

Umana v Joseph

2010 NY Slip Op 31974(U)

July 16, 2010

Sup Ct, Nassau County

Docket Number: 21576/08

Judge: Daniel R. Palmieri

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SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

**HON. DANIEL PALMIERI
Acting Justice Supreme Court**

-----x
ALFREDO UMANA,

Plaintiffs,

-against-

KIMBERLY H. JOSEPH and MARY JOSEPH,

Defendants.

-----x

TRIAL TERM PART: 45

INDEX NO.: 21576/08

MOTION DATE: 4-12-10

SUBMIT DATE: 7-13-10

SEQ. NUMBER - 001

The following papers have been read on this motion:

- Notice of Motion, dated 3-11-10.....1**
- Affirmation in Opposition, dated 6-21-10.....2**
- Reply Affirmation, dated 7-12-10.....3**

The defendants' motion for summary judgment pursuant to CPLR §3212 seeking dismissal of plaintiff's complaint on the basis that plaintiff has failed to sustain a "serious injury" within the purview of the Insurance Law §5102(d) is denied.

The underlying action results from an automobile accident which occurred on September 21, 2006, whereby the vehicle that plaintiff was operating was in contact with a vehicle operated by defendant Kimberly Joseph. Plaintiff alleges that as a consequence of said accident he has sustained a "serious injury" within the ambit of Insurance Law §5102(d).

Serious injury” is defined by § 5102(d) of the New York Insurance Law as follows:

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 persons’ usual and customary daily activities for not less than ninety days during one hundred and eighty days immediately following the occurrence of the injury or impairment. (Ins. Law § 5102(d)).

On a motion for summary judgment, the movant must establish his or her cause of action or defense sufficient to warrant a court directing judgment in its favor as a matter of law (*Junco v. Ranzi*, 288 AD2d 440 (2d Dept. 2001) *Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966 (1988); *Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986), *Rebecchi v. Whitmore*, 172 AD2d 600, (2nd Dept. 1991). “The party opposing the motion, on the other hand, must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact” (*Frank Corp. v. Federal Ins. Co.*, *supra* at 967; *GTF Mktg. V. Colonial Aluminum Sales*, 66 NY2d 965 (1985), *Rebecchi v. Whitmore*, *supra* at 601.

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the Court deciding this type of motion is not to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist. *See Barr v. County of Albany*, 50 NY2d 247 (1980); *Daliendo v. Johnson*, 147 AD2d 312, 317 (2nd Dept. 1989).

The submission by defendant establishes entitlement to judgment thus shifting the

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burden to the opponent plaintiff to rebut the movants' case by submitting proof in evidentiary form showing the existence of triable issues of fact. *Zuckerman v. City of New York*, 49 NY2d 557 (1980); *Friends of Animals v. Associated Fur Manufacturers, Inc.*, 46 NY2d 1065 (1979).

In addressing the issue as to the existence of a "serious injury" the court initially looks to the pleadings. In the Bill of Particulars plaintiff alleges having sustained a partial right shoulder tendon tear, disc herniations at C 5/6, disc bulges at L 4/5, straightening of the lordosis and radiculopathy. A claim of left knee injury has been withdrawn.

The instant application interposed by the defendants seeking dismissal of the plaintiff's complaint is supported by the affirmed medical report of Dr. Corso, an orthopedic surgeon, who examined the plaintiff on October 27, 2009, at which time he conducted a physical examination, of the plaintiff, conducted specified tests, reported quantified results and compared such results to normal conditions. In addition to his examination, Dr. Corso also reviewed medical reports and records including reports pertaining to Magnetic Resonance Imaging studies {hereinafter MRI} and medical records of plaintiff. Subsequent to his review and his examination of the plaintiff, the doctor concluded that plaintiff is not in need of any orthopedic treatment, has no orthopedic disability and no permanency or residual.

Dr. Kade, a physiatrist conducted an electro diagnostic study on November 21, 2006 which revealed no evidence of cervical radiculopathy.

