

Ryan v Hiatrides

2010 NY Slip Op 33295(U)

November 23, 2010

Sup Ct, Suffolk County

Docket Number: 07-40160

Judge: Denise F. Molia

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Defendant now moves for summary judgment on the basis that plaintiff's injuries do not meet the "serious injury" threshold requirement of Insurance Law § 5102(d). In support of the motion, defendant submits a copy of the pleadings, a copy of plaintiff's deposition transcript, copies of plaintiff's hospital records from the emergency room at North Shore University Hospital, the sworn medical reports of Dr. Jay Nathan and Dr. Alan Greenfield. On October 21, 2009, at defendant's request, Dr. Nathan conducted an independent orthopedic examination of plaintiff. On May 3, 2010, at defendant's request, Dr. Greenfield performed an independent radiological review of the magnetic resonance images ("MRI") films of plaintiff's cervical and lumbar spines. Plaintiff opposes the instant motion on the ground that defendant failed to establish his prima facie burden that he did not sustain an injury within the meaning of Insurance Law § 5102(d). In the alternative, plaintiff asserts that the evidence submitted in opposition demonstrates that he sustained an injury within the "limitations of use" category and the "90/180 days" category. In opposition to the motion, plaintiff submits his own affidavit, the affirmation of Dr. Ben Dorenkamp, and the medical report of Dr. Robert Kloepper.

It has long been established that the "legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries (*Dufel v Green*, 84 NY2d 795, 798, 622 NYS2d 900 [1995]; see also *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 746 NYS2d 865 [2002]). Therefore, the determination of whether or not a plaintiff has sustained a "serious injury" is to be made by the court in the first instance (see *Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]; *Porcano v Lehman*, 255 AD2d 430, 680 NYS2d 590 [1988]; *Nolan v Ford*, 100 AD2d 579, 473 NYS2d 516 [1984], *aff'd* 64 NYS2d 681, 485 NYS2d 526 [1984]).

Insurance Law § 5102 (d) defines a "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."

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a "serious injury" (see *Toure v Avis Rent A Car Sys.*, *supra*; *Gaddy v Eyer*, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, such as, affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (*Pagano v Kingsbury*, 182 AD2d 268, 270, 587 NYS2d 692 [1992]). A defendant may also establish entitlement to summary judgment using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (see *Fragale v Geiger*, 288 AD2d 431, 733 NYS2d 901 [2001]; *Grossman v Wright*, 268 AD2d 79, 707 NYS2d 233 [2000]; *Vignola v Varrichio*, 243 AD2d 464, 662 NYS2d 831 [1997]; *Torres v Micheletti*, 208 AD2d 519, 616 NYS2d 1006 [1994]). Once defendant has met this burden, plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the

threshold of the statutory standard for “serious injury” under New York’s No-Fault Insurance Law (*see Dufel v Green, supra; Tornabene v Pawlewski*, 305 AD2d 1025, 758 NYS2d 593 [2003]; *Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692 [1992]). However, if a defendant does not establish a prima facie case that the plaintiff’s injuries do not meet the serious injury threshold, the court need not consider the sufficiency of the plaintiff’s opposition papers (*see Burns v Stranger*, 31 AD3d 360, 819 NYS2d 60 [2006]; *Rich-Wing v Baboolal*, 18 AD3d 726, 795 NYS2d 706 [2005]; *see generally, Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]).

Here, defendant has established his entitlement to judgment as a matter of law that plaintiff did not sustain a “serious injury” within the meaning of Insurance Law § 5102(d) (*see Gaddy v Eyler, supra; Vilomar v Castillo*, 73 AD3d 758, 901 NYS2d 651 [2010]; *Seebaran v Mendonca*, 51 AD3d 658, 858 NYS2d 248 [2008]; *Albano v Onolfo*, 36 AD3d 728, 830 NYS2d 205 [2007]). The Court notes that sprains and strains are not serious injuries within the meaning of Insurance Law § 5102(d) (*see Rabolt v Park*, 50 AD3d 995, 858 NYS2d 995 [2008]; *Washington v Cross*, 48 AD3d 457, 849 NYS2d 784 [2008]; *Maenza v Letkajornsook*, 172 AD2d 500, 567 NYS2d 850 [1991]). Defendants’ orthopedist, Dr. Nathan, tested the ranges of motion in plaintiff’s cervical and lumbar spines using a goniometer and set forth his specific measurements, as well as compared plaintiff’s ranges of motion to the normal ranges (*see Cantave v Gelle*, 60 AD3d 988, 877 NYS2d 129 [2009]; *Staff v Yshua*, 59 AD3d 614, 874 NYS2d 180 [2009]). Dr. Nathan states, in his report, that an examination of plaintiff’s cervical spine reveals that he has full range of motion in this area, and that there was no muscle spasm or tenderness on palpation of the paracervical muscles bilaterally. The report states that plaintiff exhibits flexion, extension, right and left lateral flexion of 45 degrees, respectively, and that 45 degrees is normal. Dr. Nathan’s report also states that plaintiff has full range of motion in his thoracolumbar spine, that there is no tenderness or paravertebral spasm upon palpation of this areas’s muscles, and that his straight leg test was negative. As to the lumbar region, the report states that plaintiff exhibited flexion of 90 degrees, that 90 degrees is normal, and extension, right and left flexion, and right and left rotation of 30 degrees, respectively, and that 30 degrees is normal. It states that an examination of plaintiff’s upper and lower extremities reveals that there is no tenderness, heat, swelling, erythema or effusion present in these areas, and that plaintiff has full ranges of motion in these regions. Dr. Nathan’s report concludes that plaintiff sustained thoracolumbar and cervical spine sprains as a result of the subject accident, that his prognosis is satisfactory, and that he is capable of performing his usual daily living activities without restrictions.

