

Monroe v Morgan

2011 NY Slip Op 31143(U)

April 26, 2011

Supreme Court, Suffolk County

Docket Number: 32984/08

Judge: Arthur G. Pitts

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injury means 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 and eighty days immediately following the occurrence of the injury or impairment." (Insurance Law 5102 (d)) In the context of the plaintiff's claims, the term "consequential" means important or significant (*Kordana v. Pomellito*, 121 A.D.2d 783, 503 N.Y.S.2d 198 , 200 [3rd Dept. 1986] , App. Dis. 68 N.Y.2d 848, 508 N.Y.S.2d 425) The term, "significant" as it appears in the statute has been defined as "something more than a minor limitation of use" and the term "substantially all" has been construed to mean "that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment" (*Licari v. Elliott*, 57 N.Y.2d 230, 455 N.Y.S.2d 570 [1982])

On a motion for summary judgment to dismiss the complaint for failure to set forth a prima facie case of serious injury as defined by Insurance Law 5102 (d), the initial burden is on the defendant "to present evidence, in competent form, showing that the plaintiff has no cause of action" (*Rodriguez v. Goldstein*, 182 A.D.2d 396, 582 N.Y.S.2d 395, 396 [1st Dept. 1992]) . Once the defendant has met the burden, the plaintiff must then, by competent proof, establish a prima facie case that such serious injury exists. (*DeAngelo v. Fidel Corp. Services, Inc.*, 171 A.D.2d 588, 567 N.Y.S.2d 454, 455 [1st Dept. 1991]) . Such proof in order to be in a competent or admissible form, shall consist of affidavits or affirmations. (*Pagano v. Kingsbury*, 182 A.D.2d 268, 587 N.Y.S.2d 692 [2nd Dept. 1992]) The proof must be viewed in a light most favorable to the non-moving party. (*Cammarere v. Villanova*, 166 A.D.2d 760, 562 N.Y.S.2d 808, 810 [3rd Dept. 1990])

Summary Judgment as to Plaintiff Katherine Monroe

Plaintiff Katherine Monroe has alleged in her verified bill of particulars that she sustained the following injuries: Herniated discs at C2-3 and C3-4 with ventral CSF impression; herniated discs C4-5, C5-6 and C6-7 with ventral cord impression and central canal stenosis; disc bulge C6-7; cervical spine sprain; herniated disc T1-2 with anterior spinal canal narrowing; disc bulges T4-5, T5-6; herniated disc at L1-2 and L3-4 with indentation of the ventral thecal sac; lumbosacral spine sprain; bilateral carpal tunnel syndrome and; bilateral ulnar neuropathy.

In support of the instant motion, the defendants have submitted the affirmed report of Isaac Cohen, M.D., an orthopedic surgeon, who examined the plaintiff on July 8, 2010 as well as reviewed all relevant medical records. Dr. Cohen after conducting the examination including various range of motion testing concluded that "at the time of this evaluation, there is no evidence of disability, sequelae or permanency related to the accident of record. She is not receiving any form of active management and none is indicated. She is capable of performing her normal activities without restrictions." His

diagnosis was “cervical and lumbosacral strain, superimposed over preexistent degenerative condition, resolved.” Based upon the foregoing, the defendants has demonstrated, as a matter of law, that the plaintiff Katherine Monroe has not sustained a serious injury. (*Reeves v. Scopaz*, 227 A.D.2d 606, 643 N.Y.S.2d 620 [2nd Dept. 1996] ; *Horan v. Mirando*, 221 A.D.2d 506, 633 N.Y.S.2d 402 [2nd Dept. 1995])

“In order to successfully oppose the motion for summary judgment, plaintiff must set forth ‘competent medical evidence based upon objective medical findings and diagnostic tests to support his claim because subjective complaints of pain absent other proof are insufficient to establish a serious injury’. (*Eisen v. Walter & Samuels*, 215 A.D.2d 149, 150, 626 N.Y.S.2d 109)” (*Tankersley v. Szesnat*. 235 A.D.2d 1010, 1012, 653 N.Y.S.2d 184 [3rd Dept 1997])

In opposition thereto, the plaintiff has proffered the affirmed report of Thomas J. Dowling, M.D. an orthopedic surgeon dated October 20, 2010. Dr. Dowling was the plaintiff’s treating physician, having an initial consultation with her on December 11, 2008. She met with Dr. Dowling on eight occasions, the last on September 10, 2010. His final impression was a “discogenic back pain with underlying herniated discs leading to left-sided sciatica.....based on the history given by the patient, it is my medical opinion that there is a definite causal relationship between the motor vehicle accident of September 2, 2007 and the onset of the patient’s back symptomatology related to a discogenic source.” The plaintiff has further submitted five (5) MRI reports, the first of which relates to an MRI taken of the plaintiff on December 8, 2007 and the last regarding an MRI taken of the plaintiff on July 22, 2010. The affirmed report of Robert Wagner, M.D., a radiologist, dated July 23, 2010, compares the results of the most recent MRI to that of an MRI taken on December 12, 2008. Upon such comparison and review Dr. Wagner diagnosed the plaintiff with the following: mild levoscoliosis of the lumbar spine; diminished disc space height L3/4 through L5/S1 and schmorl’s nodes within the endplates at L5/S1 without interval change; broad-based posterior left paracentral disc herniation L1/2 slightly more prominent than on the prior study; small broad-based posterior right paracentral disc herniation L3/4 without interval change; small broad-based posterior disc herniation L4/5 which is new; small posterior annular disc bulge L5/S1 without interval change.