Defendant has also submitted affirmed reports from Dr. Sapan Cohn, a radiologist

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who examined MRI studies of plaintiff's lumbar spine and right shoulder and concluded that there was no disc herniation or bulge anywhere and no evidence of acute trauma.

Upon motion by a defendant for summary judgment seeking to dismiss a serious injury complaint, defendant carries the burden of establishing that the plaintiff did not suffer a "serious injury" as enumerated in Article 51 of the Insurance Law §5102(d). *Gaddy v. Eyles*, 79 N.Y.2d 955 (1992). Upon such a showing, it becomes incumbent upon the nonmoving party to come forth with sufficient admissible evidence to raise an issue of fact as to the existence of a "serious injury". *Licari v. Elliott*, 57 N.Y.2d 230 (1982).

Defendants have satisfied their burden of demonstrating that plaintiff has not suffered a "serious injury" *Giraldo v. Mandanici*, 24 AD3d 419 (2d Dept. 2005); *Houston v. Gajdos*, 11 AD3d 514 (2d Dept. 2004); *Matthews v. Cupie Transportations Corp.*, 302 AD2d 566 (2d Dept. 2003).

Thus, the burden shifts to the plaintiff to rebut the movant's case by the submission of admissible proof which is demonstrative of a "serious injury". (*Gaddy, supra.*)

In opposition to the defendant's instant application and in support of plaintiff claims, the plaintiff submits an affirmation from his attorney, his own affidavit and an affirmation of Dr. Dynoff, an orthopedist and pain management physician. Also found attached to plaintiff's Bill of Particulars is an affirmed report of an examination by Dr. Bhatt, an orthopedic surgeon conducted five days after the accident.

The Court has not considered various other reports attached to the plaintiff's bill of particulars, issued by Dr. Roth, a chiropractor who treated plaintiff, reports from the office of Dr. Carothers a radiologist and handwritten notes of what may be office visits, because

they are not in admissible form. The Court has considered the affirmed report of Dr. Bhatt and the reports of Dr. Kade. Although defendant has only submitted the November 21, 2006, cervical test report which shows no evidence of cervical radiculopathy in the interest of completeness, the Court permits reliance on a report issued on the same day which discloses L5-S1, left side radiculopathy.

The unsworn reports and notes may not be considered, however, since the November 21, 2006 report of Dr. Kade, although unaffirmed and not sworn was put forward by defendants, it may be considered under the authority of *Pagano v. Kingsbury*, 182 AD2d 268 (2d Dept. 1992). However, plaintiff's Dr. Dynoff may not rely on unsworn or unsubmitted reports of plaintiff's other treating medical providers. *Cassa v. Montero*, 48 AD3d 728 (2d Dept. 2008); *Codrington v. Ahmad*, 40 AD3d 799 (2d Dept. 2007).

The Court has not considered the police accident report because it is unsworn, unauthenticated hearsay and inadmissible unless a hearsay exception applies. *Liquori v. City of New York*, 250 AD2d 738 (2d Dept. 1998).

Since defendants have satisfied their burden of demonstrating that plaintiff has not suffered a "serious injury" *Giraldo v. Mandanici*, 24 AD3d 419 (2d Dept. 2005); *Houston v. Gajdos*, 11 AD3d 514 (2d Dept. 2004); *Matthews v. Cupie Transportations Corp.*, 302 AD2d 566 (2d Dept. 2003), the burden shifts to the plaintiff to rebut the movant's case by the submission of admissible proof which is demonstrative of a "serious injury".

Dr. Bhatt performed objective tests and found quantified range of motion deficiencies in the cervical and lumbar spines and right shoulder, all of which he attributes to the accident. Plaintiff treated with Dr. Dynoff an orthopedic doctor who concluded that any

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further treatment would only be palliative and that the injuries were permanent. *Pommels v. Perez*, 4 NY3d 566 (2005).

