence of herniated or bulging discs do not in themselves constitute a serious injury. Instead, such injuries must be accompanied by objective evidence of the extent or degree of the alleged physical limitations resulting therefrom and the duration thereof (*see Nelson v Amicizia*, 21 AD3d 1015, 803 NYS2d 87 [2d Dept 2005]; *Kearse v New York City Tr. Auth.*, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]; *Guzman v Paul Michael Mgt.*, 266 AD2d 508, 698 NYS2d 719 [2d Dept 1999]). It is equally well established that limitations and restrictions which are only observed and properly quantified months after the accident, and without evidence of their existence, contemporaneous with the accident, are insufficient to establish an actionable serious injury under § 5102(d) of the Insurance Law (*see Leeber v Ward*, ___ AD3d ___, 2008 WL 4491902 [2d Dept 2008]; *Perdermo v Scott*, 50 AD3d 1115, 857 NYS2d 212 [2d Dept 2008]; *Borgella v D&L Taxi Corp.*, 38 AD3d 701, 834 NYS2d 199 [2d Dept 2007]; *Imusen v Konopka*, 38 AD3d 608, 831 NYS2d 530 [2d Dept 2007]).

Here, the plaintiff's submissions were insufficient to raise a triable issue of fact as to whether a "serious injury" under Insurance Law §5102(d) was sustained by him in the subject accident (*see Sims v Megaris*, 15 AD3d 468, 790 NYS2d 487 [2d Dept 2005], *lv den* 5 NY3d 703, 800 NYS2d 374 [2005]). The affirmation of the plaintiff's radiologist, Dr. Diamond, indicated that the MRI study undertaken by him on September 28, 2005 revealed that plaintiff had "Kyphotic Lumbar Curvature," bulging discs at L1-L2 and L2-L3, herniated discs at L3-L4 "extending to impress the ventral thecal sac and narrow the foramina with abutment of the exiting L3 roots", and herniated discs at L4/L5 and L5/S1 "extending to narrow the foramina with impingement upon the exiting L4 and L5 roots." Dr. Diamond's affirmation did not, however, include an opinion as to causation nor did it detail any observed restrictions or limitations resulting from any of the disc herniations and bulges indicated on the September 28, 2005 MRI study (*see Sorto v Maorales*, ___ AD3d ___, 2008 WL 4593108 [2d Dept 2008]; *Silla v Mohammad*, 52 Ad3d 681, 861 NYS2d 83 [2d Dept 2008]).

The affirmation of the plaintiff's treating chiropractor, Dr. Priestley, was also insufficient to establish a serious injury. Not apparent therefrom is the date on which Dr. Priestley first examined and/or treated the plaintiff. What is apparent is that Dr. Priestley examined the plaintiff on April 30, 2008 and administered orthopedic and neurological tests from which he quantified observed restrictions and limitations in the plaintiff's neck and back. Dr. Priestley concluded that on April 30, 2008, the plaintiff was suffering from range of motion restrictions in his cervical and lumbar spine which were attributed to the subject accident. However, the failure of Dr. Priestley's affirmation to include competent medical evidence of restrictions and/or limitations resulting from the injuries allegedly sustained in the subject accident that were measured contemporaneously with the subject accident renders his affirmation insufficient to establish a question of fact with respect to serious injury under Insurance Law § 5102(d)(vii) or (viii) (*see Leeber v Ward*, ___ AD3d ___, 2008 WL 4491902, *supra*; *Sorto v Maorales*, ___ AD3d ___, 2008 WL 4593108, *supra*; *Perdermo v Scott*, 50 AD3d 1115, *supra*; *Borgella v D&L Taxi Corp.*, 38 AD3d 701, *supra*).

Nor did the plaintiff establish that a question of fact exists regarding whether the plaintiff sustained 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

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occurrence of the injury or impairment (Insurance Law § 5102(d) (ix). The plaintiff's reliance upon his deposition testimony to establish such an injury is misplaced for the reasons set forth above. His failure to adduce medial evidence tending to establish a medically determined injury resulting in the impairments contemplated by Insurance Law § 5102(d)(ix) is fatal to his claim of an actionable serious injury thereunder submitted (*see Vita v Enterprise Rent-A-Car*, 8 AD3d 558, 779 NYS2d 128 [2d Dept 2004]).

In view of the foregoing, the court finds that the plaintiff's submissions were insufficient to raise any genuine question of fact on the issue of a serious injury under Insurance Law § 5102(d). The instant motion and cross motion by the defendant for summary judgment dismissing the plaintiff's complaint are thus granted. The within action shall be marked disposed upon entry of this order.

Dated: _____

10/23/08



THOMAS F. WHELAN, J.S.C.