

Bock v Esquivel

2010 NY Slip Op 31567(U)

June 14, 2010

Supreme Court, Queens County

Docket Number: 24479/2007

Judge: Robert J. McDonald

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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.

Whether a plaintiff has sustained a serious injury is initially a question of law for the Court (*Licari v Elliott*, 57 NY2d 230). It is defendant's obligation to demonstrate that the plaintiff has not sustained a "serious injury" by submitting affidavits or affirmations of its medical experts who have examined the litigant and have found no objective medical findings which support the plaintiff's claim (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345; *Grossman v Wright*, 268 AD2d 79). If the defendant's motion raises the issue as to whether the plaintiff has sustained a "serious injury" the burden shifts to the plaintiff to prima facie demonstrate through the production of evidence sufficient to demonstrate the existence of a "serious injury" in admissible form, or at least that there are questions of fact as to whether plaintiff suffered such injury (*Gaddy v Eyley*, 79 NY2d 955; *Bryan v Brancato*, 213 AD2d 577).

Insurance Law 5102 is the legislative attempt to "weed out frivolous claims and limit recovery to serious injuries" (*Toure v Avis Rent-A-Car Systems, Inc.*, 98 NY2d 345, 350).

Under Insurance Law 5102(d) a permanent consequential limitation of use of a body organ or member qualifies as a "serious injury", however, the medical proof must establish that the plaintiff suffered a permanent limitation that is not minor slight, but rather, is consequential which is defined as an important or significant limitation.

The defendant submits an affirmation by Dr. Ravi Tikoo, M.D., a Board Certified Neurologist, dated October 14, 2009. Dr. Tikoo conducted a neurological evaluation of the plaintiff with regard to the accident on August 3, 2007. The plaintiff complained of neck and back pain. Dr. Tikoo noted in his physical examination that "[t]here was mild tenderness of the cervical and lumbar spine. No associated spasm was noted. Straight leg raising was possible up to 90 degrees bilaterally in the sitting position (normal=90)." Dr. Tikoo's conclusion was that despite the plaintiff's subjective complaint of pain "there were no objective findings to substantiate these complaints." The plaintiff was found not to have "significant clinical evidence of neuropathy, radiculopathy, or disc herniation from the accident."

The defendant submits the affirmation of Dr. Andrew W. Weiss, M.D. a Board Certified Orthopedic Surgeon, dated October 13, 2009. Dr. Weiss evaluated the plaintiff. The plaintiff's cervical spine was "normal active range." With regard to the plaintiff's thoracolumbar spine while the plaintiff expressed complaints with regard to L1-L5 the measurements were all within normal limits, and no surgical scars were noted. The plaintiff's right wrist/hand and left wrist/hand revealed normal movement. The plaintiff was found to have "no residuals related to the motor vehicle accident of August 3, 2007". He found no "clinical evidence" for S1 or C6-7 radiculopathy.

The defendant submits the affirmation of Dr. Audrey Eisenstadt, M.D., a Board Certified Radiologist, dated September 25, 2009. Dr. Eisenstadt reviewed an MRI of the plaintiff's lumbar

spine taken November 1, 2007 at All County Open MRI & Diagnostic Radiology. Dr. Eisenstadt found “osteophyte formation” at the L2-3, L3-4, and L4-5 intervertebral disc levels. “Endplate signal change is seen at the L4-5 level”. Disc degeneration is observed at the L4-5 and L5-S1 intervertebral disc levels. “Bulging of disc material is seen at the L2-3, L3-4, L4-5, and L5-S1 levels.” No focal disc herniations were observed. The MRI taken three months after the accident show degenerative disc disease and bony productive changes greater than six months in origin and “clearly predate” the accident. No post-traumatic abnormalities are identified. The bulging is not classified as a “traumatic abnormality” and is degeneratively induced.

