

Fernandez v De Pesa
2008 NY Slip Op 33436(U)
December 18, 2008
Supreme Court, New York County
Docket Number: 105592/06
Judge: Martin Shulman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **MARTIN SHULMAN**
J.S.C.
Justice

PART 1

Index Number : 105592/2006

FERNANDEZ, JOSE L.

INDEX NO. 105592/06

vs

DE PESA, ROBERT

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. 001

SUMMARY JUDGMENT

MOTION CAL. NO. _____

this motion to/for _____

Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits A-F

Answering Affidavits — Exhibits 1-5

Replying Affidavits _____

PAPERS NUMBERED

1
2
3

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED
DEC 24 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: DEC 18 2008

MARTIN SHULMAN
J.S.C. *J.S.C.*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 1

----- X
JOSE L. FERNANDEZ and ELYSE FERNANDEZ,

Plaintiffs,

Index No. 105592/06

- against-

ROBERT DE PESA,

Defendant.

DECISION AND ORDER

FILED

DEC 24 2008

COUNTY CLERK'S OFFICE
NEW YORK

MARTIN SHULMAN, J.S.C.:

This personal injury action arises out of an automobile accident that occurred on July 16, 2004. The vehicle driven by defendant Robert De Pesa ("De Pesa") allegedly struck the vehicle driven by plaintiff Jose L. Fernandez ("Fernandez") from behind. De Pesa moves for summary judgment dismissing the complaint (CPLR 3212) on the ground that plaintiff has failed to demonstrate the existence of a factual question whether he suffered a "serious injury" pursuant to Insurance Law § 5102(d).

Fernandez argues that he suffered a "serious injury" under four of the categories listed in Insurance Law § 5102(d): "permanent loss of use of a body organ, member, function or system;" "permanent consequential limitation of the use of a body organ or member;" "significant limitation of use of a body function or system;" and "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 or customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment."

"The initial burden is on defendants to present evidence, in competent form, showing that plaintiff has no cause of action; unless that burden is met, plaintiff need not come forward with proof that she sustained a serious injury within the contemplation of Insurance Law § 5102(d)". (Rodriguez v Goldstein, 182 AD2d 396, 397 [1st Dept 1992]); Cosovic v Term Leasing, Inc., 234 AD2d 79, 80 [1st Dept 1996]). In support of his motion for summary judgment, De Pesa submits the expert affidavits of Daniel Feuer, M.D. and A. Robert Tantleff, M.D., and also bases his motion on the pleadings, verified bill of particulars, supplemental verified bill of particulars and Fernandez's deposition testimony.

Dr. Feuer states in his affidavit that he conducted an independent neurological examination of Fernandez on March 24, 2008, almost four years after the accident. Dr. Feuer states that he found normal range of motion in both the lumbar and cervical spine. Range of motion testing was 45/45 degrees in extension, 45/45 in flexion, 80/80 degrees bilaterally in rotation and 45/45 degrees bilaterally in lateral flexion.

Dr. Tantleff states in his affidavit that he performed an independent radiology review of the MRI of Fernandez's lumbar spine on April 16, 2008. Dr. Tantleff opines that Fernandez is suffering from chronic degenerative disc disease, which is longstanding and predated the accident, and which is associated with increased pain with aging.

In his deposition testimony, Fernandez states that he has suffered neck and back pain since the accident. He acknowledges that he performed many of his customary activities, such as cutting the lawn or doing the laundry, but states that he did them less often because of pain.

Fernandez testified at his deposition that his most recent work was in 2007, as a truck driver and owner of a trucking business. He testified that he was able to drive the truck for long periods of time, but had to stretch, and experienced pain in his lower back and legs when he lifted the back gate of the truck, but was able to do so.