In addition, Dr. Greenfield in his medical reports state that plaintiff suffers from multilevel degenerative spondylosis changes in his cervical and lumbar regions. Dr. Greenfield’s unequivocal reports state that the multilevel degenerative changes are noted at levels C4 through C7, and in the lower thoracic and upper lumbar spine, where plaintiff alleges his injuries were sustained (*see Depena v Sylla*, 63 AD3d 504, 880 NYS2d 641 [2009], *lv denied* 13 NY3d 706, 887 NYS2d 4 [2009]; *Jean v Kabaya*, 63 AD3d 509, 881 NYS2d 891 [2009]; *Houston v Gajdos*, 11 AD3d 514, 728 NYS2d 839 [2004]). Dr. Greenfield’s reports further states that there is no evidence of fracture or any finding that may be attributed to the subject accident.

Therefore, the burden shifted to plaintiff to come forward with competent admissible medical evidence based on objective findings, sufficient to raise a triable issue of fact that he sustained a “serious injury” (*see Gaddy v Eyler, supra; Luckey v Bauch*, 17 AD3d 411, 792 NYS2d 624 [2005]; *McLoyrd v*

Pennypacker, 178 AD2d 277, 577 NYS2d 272 [1991]). A plaintiff must demonstrate a total loss of use of a body organ, member, function or system to recover under the “permanent loss of use” category, (see *Oberly v Bangs Ambulance Inc.*, 96 NY2d 295, 727 NYS2d 378 [2001]). “Whether a limitation of use or function is ‘significant’ or ‘consequential’ * * * relates to medical significance and 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*, *supra* at 798; see *Toure v Avis Rent A Car Sys.*, *supra*). Therefore, in order for a plaintiff to prove the extent or degree of physical limitation under the “permanent consequential limitation of use of a body organ or member” or the “significant limitation of use of a body function or system” category, a plaintiff must present either objective medical evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration (see *Magid v Lincoln Servs. Corp.*, 60 AD3d 1008, 877 NYS2d 127 [2009]; *Laruffa v Yui Ming Lau*, 32 AD3d 996, 821 NYS2d 642 [2006]; *Cerisier v Thibiu*, 29 AD3d 507, 815 NYS2d 140 [2006]; *Meyers v Bobower Yeshiva Bnei Zion*, 20 AD3d 456, 797 NYS2d 773 [2005]). 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 may also suffice (see *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865 [2000]; *Dufel v Green*, *supra*). 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]).

Further, a plaintiff must also present medical proof contemporaneous with the accident showing the initial restrictions in movement or an explanation for its omission (see *Bell v Rameau*, 29 AD3d 839, 814 NYS2d 534 [2006]; *Suk Ching Yeung v Rojas*, 18 AD3d 863, 796 NYS2d 661 [2005]; *Ifrach v Neiman*, 306 AD2d 380, 760 NYS2d 866 [2003]), as well as objective medical findings of restricted movement based on a recent examination (see *Laruffa v Yui Ming Lau*, *supra*; *Murray v Hartford*, 23 AD3d 629, 804 NYS2d 416 [2005], *lv denied* 6 NY3d 713, 816 NYS2d 748 [2006]; *Batista v Olivo*, 17 AD3d 494, 795 NYS2d 54 [2005]; *Kauderer v Penta*, 261 AD2d 365, 689 NYS2d 190 [1999]). For a bulging disc or radiculopathy to constitute a serious injury, there must also be objective evidence of the extent or degree of the alleged limitation resulting from the injury and its duration (see *Mejia v DeRose*, 35 AD3d 407, 825 NYS2d 722 [2006]; *Foley v Karvelis*, 276 AD2d 666, 714 NYS2d 337 [2000]). Moreover, a plaintiff alleging injury within the “limitation of use” categories who ceases treatment after the accident must provide a reasonable explanation for having done so (*Pommells v Perez*, 4 NY3d 566, 574, 797 NYS2d 380 [2005]; see *Ferebee v Sheika*, 58 AD3d 675, 873 NYS2d 93 [2009]; *Besso v DeMaggio*, 56 AD3d 596, 868 NYS2d 681 [2008]).

