

Passaro v Marano

2011 NY Slip Op 33128(U)

November 22, 2011

Supreme Court, Nassau County

Docket Number: 9661-10

Judge: Steven M. Jaeger

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SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK

Present:
HON. STEVEN M. JAEGER,
Acting Supreme Court Justice

DAWN PASSARO,

Plaintiff,

-against-

MARIE A. MARANO,

Defendant.

TRIAL/IAS, PART 43
NASSAU COUNTY
INDEX NO.: 9661-10

MOTION SUBMISSION
DATE: 10-18-11

MOTION SEQUENCE
NO. 1

The following papers read on this motion:

- | | |
|---|---|
| Notice of Motion, Affirmation, and Exhibits | X |
| Affirmation in Opposition and Exhibit | X |

Defendant moves pursuant to CPLR §3212 seeking an order granting summary judgment in favor of Defendant and dismissing Plaintiff's complaint, alleging that Plaintiff's injuries do not satisfy the "serious injury" threshold requirement of Insurance Law §5102(d).

This action arises out of a motor vehicle accident that occurred on September 12, 2009 in the parking lot of a "Stop & Shop" at 2525 Hempstead Turnpike, Town of Hempstead, County of Nassau. As a result of the accident, Plaintiff allegedly sustained serious personal injuries, including but not limited to, central disc herniations at C4-C5 and C5-C6; central disc protrusion at L5-S1 causing impingement on the descending left S1 nerve root; right L5 radiculopathy; left S1 radiculopathy; and right C5-C6 radiculopathy.

In a motion for summary judgment the moving party bears the burden of making a prima facie showing that he or she is entitled to summary judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of a material issue of fact. *Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2D 395 (1957); *Friends of Animals, Inc. v. Associates Fur Mfrs.*, 46 NY2d 1065 (1979); *Zuckerman v. City of New York*, 49 NY2d 5557 (1980); *Alvarez V. Prospect Hospital*, 68 NY2d 320 (1986).

The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *Winegard v. New York University Medical Center*, 64 NY2d 851 (1985). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. *Zuckerman v. City of New York, supra*. The primary purpose of a summary judgment motion is issue finding not issue determination, *Garcia v. J.C. Duggan, Inc.*, 180 AD2d 579 (1st Dept. 1992), and it should only be granted when there are no triable issues of fact. *Andre v. Pomeroy*, 35 NY2d 361 (1974).

Within the context of a summary judgment motion that seeks dismissal of a personal injury action resulting from a motor vehicle accident for the alleged failure of the plaintiff to sustain a "serious injury" within the meaning of Insurance Law §5102(d), the defendant bears the burden of establishing a prima facie case that the plaintiff's injuries do not meet the threshold requirements of the statute. *Gaddy v. Eyster*, 79 NY2d 955 (1992). Upon such a showing, it becomes incumbent on the plaintiff to come forward with sufficient evidence, in admissible form, to demonstrate the existence of a

question of fact on the issue. *Id.* The court must then decide whether the plaintiff has established a prima facie case of sustaining a “serious injury”. *Licari v. Elliot*, 57 NY2d 230 (1983).

Insurance Law §5102(d) defines “serious injury” as a personal injury which results in: (1) death; (2) dismemberment; (3) significant disfigurement; (4) a fracture; (5) loss of fetus; (6) permanent loss of a body organ, member, function or system; (7) permanent consequential limitation of use of a body organ or member; (8) significant limitation of use of a body function or system; or (9) 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 (90) days during the one-hundred-eight (180) days immediately following the occurrence of the injury or impairment.

The defendant is not required to disprove any category of “serious injury” that has not been pled by the plaintiff. *Melino v. Lauster*, 82 NY2d 828 (1993). Whether the plaintiff can demonstrate the existence of a compensable “serious injury” depends upon the quality, quantity, and credibility of admissible evidence. *Manrique v. Warshaw Woolen Associates, Inc.*, 297 AD2d 519 (1st Dept. 2002).

Essentially, in order to satisfy the statutory “serious injury” threshold, objective proof of the plaintiff’s injury is required. In *Toure v. Avis Rent-A-Car Systems*, 98 NY2d 345 (2002), the Court of Appeals held that a plaintiff’s proof of injury must be supported by objective medical evidence, in admissible form, such as sworn MRI and CT scan tests. However, these sworn tests must be paired with the doctor’s observations during

the physical examination of the plaintiff. Unsworn MRI reports can also constitute competent evidence if both the plaintiff and the defendant rely on those reports.

Gonzalez v. Vasquez, 301 AD2d 438 (1st Dept. 2003).

Conversely, even where there is ample proof of a plaintiff's injury, certain factors may nonetheless override a plaintiff's objective medical proof of limitations and permit dismissal of a plaintiff's complaint. Specifically, additional contributing factors such as a gap in treatment, an intervening medical problem, or a pre-existing condition would interrupt the chain of causation between the accident and the claimed injury. *Pommels v. Perez*, 4 NY3d 566 (2005).