Fernandez testified that, in early 2004, he became a partner in a baseball clinic that taught children in different age groups. Fernandez's work involved supervising the younger children. He described it as being similar to day care. Fernandez testified that sometimes, when the instructor was busy, he would try to help "in both running and stretching and doing all kinds of baseball exercises." He had to help approximately twice a week. Additionally, his duties included making sure everybody had paid. Fernandez sold his interest in November 2004. He was not hospitalized and did not miss any work as a result of the accident.

In opposition to the motion, plaintiff submits the expert affidavits of Mark A. Shapiro, M.D. and Larry Newman, M.D., as well as his own affidavit of merit. In his affidavit of merit, Fernandez states that during the five months that he was under Dr. Neuman's care, he complained of "unremitting lower back pain and neck pain which restrained the performance of all of my usual and customary activities" (Exh. 1 to Aff. in Opp.).

Fernandez further states in his affidavit of merit that, after he was discharged by Dr. Neuman on December 14, 2004, five months after the accident, he obtained treatment with Dr. Danielle Groves of Premiere Orthopedics and Sports Medicine, P.C. Fernandez states that at his second appointment with Dr. Groves, on February 5, 2005, he continued to complain of low back pain, and tingling and numbness in his legs. He

states that she advised him to undergo epidural injections, but that he declined to do so.

Dr. Shapiro, a radiologist, states in his affidavit that, on July 22, 2004, he supervised the taking of five sheets of MRI images for Fernandez, and interpreted them on July 22, 2004. Dr. Shapiro states that his impression was that Fernandez had herniations with nerve impingement at discs L4-L5 and L5-S1.

Dr. Newman states in his affidavit that he examined Fernandez on the day of the accident and prescribed a course of physical therapy and pain medication. He examined Fernandez seven times after the initial visit. The last examination was on December 14, 2004, when Dr. Newman discharged Fernandez from his care on the ground that he had achieved maximum medical improvement.

Dr. Newman states that, on November 14, 2004, he performed range of motion testing on Fernandez on both his neck and lower back. Dr. Newman states that his findings for range of motion for flexion of the cervical spine was 45/60; for extension of the cervical spine: 20/30; for bending of the cervical spine: 20/45; and for lateral motion of the cervical spine: 20/75. He states that he performed the tests three times. Dr. Newman opines that the decreases in range of motion of the cervical spine four months after the accident are significant limitations.

Also on November 14, 2004, Dr. Newman performed range of motion testing for Fernandez's lumbar spine. He states that he found 60 degrees flexion, compared to a normal measure of 90 degrees; 10 degrees extension, compared to a normal measure of 30 degrees; 10 degrees lateral bending, compared to a normal measure of 30

degrees; and 20 degrees lateral rotation, compared to a normal measure of 60 degrees. He states that he performed these range of motion tests three times.

Dr. Newman opines that the decreases in the range of motion of the lumbar spine four months after the accident are “extremely significant limitations and will not improve to any degree” (Exh. 3 to Aff. in Opp.) He states that it is his opinion that plaintiff’s injuries “would significantly curtail the performance of all of the activities stated in the affidavit by the plaintiff.” Although Dr. Newman’s affidavit is dated May 19, 2008, his opinion is based on his examinations in 2004. The court does not consider any of Dr. Newman’s statements about Fernandez’s subsequent treatment by Dr. Groves because there is no submission from Dr. Groves, and the medical records from that subsequent treatment are not affirmed by the treating doctor.

While De Pesa has met his burden of proving a prima facie case of entitlement to judgment as a matter of law with respect to the two categories of serious injury involving permanent loss, and the 90/180 day category, he has not met his burden with respect to the category of serious injury involving “significant limitation of use of a body function or system.” Because the examination by Dr. Feuer was almost four years after the accident, “there was insufficient proof of the duration of the alleged impairment” (Burnett v Miller, 255 AD2d 541 [2d Dept 1998]).

