

Nudelman v Lopez

2009 NY Slip Op 30858(U)

April 7, 2009

Supreme Court, Richmond County

Docket Number: 102614/07

Judge: Joseph J. Maltese

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

Index No.:102614/07
 Motion No.: 001

GARY NUDELMAN,

Plaintiff

against

MICHAEL J. LOPEZ,

Defendant

DECISION & ORDER

HON. JOSEPH J. MALTESE

The following items were considered in the review of this motion for summary judgment.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2
Replying Affidavits	3
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The defendant moves this court for an order pursuant to *CPLR* § 3212 seeking to dismiss plaintiff's complaint on the grounds that the plaintiff has not sustained a serious injury as defined by *Insurance Law* § 5102(d). Defendant's motion is denied in its entirety.

Facts

This action arises out of a motor vehicle accident that took place on October 16, 2005 at the Staten Island Expressway, Staten Island, New York. As a result of this accident, the plaintiff claims to suffer from a cervical disc herniation.

Discussion

The defendant seeks summary judgment on the ground that the plaintiff has not sustained a “serious injury” as defined by *Insurance Law* § 5102.¹ 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

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

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 [3d Dept 1993]; *Daviero v. Johnson*, 88 AD2d 732 [3d Dept 1982].

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

⁴ 11 NYCRR §65-2.1[e].

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

⁶ *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 *Licari v. Elliott*, 57 NY2d 230, 237 [1982].

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 conclude that no objective medical findings support the plaintiff's claim. In the case before this court, the defendant came forward with the affirmed report of Dr. Salvatore Corso, an orthopedist. His examination of the plaintiff's cervical spine revealed maintenance of the normal cervical lordosis.

Where defendant's motion for summary judgment 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 the 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's expert must submit quantitative objective findings in addition to an opinion as to the significance of the injury.¹⁰

The 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 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 "consequential limitation of use" must be with respect to a body organ or member, whereas the "significant limitation of use" must be with

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

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

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

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

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

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 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.¹⁵ In other words, a medical expert must describe the qualitative nature of the plaintiff's limitation based on the normal function, purpose, or use of the plaintiff's affected body part.¹⁶

As to the causation element, it will be necessary for the plaintiff to establish this element 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.¹⁷

When supported by objective evidence, an expert's qualitative assessment of the seriousness of a plaintiff's injuries can be tested during cross-examination, challenged by another expert and weighed by the trier of fact. By contrast, an expert's opinion unsupported by an objective basis may be wholly speculative, thereby frustrating the legislative intent of the No-

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

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

¹⁵ *Route v. Avis Rent A Car System*, 98 NY2d at 353, *supra*.

¹⁶ *Id.* at 355.

¹⁷ *Toure v. Avis Rent A Car System*, 98 NY2d at 353, 355, *supra*.

Fault Law to eliminate statutorily-insignificant injuries or frivolous claims.¹⁸

The plaintiff submits the affirmed statement of Dr. Scott Skolkin, a chiropractor who treated the plaintiff on October 24, 2005 and who saw the plaintiff again on February 4, 2009. After reviewing certified MRI and Marlboro Chiropractic reports and by conducting his own objective testing, Dr. Skolkin's diagnosis of the plaintiff is traumatic onset cervical disc herniation. The plaintiff's most recent cervical spine examination found that his flexion was at 30 degrees (when 60 is normal), extension was at 35 degrees (when 50 is normal), left rotation was at 60 degrees (when 80 is normal), right rotation was at 45 degrees (when 80 is normal), left lateral flexion was at 30 degrees (when 40 is normal), and right lateral flexion was at 25 degrees (when 40 is normal). Dr. Skolkin concluded that these injuries were causally related to the accident that occurred on October 16, 2005. At the presentation of this evidence, the plaintiff raises at least an issue of fact regarding the nature of his injury.