It has been held that the existence of a herniated or bulging disc, in and of itself, does not in and of itself constitute a serious injury (*see, Guzman v. Michael Mgt.*, 266 A.D.2d 506, 698 N.Y.S.2d 719). To raise a triable issue of fact as to whether a herniated or bulging disc constitutes a serious injury, a plaintiff is required “to provide objective evidence of the extent or degree of the alleged physical limitations resulting from the injury and their duration” (*Noble v. Ackerman*, 252 A.D.2d 392, 394, 675 N.Y.S.2d 86; *see also, Guzman v. Michael Mgt., supra*) (*Pierre v. Nanton*, 279 A.D.2d 621, 719 N.Y.S. 2d 706, 707 [2nd Dept. 2001]). “In order to successfully oppose the motion for summary judgment, plaintiff must set forth competent medical evidence based upon objective medical findings and diagnostic tests to support his claim.... (*Tankersley v. Szesnat*. 235 A.D.2d 1010, 1012, 653 N.Y.S.2d 184) Herein plaintiff Katherine Monroe has met such burden for purposes of the instant motion and accordingly, the defendant’s motion for summary judgment as to her is denied.

Summary Judgment as to Plaintiff Keith Monroe

Plaintiff Keith Monroe has alleged in his verified bill of particulars that he sustained the following injuries: Disc bulges L4-5, L5-S1; lumbosacral spine sprain; lumbosacral radiculitis; aggravation and/or exacerbation of degenerative disc disease of the lumbar spine; cervical spine sprain; left knee sprain; left knee contusion.

In support of the instant motion, the defendant has submitted the affirmed report of Isaac Cohen, M.D., an orthopedist who examined the plaintiff on July 8, 2010 as well as reviewed all relevant medical records. Dr. Cohen, after conducting an examination, which included various range of motion testing, and reviewing the plaintiff's medical records diagnosed him with a "status post motor vehicle accident, left knee contusion, resolved and cervical and lumbosacral strain, resolved." He concluded that "it is my opinion that the claimant sustained mild soft tissue injuries to the neck, back, and left knee, as a consequence of the accident of record, 9/2/07, based on the information provided. These conditions resolved uneventfully without any evidence of active disability, sequelae or permanency documented. At the time of this evaluation, Mr. Monroe is able to perform his normal activities in unrestricted fashion. No further treatment is indicated or necessary." Based upon the foregoing, the defendants have demonstrated, as a matter of law, that the plaintiff has not sustained a serious injury. (*Reeves v. Scopaz*, supra ; *Horan v. Mirando*, supra)

"In order to successfully oppose the motion for summary judgment, plaintiff must set forth 'competent medical evidence based upon objective medical findings and diagnostic tests to support his claim because subjective complaints of pain absent other proof are insufficient to establish a serious injury'. (*Eisen v. Walter & Samuels*, supra)" (*Tankersley v. Szesnat*, supra at 1012)

In opposition to the instant motion, the plaintiff has proffered the certified medical records of South Shore Orthopedics and his then treating physician, James L. Marzec, M.D. The report dated September 5, 2007 diagnosed the plaintiff with "cervical spine and lumbosacral spine strain and spasm with bilateral lower extremity radiculitis. Also, left knee contusion/strain and possible meniscal tear." It appears that some unspecified range of motion testing was performed at the plaintiff's initial examination. An MRI was performed on the plaintiff on February 9, 2008. An un-affirmed report of A. Parghi, M.D., a radiologist, dated February 11, 2008 was also proffered by the plaintiff but will not be considered herein. (*Hagan v. Thompson*, 234 A.D.2d 420, 651 N.Y.S.2d 122 [2nd Dept 1996])

It has been held that the existence of a herniated or bulging disc, in and of itself, does not constitute a serious injury (see, *Guzman v. Michael Mgt.*, supra). To raise a triable issue of fact as to whether a herniated or bulging disc constitutes a serious injury, a plaintiff is required "to provide objective evidence of the extent or degree of the alleged physical limitations resulting from the injury and their duration" (*Noble v. Ackerman*, supra; see also, *Guzman v. Michael Mgt.*, supra) (*Pierre v. Nanton*, supra) "In order to successfully oppose the motion for summary judgment, plaintiff must set forth competent medical evidence based upon objective medical findings and diagnostic tests to support his claim..... (*Tankersley v. Szesnat*. Supra) The plaintiff also has the burden to establish

a causal connection of his injuries and the subject accident. (*Howell v. Reupke*, 16 A.D.3d 377, 790 N.Y.S.2d 703 [2nd Dept 2005]) Herein plaintiff Keith Monroe has failed to meet such burdens for purposes of the instant motion and accordingly, the defendants' motion for summary judgment as to him is granted as to the first cause of action of the within complaint. His fourth cause of action regarding his derivative claim is undisturbed by this decision.

This shall constitute the decision and order of the Court.

Submit judgment

So ordered.

Dated: Riverhead, New York
April 26, 2011



J.S.C.

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