Dr. Newman’s opinion, based on a contemporaneous examination and regular visits over a five month period following the accident, that Fernandez suffered a “significant limitation” injury, and would continue to suffer significant pain is sufficient to defeat summary judgment (see Lopez v Senatore, 65 NY2d 1017, 1020 [1985]. “The measured limitations of motion ... in the cervical and lumbosacral spine areas described

in the medical reports of plaintiff's treating physicians are sufficient to raise an issue of fact whether, as a result of the accident, plaintiff sustained a non-permanent injury or impairment within the meaning of Insurance Law § 5102(d)" (Mancusi v McDonald, 203 AD2d 146 [1st Dept 1994]).

While there is no requirement that a significant limitation be permanent, it must be of a sufficient duration that it be "significant" (Partlow v Meehan, 155 AD2d 647 [2d Dept 1989]). "[T]here can be no doubt that if a bodily limitation is substantial in degree yet only fleeting in duration, it should not qualify as a 'serious injury' under the statute" (id. at 648). "Any assessment of the 'significance' of a bodily limitation necessarily requires consideration not only of the extent or degree of the limitation but of its duration as well" (McCleary v Hefter, 194 AD2d 594 [2d Dept 1993]).

In Thrall v City of Syracuse (60 NY2d 950 [1983]), the Court of Appeals held that plaintiff had not suffered a significant limitation serious injury where the plaintiff had regained full range of motion of his arm within four months of the accident. In Nasrallah v Helio De (1998 WL 152568, *6 [SD NY 1998]), Judge Sotomayor held that a limitation of movement that lasted at least nine months was sufficient to constitute a "serious injury."

Dr. Feuer's expert opinion that Fernandez did not suffer any limitation of range of motion as of March 24, 2008, almost four years after the accident, is not conclusive on the issue of the duration of Fernandez's alleged "significant limitation" injury. The deficiency in De Pesa's proof is that it does not establish as a matter of law that the duration of Fernandez's injury was of such a limited nature as to be insignificant. De Pesa's proof only establishes prima facie what Fernandez's condition was four years

after the accident. Fernandez could have met the duration requirement for a 'significant limitation' 'serious injury,' and still be fully recovered within four years. Therefore, De Peso has not demonstrated his prima facie entitlement to judgment as a matter of law on the ground that Fernandez did not suffer a serious injury.

Because the court holds that De Pesa did not present sufficient evidence to establish that Fernandez did not suffer a "serious injury" under the category of a "significant limitation of use of a body function or system," the burden did not shift to Fernandez to demonstrate the existence of a triable issue of fact whether he suffered a "significant limitation" "serious injury" (see Gaddy v Eyler, 79 NY2d 955 [1992]). If the burden had shifted on the "significant limitation" issue, the court would hold that Fernandez met his burden of demonstrating the existence of a factual issue on the existence of a "significant limitation" serious injury by presenting the expert affidavits of Dr. Shapiro and Dr. Newman, and his own affidavit of merit.

Dr. Feuer's finding of full range of motion almost four years after the accident establishes De Peso's prima facie case that Fernandez did not suffer a permanent injury under either category. Fernandez alleges that his "household and recreational activities were curtailed as a result of the accident, but has submitted no evidence to support that contention. Plaintiff has therefore failed to establish that [his] injury caused a 90-out-of-180-day curtailment of substantially all [his] normal activities" (see Gaddy v Eyler, 79 NY2d at 958).

At trial, the issue shall be limited to whether Fernandez suffered a "significant limitation" serious injury only, inasmuch as De Peso has demonstrated his entitlement to judgment as a matter of law on the remaining categories of serious injury.


Accordingly, it is

ORDERED that defendant's motion for summary judgment is granted to the extent of dismissing the complaint with respect to all categories of serious injury except for "significant limitation of use of a body function or system"; and it is further

ORDERED that the case be remanded back to the Administrative Coordinating Part to be calendared for trial.

The foregoing constitutes this court's Decision and Order. A copy of this Decision and Order has been sent to counsel for the parties.

Dated: December 18, 2008


Martin Shulman, J.S.C.

FILED
DEC 24 2008
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