The defendant also challenges the plaintiff's claim of injury by asserting that the plaintiff did not account for a gap in the treatment. A plaintiff must offer some explanation when he terminates treatment following an accident that caused him a "serious injury."¹⁹ In his affidavit and at his examination before trial, the plaintiff stated that he continued treatment on his own when he stopped going to Marlboro Chiropractic. These treatments include icy/hot treatment, massage, stretching, and range of motion exercises. Dr. Skolkin also maintained that the plaintiff continues to perform the following treatments: hydro collator application, mineral ice massage, ultrasound application, cervical spine long axis tractum, and gentle spinal manipulation. Although the plaintiff ceased treatment at Marlboro Chiropractic, statements from his affidavit, deposition, and Dr. Skolkin's affirmed statement reveal that the plaintiff may have continued treatment. As such, there is a triable issue of fact whether the plaintiff must provide the explanation for his treatment termination and summary judgment cannot be granted in favor of

¹⁸ *Toure v. Avis Rent A Car System*, 98 NY2d at 353

¹⁹ *Pommels v. Perez*, 4 NY3d 566 [2005].

the defendant at this juncture.

Additionally, this court does not find defendant's assertion that plaintiff failed to meet the 90/180 test persuasive. To satisfy this threshold requirement, four requirements must be met: First, plaintiff must establish that plaintiff's inability to perform the requisite acts lasted for not less than 90 days during the 180 days following the occurrence of the injury.²⁰ Secondly, there must be proof that "substantially all" of the plaintiff's usual activities were curtailed.²¹ Thirdly, the plaintiff must submit competent medical evidence that an injury or impairment was sustained.²² Lastly, the plaintiff must present competent medical evidence that the injury was the cause of the claimed disability or impairment over the applicable period.²³

The plaintiff testified at his examination before trial:

Q. How much time did you lose from work as a result of the injuries from this accident?

A. About three, three to four months, I guess.

Q. Now, was that consecutively, is than an accumulative number?

A. Pretty much consecutive, I think, because the drive was killing me. Sitting in the car was - -.²⁴

Plaintiff also averred that the accident altered his customary activities. He testified:

Q. As a result of the accident, what is it that you can no longer do now, that you used to be able to do before the accident, without thinking about it, without any pain or limitations; something you can no longer do, if there is anything?

²⁰ *Baker v. Zelem*, 202 AD2d 617 [2d Dept 1994].

²¹ *Gaddy v. Eyler*, 79 NY2d 955, 959 [1992]; *Licari v. Elliott*, 57 NY2d 230 [1982]; *Rhinal v. Naylor*, 187 AD2d 498 [2d Dept 1992].

²² *McKnight v. LaValle*, 147 AD2d 902 [4th Dept 1989]; *Doyle v. Erie County Water Authority*, 113 Ad2d 1016 [4th Dept 1985]; *Guzzard v. Crawford*, 106 AD2d 750 [3dDept 1984].

²³ *Relin v. Brotherton*, 221 AD2d 840 [3d Dept 1995].

²⁴ Testimony of Gary Nudelman, June 17, 2008, 36-37.

A. What can't I do? Again, I just have the neck pain, so I just don't do certain exercises anymore. Anything over the head. I mean, I don't lift things over my head, I guess. I have special pillows. Now, it's killing me to sleep. When it comes from your neck I have to be careful how to sleep.²⁵

This court finds that these limitations meet the threshold necessary to withstand a summary judgment motion.

As there is at least one genuine issue of fact raised in opposition to defendant's motion, summary judgment must be denied in its entirety

Conclusion

The 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."²⁶ Granting 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."²⁷ 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.²⁸ 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)

²⁵ Testimony of Gary Nudelman, June 17, 2008, 40.

²⁶ *CPLR* §3212[b].

²⁷ *Marine Midland Bank, N.A., v. Dino, et al.*, 168 AD2d 610 [2d Dept 1990].

²⁸ *American Home Assurance Co., v. Amerford International Corp.*, 200 AD2d 472 [1st Dept 1994].

Accordingly, it is hereby:

ORDERED, that the defendant's motion to dismiss the plaintiff's complaint is denied in its entirety; and it is further

ORDERED, that the parties shall return to DCM Part 3 on **June 10, 2009 at 9:30 A.M.** for a Compliance Conference.

ENTER,

DATED: April 7, 2009

Joseph J. Maltese
Justice of the Supreme Court