Plaintiff, in opposition, has failed to raise a triable issue of fact that he sustained a serious injury as a result of the subject accident (see *DeJesus v Cruz*, 73 AD3d 539, 902 NYS2d 503 [2010]; *Chong Sim Kim v Amaya*, 51 AD3d 487, 857 NYS2d 140 [2008]; *Ali v Khan*, 50 AD3d 454, 857 NYS2d 71 [2008]). Although plaintiff submits the medical report of his treating medical doctor, Dr. Kloepper, and the affidavit of Dr. Dorenkamp, a chiropractor who performed an independent examination of him at his insurance company’s request, plaintiff has failed to submit any contemporaneous admissible objective medical evidence that demonstrates that he sustained any significant limitations of use of his cervical spine or lumbar spine as a result of the subject accident (see *Nieves v Michael*, 73 AD3d 716, 901 NYS2d 100 [2010]; *O’Bradovich v Mrijaj*, 35 AD3d 274, 827 NYS2d 38 [2007]; *Petinrin v Levering*, 17 AD3d 173, 794 NYS2d 12 [2005]). Where the only evidence that plaintiff sustained a limitation of

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motion is contained in the reports of a chiropractor and a medical doctor who both examined plaintiff years after the accident, the finding is “too remote to raise an issue of fact as to whether the limitations were caused by the accident” (*Lopez v Simpson*, 39 AD3d 420, 421, 835 NYS2d 98 [2007]; *see Atkinson v Oliver*, 36 AD3d 552, 830 NYS2d 30 [2007]; *Vaughan v Baez*, 305 AD2d 101, 758 NYS2d 648 [2003]). Significantly, no proof has been offered by plaintiff to establish that his alleged ailments go beyond temporary discomfort or are not relieved by an aspirin. In fact, plaintiff testified at his deposition that he takes Ibuprofen for the pain. Thus, the subjective complaints of pain and impaired joint function expressed by plaintiff during his deposition, in Dr. Dorenkamp’s affidavit, and Dr. Kloepper’s report are insufficient to raise a triable issue of fact (*see Sheer v Koubek*, 70 NY2d 678, 518 NYS2d 788 [1987]; *Sham v B&P Chimney Cleaning & Repair Co., Inc.*, 71 AD3d 978, 900 NYS2d 72 [2010]; *Villeda v Cassas*, 56 AD3d 762, 871 NYS2d 167 [2008]; *Rudas v Petschauer*, 10 AD3d 357, 781 NYS2d 120 [2004]; *Barrett v Howland*, 202 AD2d 383, 608 NYS2d 681 [1994]). Additionally, plaintiff’s experts failed to address the findings of defendant’s radiologist that the conditions in his cervical and lumbar regions are due to preexisting, degenerative changes that are not related to any traumatic injury attributable to the accident (*see Mensah v Badu*, 68 AD3d 945, 892 NYS2d 428 [2009]; *Colon v Tavares*, 60 AD3d 419, 873 NYS2d 637 [2009]). Where a defendant in an action seeking damages for a “serious injury” presents evidence that a plaintiff’s alleged pain and injuries are related to a pre-existing condition, the plaintiff must come forward with medical evidence addressing the defense of lack of causation (*Pommells v Perez*, 4 NY3d 566, 580, 797 NYS2d 380 [2005]; *see Ciordia v Luchian*, 54 AD3d 708, 864 NYS2d 74 [2008]; *Luciano v Luchsinger*, 46 AD3d 634, 847 NYS2d 622 [2007]; *Giraldo v Mandanici*, 24 AD3d 419, 805 NYS2d 124 [2005]). Furthermore, neither Dr. Dorenkamp nor Dr. Kloepper affidavits are in admissible form inasmuch as they were signed in and notarized in the States of Colorado and Utah, respectively, and were not accompanied by the required certificate of conformity (*see CPLR 2309 [c]*; *see generally Grasso v Angerami*, 79 NY2d 813, 580 NYS2d 178 [1991]).

Finally, the fact that plaintiff is unable to perform a few enumerated tasks for a lengthy period without pain does not constitute a curtailment from performing substantially all of his usual activities to a great extent (*see Licari v Elliott, supra*; *Crane v Richard*, 180 AD2d 706, 579 NYS2d 736 [1992]). As a result, plaintiff failed to raise a triable issue as to whether he was substantially curtailed from all of his usual and customary activities for 90 of the first 180 days following the accident (*see Rennell v Horan*, 225 AD2d 939, 639 NYS2d 171 [1996]; *Balshan v Bouck*, 206 AD2d 747, 614 NYS2d 487 [1994]; *Kimball v Baker*, 174 AD2d 925, 571 NYS2d [1991]). Accordingly, defendant’s motion for summary judgment is granted.

Dated: 11/23/2010

Hon. Denise F. Molia

J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION