

Sanchez v Pierre

2011 NY Slip Op 33421(U)

December 20, 2011

Supreme Court, Queens County

Docket Number: 28212/08

Judge: Robert J. McDonald

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Pierre and owned by The Cleanery on Florida Street, Ltd. Two hours after the accident the plaintiff went to the emergency room at Glen Cove Hospital for treatment of dizziness and headaches. He was discharged the same day. Two months later he sought treatment at Healthmakers for pain in his arms and neck. In his verified bill of particulars, plaintiff, age 36, states that as a result of the accident he sustained, inter alia, a disc herniation/bulging disc at the C4-C5 level and the C5-C6 level. The bill of particulars states that he was confined to bed for one week following the accident and confined to his house for four weeks following the accident. He states that he was incapacitated from employment for 16 days after the accident.

Plaintiff contends that he sustained a serious injury as defined in Insurance Law § 5102(d) in that he sustained a permanent loss of use of a body organ, member function or system; a permanent consequential limitation or use of a body organ or member; a significant limitation of use of a body function or system; and a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute his 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.

The plaintiffs commenced this action by filing a summons and complaint on November 20, 2008. Issue was joined by service of defendants' verified answer dated July 16, 2009. Defendants now move for an order pursuant to CPLR 3212(b), granting summary judgment dismissing the plaintiffs' complaint on the ground that plaintiff, Freddy Sanchez did not suffer a serious injury as defined by Insurance Law § 5102.

In support of the motion, defendants submit an affirmation from counsel, Brian Brown, Esq.; a copy of the pleadings; plaintiff's verified bill of particulars; the affirmed medical reports of board certified neurologist, Dr. Daniel Feuer and radiologist, Dr. Sheldon P. Feit; and a copy of the transcript of the examination before trial of plaintiff Freddy Sanchez.

Dr. Daniel Feuer, a board certified neurologist, retained by the defendants, examined Mr. Sanchez on March 30, 2011. Plaintiff presented with headaches, neck pain and arm pain. Dr. Feuer performed quantified and comparative range of motion tests. He found that the plaintiff had no limitations of range of motion in the cervical spine, lumbosacral spine and in his arms. The doctor states that the plaintiff's neurological examination was within normal limits and there were no objective clinical

deficits referable to the nervous system to support his subjective complaints. He stated that the MRI testing failed to document spinal cord or nerve root impingement. Dr. Feuer concludes that plaintiff did not demonstrate any objective neurological disability or neurological permanency which is causally related to the accident of June 18, 2007. The plaintiff was found to be neurologically stable and able to engage in full active employment as a newspaper delivery person without restriction.

Dr. Sheldon P. Feit, a radiologist reviewed the MRI studies of the plaintiff's cervical spine. He states in an affirmed report that his review of the cervical spine MRI found no evidence of disc bulges or herniations and no other discernible abnormalities. Therefore, he concludes there are no abnormalities causally related to the accident of June 18, 2007.

In his examination before trial, plaintiff testified that he works as a newspaper delivery man and as a self-employed satellite dish installer. He did not leave the scene of the accident in an ambulance. However, his wife drove him to Glen Cove Hospital later that day as he was having headaches and felt dizzy. He was discharged the same day and did not seek further medical treatment until two months later when he first went to Dr. Hausknect at Healthmakers. During the two month period he continued to work. He stated he was still having headaches and problems with his arms and pain in his neck. He was prescribed a course of physical therapy and he went three times per week for a year and a half. He stopped physical therapy at the end of 2008 but returned again in the summer of 2009 and continued for another year. He stopped the second time because the therapy was no longer working and the only option was injections for the pain. He testified that he was not confined to bed at all after the accident and was not confined to his home. He states that he cannot install as many satellite antennae per day as he did before the accident.

Defendants' counsel contends that the medical reports of Drs. Feuer and Feit as well as the plaintiff's deposition testimony are sufficient to establish, prima facie, that the plaintiff has not sustained a permanent consequential limitation or use of a body organ or member; a significant limitation of use of a body function or system; or a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute his 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.

In opposition, plaintiffs' attorney, Ona E. Sanders, Esq., submits her own affirmation as well as the affirmed medical report of chiropractor, Dr. Valerie A. Delosreyes, the affirmed medical report of neurologist, Dr. Aric Hausknecht, the unaffirmed MRI report of radiologist Dr. Rizzuti and the affirmed medical report of Dr. Harold James.

Dr. Delosreyes, a chiropractor at Healthmakers, first examined the plaintiff on August 13, 2007. Counsel submits a medical report from Dr. Delosreyes, however, as the report is from a chiropractor it must be in affidavit form. As this report is merely affirmed and was not sworn to before a notary or other authorized official it is not in admissible form and does not constitute competent evidence sufficient to oppose the defendants' motion (see Hartley v White, 63 AD3d 1689[4th Dept. 2009]; Feggins v Fagard, 52 AD3d 1221[4th Dept. 2008]; Shinn v Catanzaro, 1 AD3d 195[1st Dept. 2003]). Plaintiffs' failure to submit the chiropractor's report in admissible form requires that it be excluded from consideration (see CPLR 2106; Pierson v Edwards, 77 AD3d 642 [2d Dept. 2010]; DiLernia v Khan, 62 AD3d 644 [2d Dept. 2009]; McMullin v Walker, 68 AD3d 943 [2d Dept. 2009]; Perdomo v Scott, 50 AD3d 1115 [2d Dept. 2008]).