Dr. Eisenstadt also reviewed the MRI of plaintiff’s cervical spine. “There is a straightening of the cervical lordosis seen. A retrolisthesis is seen at the C4 vertebral level. Osteophyte formation and endplate signal change at the C4-5 level is noted.” The morphology was normal and no marrow edema was seen. “No compression fractures are identified.” There is disc degeneration observed at the C3-4, C4-5, and C5-6 intervertebral disc levels. Bulging of the invertebrate discs are seen at the C3-4, C4-5, and C6-7 levels. “No focal disc herniations are noted. No annular tears are seen.” “Uncinate joint hypertrophy is seen at the C4-5 and C5-6 levels. No Arnold-Chian deformity is seen.” The bony productive changes are degeneratively induced and greater than six months in origin. All the changes noted are part of the degenerative process. “No osseous, ligamentous, or intervertebral disc changes are attributable to” the accident. No post-traumatic abnormalities are identified.

Here the defendant has come forward with sufficient evidence to support the claim that the plaintiff has not sustained a “serious injury” (*Gaddy v Eyley*, 79 NY2d 955).

The plaintiff submits an affirmation of Dr. Mihir Bhatt, M.D. dated May 2010. He recounts his earlier examinations and results relating to the plaintiff since he first saw him on August 10, 2007. Dr. Bhatt states that the plaintiff saw him again on March 10, 2010 where he was re-evaluated and Dr. Bhatt continues to treat the plaintiff. The most recent re-evaluation took place May 5, 2010 when the plaintiff presented his continued complaints of left and right shoulder pain, as well as pain in the head, neck, thoracic spine, and lower back and parathesia in his upper extremity and fingers. He found the plaintiff to have a “weak grasp due to pain on the left as well as neck pain.” Dr. Bhatt recommended an MRI of his shoulder. Dr. Bhatt found interspinous tenderness at C4 to C7, inter spinous tenderness at L4 to L5 and S1, and “shooting pain in calf at 45 degrees.” He found “posterior disc herniations in the lumbosacral spine at L3-4, L4-5, and L5-S1” “Schmorl’s nodes at L1-2 and L2-3” and “bilateral C6-C7 radiculopathy.” Dr. Bhatt found that the plaintiff’s injuries from the accident “inhibit the patient’s ability to carry out normal activities of daily living” and “the limitations of motion to the cervical and lumbar spine and left and right shoulders are significant as they present nearly three years after the accident and they can be considered permanent.”

The plaintiff submits the affidavit of Dr. Mark S. Snyder, D.C., dated May 19, 2010. Dr. Snyder gives his historical perspective as to his opinion that the plaintiff was in fact injured in the accident on August 3, 2007. He recounts how he last saw the plaintiff professionally on March 31, 2010 and based on the plaintiff’s complaints conducted a chiropractic examination. It was Dr. Snyder’s opinion that the plaintiff had “decreased range of motion of the cervical spine, accompanied

by decreased strength; muscle spasm within the cervical and lumbar muscles; and tenderness to percussion over the cervical and lumbar spine.” He found that the plaintiff had a decreased range of motion in his lumbar spine, and thoraco-lumbar spine. It was Dr. Snyder’s chiropractic opinion that based on his examination and study of the MRI that the plaintiff’s present disabilities are as a result of the accident on August 3, 2007. “It is further by expert chiropractic opinion that the radiculopathy and carpal tunnel syndrome diagnosed via EMG.NCV are causally related to the subject motor vehicle accident and are permanent in nature” and that “the limitation of motion to the cervical and lumbosacral spine are significant as they still present two and half years post accident, so they can only be considered permanent.”

There is the affirmation of Dr. Richard J. Rizzuti, M.D. a Board Certified Radiologist, dated April 9, 2010. Dr. Rizzuti comments on the plaintiff’s MRI taken of November 1, 2007 of his lumbar spine. Dr. Rizzuti states that the MRIs demonstrate “posterior disc herniations at L3-4-L4-5, and L5-S1 impinging on the anterior aspect of the spinal cord, and on the right nerve roots at L4-5 and at L5-S1. Schmorl’s nodes at L1-2 and L2-3.”