Dr. Dynoff, like Dr. Bhatt, conducted medical examinations that were contemporaneous with the accident and Dr. Dynoff also conducted a recent examination. Dr. Dynoff also administered three sets of trigger point injections. In his 2010 examinations, Dr. Dynoff conducted specified tests and quantified the results and found range of motion limitations in plaintiff's right shoulder, cervical spine and lumbar spine. Although Dr. Dynoff does not reveal his range of motion findings in 2006 that information is supplied via the report of Dr. Bhatt.

As noted above, the Court has disregarded references by Dr. Dynoff to unsworn/unaffirmed MRI reports, however, since he claims to have reviewed the MRI films, his opinion may be predicated upon his personal MRI film review. For the reasons noted above, Dr. Dynoff may also base his opinion on Dr. Kade's reports.

When assessing the medical evidence offered by a plaintiff on threshold motions, the court must insure, *inter alia*, that the evidence is objective in nature and that a plaintiff's subjective claims as to pain or limitation of motion are sustained by objective medical findings. *Grossman v. Wright*, 268 A.D.2d 79 (2d Dept. 2000). Further, these objective medical findings must be based upon a recent examination of the plaintiff wherein the expert must provide an opinion as to the significance of the injury. *Grossman, supra*; *Constantinou v. Surinder*, 8 AD3d 323 (2d Dept. 2004).

With respect to the category where a plaintiff has allegedly sustained a medically

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determined injury or impairment for the first ninety out of the one hundred and eighty days following the accident, a plaintiff is required to submit medical proof which demonstrates the existence of an injury/impairment and that such injury or impairment has prevented the plaintiff from performing substantially all of his daily customary activities. *Licari v. Elliott*, 57 N.Y.2d 230 (1982). The medical evidence and activities of plaintiff following the accident do not support a claim under this category. *Boyle v. Gundogan*, 19 AD3d 351 (2d Dept. 2005). However, the foregoing does not preclude the plaintiff from attempting to prove a claim under this category at trial since this decision establishes only that there are factual issues to be determined.

As to the statutory categories of permanent consequential limitation of use of a body organ or member and a significant limitation of use of a body function or system, the Court of Appeals has held that whether a particular limitation is consequential or significant is a question of medical significance and involves a determination as to the degree or nature of the injury based upon the normal function, purpose and use of the particular body part. *Toure v. Avis Rent a Car Systems Inc.*, 98 NY2d 345 (2002). Here medical evidence which ascribes a numeric percentage loss to the plaintiff's loss of range of motion regarding the shoulder and both the cervical and lumbar spines together with the objectively based opinions as to permanency and causality are sufficient to support a claim of "serious injury" and thus raise a triable issues of fact which preclude summary judgment. (*Toure, supra.*) Plaintiff's evidence demonstrates quantified limitations of right shoulder, cervical and lumbar motion. *Garner v. Tong*, 27 AD3d 401 (1st Dept. 2006); *Nelms v. Khokhar*, 12 AD3d 426 (2d Dept.

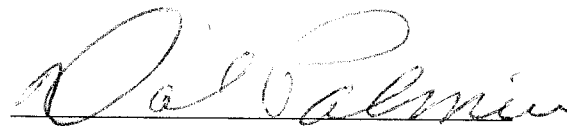
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2004); *Mazo v. Wolfosky*, 9 AD3d 452 (2d Dept. 2004).

Based upon the foregoing, the defendant's motion for summary judgment seeking dismissal of plaintiff's complaint is denied.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: July 16, 2010



HON. DANIEL PALMIERI
Acting Supreme Court Justice

TO: Silvia M. Surdez, P.C.
Attorneys for Plaintiff
23-24 Steinway Street, Ste 101
Astoria, NY 11105

Richard T. Lau & Associates
By: Linda Meisler, Esq.
Attorneys for Defendants
P.O. Box 9040
Jericho, NY 11753

ENTERED

JUL 20 2010

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**