The plaintiff also submitted a radiological report from Dr. Rizzuti which was also not properly affirmed and therefore, is also not in admissible form and without probative value for purposes of the motion for summary judgment (see Grasso v Angerami, 79 NY2d 813[1991]). Therefore, the unsworn MRI report is insufficient to refute the affirmation of the defendants' radiologist that the MRI films failed to reveal any evidence of herniated or bulging discs (see Lively v Fernandez, 85 AD3d 981 [2d Dept. 2011]; Sammut v Davis, 16 AD3d 658 [2d Dept. 2005]).

Plaintiff was personally examined at Healthmakers by neurologist, Dr. Hausknecht on August 13, 2007, two months after the accident. At that time the doctor performed quantified and objective range of motion testing which revealed limitations in range of motion of the cervical and thoracolumbar spines which he found to be causally related to the accident of June 18, 2007.

The plaintiff was most recently evaluated by Dr. Harold James at Healthmakers on August 8, 2011. The plaintiff's range of motion testing on that date indicating only minimal limitations of range of motion with respect to the cervical spine. Dr. James stated that the plaintiff was permanently

partially disabled.

On a motion for summary judgment, where the issue is whether the plaintiff has sustained a serious injury under the no-fault law, the defendant bears the initial burden of presenting competent evidence that there is no cause of action (Wadford v Gruz, 35 AD3d 258 [1st Dept. 2006]). "A defendant can establish that a plaintiff's injuries are not serious within the meaning of Insurance Law § 5102 (d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (Grossman v Wright, 268 AD2d 79 [1st Dept. 2000]). Whether a plaintiff has sustained a serious injury is initially a question of law for the Court (Licari v Elliott, 57 NY2d 230 [1982]).

Initially, it is defendants' 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 (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]). Where defendants' motion for summary judgment properly raises an issue as to whether a serious injury has been sustained, it is incumbent upon the plaintiff to produce evidentiary proof in admissible form in support of his or her allegations. The burden, in other words, shifts to the plaintiff to come forward with sufficient evidence to demonstrate the existence of an issue of fact as to whether he or she suffered a serious injury (see Gaddy v Eyler, 79 NY2d 955 [1992]; Zuckerman v City of New York, 49 NY2d 557 [1980]; Grossman v Wright, 268 AD2d 79 [2d Dept 2000]).

Here, the proof submitted by the defendants, including the affirmed medical reports of Drs. Feuer and Heit as well as the transcript of plaintiff's examination before trial was sufficient to meet its prima facie burden by demonstrating that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]).

In opposition however, the plaintiff failed to come forward with sufficient evidence to demonstrate the existence of an issue of fact as to whether he suffered a serious injury. As stated above, the plaintiff failed to provide sufficient evidence that he sustained a bulging disc in the cervical spine as the report

of Dr. Rizzuti was not affirmed. Moreover, the plaintiff failed to show that he sustained a significant limitation of range of motion in the cervical spine as the recent report of Dr. James showed only minimal limitations in range of motion of the cervical spine (see McLoud v Reyes, 82 AD3d 848 [2d Dept. 2011][the approximate 12% limitation in range of motion was insignificant within the meaning of the no-fault statute]; Trotter v Hart, 285 AD2d 772 [3rd Dept. 2001][conclusion that plaintiff sustained a 20% loss of use of her cervical spine and 10% loss of use of her lumbar spine establishes neither a significant nor consequential injury]; Decker v Stang, 243 AD2d 1033 [3rd Dept. 1997]; Thus, a minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (see Licari v Elliott, 57 NY2d 230; Waldman v Dong Kook Chang, 175 AD2d 204 [2d Dept. 1991])).

Lastly, the plaintiff failed to raise a triable issue of fact as to whether his injury prevented him from performing substantially all of his usual and customary daily activities during at least 90 of the first 180 days following the subject accident (see Valera v Singh, 2011 NY Slip Op 8350 [2d Dept. 2011]; McLoud v Reyes, 82 AD3d 848 [2d Dept. 2011]; Nesci v Romanelli, 74 AD3d 765 [2d Dept. 2010]; Hamilton v Rouse, 46 AD3d 514 [2d Dept. 2007]; Mercado v Garbacz, 16 AD3d 631 [2d Dept. 2005]). The plaintiff testified at his deposition that he missed no time from work as a result of the accident.

Accordingly, because the evidence relied upon by plaintiff is insufficient to create a triable issue of fact with respect to any of the statutory categories of serious injury, it is hereby,

ORDERED, that the defendants' motion for summary judgment is granted and the plaintiffs' complaint is dismissed.

Dated: December 20, 2011
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.