There is a second affirmation of Dr. Rizzuti concerning the MRI of plaintiff’s cervical spine taken November 1, 2007. Dr. Rizzuti’s impression is that the plaintiff suffered “posterior disc herniations at C2-3, C3-4, and at C4-5 and in the upper thoracic region at C7-T1, T1-2, and T2-3 abutting the anterior aspect of the spinal cord.”

To establish that the plaintiff has suffered a permanent or consequential limitation of use of a body organ or member and/or a significant limitation of use of a body function or system, the plaintiff must demonstrate more than “a mild, minor or slight limitation of use” and is required to provide objective medical evidence of the extent or degree of limitation and its duration (*Booker v Miller*, 258 AD2d 783; *Burnett v Miller*, 255 AD2d 541). Resolution of the issue of whether “serious injury” has been sustained involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part (*Dufel v Green*, 84 NY2d 795). Upon examination of the papers and exhibits submitted this Court finds that the plaintiff has raised triable factual issue as to whether the plaintiff has “permanent consequential” and “significant limitation” categories.

The question presented as to the difference between the conflicting measurements of plaintiff’s ability to move creates an issue of fact for the jury (*Martinez v Pioneer Transportation Corp.*, 48 AD3d 306).

With regard to the 90/180 rule, the defendant’s medical expert must relate specifically to the 90/180 claim made by the plaintiff before dismissal is appropriate (*See, Scinto v Hoyte*, 57 AD3d 646; *Faun Thau v Butt*, 34 AD3d 447; *Lowell v Peters*, 3 AD3d 778).

Regarding the “permanent loss of use” of a body organ, member or system the plaintiff must demonstrate a total and complete disability which will continue without recovery, or with intermittent disability for the duration of the plaintiff’s life (*Oberly v Bangs Ambulance, Inc.*, 96 NY2d 295). The finding of “Permanency” is established by submission of a recent examination

(*Melino v Lauster*, 195 AD2d 653 *aff'd* 82 NY2d 828). The mere existence of a herniated disc even a tear in a tendon is not evidence of serious physical injury without other objective evidence (*Sapienza v Ruggiero*, 57 AD3d 643; *Piperis v Wan*, 49 AD3d 840). Merely referring to the plaintiff's "subjective quality of the plaintiff's pain does not fall within the objective definition of serious physical injury" (*Saladino v Meury*, 193 AD2d 727, *see*, *Craft v Brantuk*, 195 AD2d 438).

Regarding "permanent limitation" of a body organ, member or system the plaintiff must demonstrate that he has sustained such permanent limitation (*Mickelson v Padang*, 237 AD2d 495). The word "permanent" is by itself insufficient, and it can be sustained only with proof that the limitation is not "minor mild, or slight" but rather "consequential" (*Gaddy v Eyer*, 79 NY2d 955). Once the question has been raised, in order for the plaintiff to sustain proof of permanency, he must demonstrate the existence of such injury through objective medical tests which demonstrate the duration and extent of the injuries alleged (*Gobas v Dowigiallo*, 287 AD2d 690).

The "significant limitation of use of a body function or system" requires proof of the significance of the limitation, as well as its duration (*Dufel v Green*, 84 NY2d 795; *Fung v Uddin*, 60 AD3d 992; *Hoxha v McEachern*, 42 AD3d 433; *Barrett v Howland*, 202 AD2d 383).

The plaintiff through his submission of affidavits and affirmations of his physicians and chiropractor has established that *prima facie* he has sustained a "serious injury" as defined in Insurance Law 5102, in the accident of August 3, 2007, to defeat the defendant's motion for summary judgment .

Accordingly, the defendant's motion to dismiss the instant action on the basis that the plaintiff has not sustained a "serious injury" as a matter of law is denied.

So Ordered.

Dated: June 14, 2010

Robert J. McDonald, J.S.C.