While a herniated or bulging disc, or the presence of radiculopathy may constitute a "serious injury" within the ambit of Insurance Law §5102(d), a plaintiff is required to provide, inter alia, objective medical evidence contemporaneous with the subject accident, which demonstrates the extent and degree of the alleged physical limitation resulting from the disc injury and its duration. *Ifrach v. Neiman*, 306 AD2d 380 (2nd Dept. 2003); *Jason v. Danar*, 1 AD3d 398 (2nd Dept. 2003); *Felix v. New York City Tr. Auth.*, 32 AD3d 529 (2nd Dept. 2006); *Garcia v. Sobles*, 41 AD3d 426 (2nd Dept. 2007); *Bestman v. Seymour*, 41 AD3d 629 (2nd Dept. 2007).

When examining medical evidence offered by a plaintiff on a threshold motion, the court must ensure that the evidence is objective in nature and that a plaintiff's subjective claims as to pain or limitation of motion are sustained by verified objective medical findings. *Grossman v. Wright*, 268 AD2d 79 (2nd Dept. 2000). Further, in addition to providing medical proof contemporaneous with the subject accident, the

plaintiff must also provide competent medical evidence containing verified objective findings based upon a recent examination wherein the expert must provide an opinion as to the significance of the injury. *Kauderer v. Penta*, 261 AD2d 365 (2nd Dept. 1999); *Constantinou v. Surinder*, 8 AD3d 323 (2nd Dept. 2004); *Brown v. Tairi Hacking Corp.*, 23 AD3d 325 (2nd Dept. 2005).

To meet the threshold regarding significant limitation of use of a body function or system or permanent consequential limitation of a body function or system, the law requires that the limitation be more than minor, mild, or slight and that the claim be supported by medical proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition. *Gaddy v. Eyler, supra*; *Licari v. Elliot, supra*. A minor, mild, or slight limitation will be deemed insignificant within the meaning of the statute. *Licari v. Elliot, supra*. A claim raised under the “permanent consequential limitation of use or a body organ or member” or “significant limitation of use of a body function or system” categories can be made by an expert’s designation of a numeric percentage of a plaintiff’s loss of motion in order to prove the extent or degree of the physical limitation. *Toure v. Avis, supra*. In addition, an expert’s qualitative assessment of a plaintiff’s condition is also probative, provided: (1) the evaluation has an objective basis; and (2) the evaluation compares the plaintiff’s limitation to the normal function, purpose, and use of the affected body organ, member, function, or system. *Id.*

In applying the foregoing standards and principles to the instant matter the Court finds that Defendant has failed to meet her initial burden in establishing a prima facie

case that Plaintiff's injuries do not satisfy the threshold requirements of Insurance Law §5102(d). As such, summary judgment in favor of Defendant is not warranted.

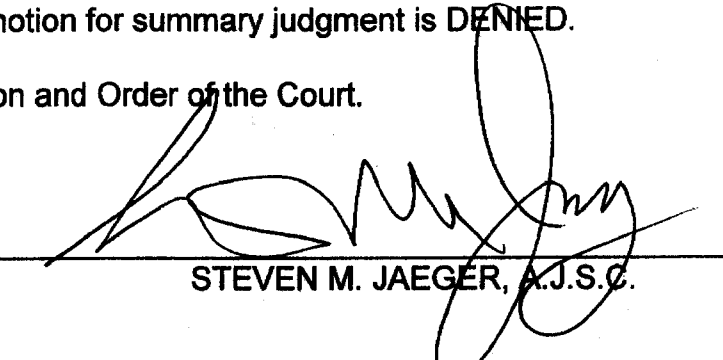
In support of her motion, Defendant submits the report of Mathew M. Chacko, M.D., a neurologist who examined Plaintiff at the request of Defendant. After reviewing Plaintiff's medical records Dr. Chacko examined Plaintiff on March 9, 2011. As part of the examination Dr. Chacko used a goniometer to test Plaintiff's range of motion. Cervical spine testing found flexion to be 40 degrees, with 50 being normal; extension to be 40 degrees, with 60 being normal; lateral rotation to be 60 degrees, with 80 being normal; and lateral flexions to be 30 degrees, with 45 being normal. Lumbar spine testing found flexion to be 40 degrees, with 60 being normal; lateral flexions to be 10 degrees, with 25 being normal; and extension to be 10 degrees, with 25 being normal.

These findings represent a loss of range of motion varying from a low of 20% to a high of 60%. This is enough to raise a triable issue of fact as to whether Plaintiff sustained a "serious injury". See, *Nelms v. Khokhar*, 12 AD3d 426 (2nd Dept. 2004). As such, Defendant has failed to meet her burden of establishing entitlement to summary judgment. The Court thus need not address the sufficiency of Plaintiff's opposing papers.

Accordingly, Defendant's motion for summary judgment is DENIED.

This constitutes the Decision and Order of the Court.

Dated: November 22, 2011



STEVEN M. JAEGER, A.J.S.C.