

Fallucca v Rivera

2010 NY Slip Op 31966(U)

July 27, 2010

Sup Ct, Richmond County

Docket Number: 100618-09

Judge: Philip G. Minardo

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

JAMES FALLUCCA,

Plaintiff,

-against-

JUAN RIVERA,

Defendant

DCM PART 6

HON. PHILIP G. MINARDO

DECISION AND ORDER

Index No.: 100618-09

Motion No. 001

The following papers numbered 1 to 3 were fully submitted on the 8th day of July, 2010.

	Papers Numbered
Notice of Motion for Summary Judgment_____	1
Plaintiff’s Affirmation in Opposition_____	2
Defendant’s Reply Affirmation_____	3

Defendant JUAN RIVERA moves, pursuant to CPLR § 3212, for an order granting him summary judgment dismissing plaintiff’s complaint on the grounds that plaintiff has not sustained a “serious injury” as defined by § 5102(d) of the New York State Insurance Law.

Plaintiff JAMES FALLUCCA commenced this action to recover damages for personal injuries he allegedly sustained when he was struck by the defendant’s motor vehicle as he was crossing Hylan Boulevard at its intersection with Reid Avenue, Staten Island, New York on December 12, 2006.¹

¹ Partial summary judgment on the issue of liability was granted to the plaintiff in interim order dated June, 17, 2010.

Plaintiff alleges that because of this accident he suffered serious injuries, including but not limited to traumatic injury to the left leg, left lower extremity pain, and reflex sympathetic dystrophy and sympathetic pain syndrome of the left leg and ankle. Plaintiff alleges that because of the above injuries, he suffers severe pain and tenderness of the left leg, constant pain in the left leg, loss of strength, weakness, loss of function and flexion, and limited range of motion. Plaintiff alleges that as a result of these injuries he has had to make repeated visits with various medical providers and has undergone physical therapy and rehabilitation. After completing a course of physical therapy, approximately four months after the accident, the plaintiff was prescribed a walking boot which he was required to wear anytime he ventured outside his home which he wore for about six to eight months. Plaintiff attests in his affidavit that he continues to experience pain in his left shin, which feels like a grip which gets tighter and tighter at times, and he experiences severe pain upon walking or standing for extended periods as well as extreme tenderness to the shin area. Plaintiff JAMES FALLUCCA therefore alleges he has sustained a serious injury that resulted in a significant limitation of the use of a body function or system, and a medically determined injury or impairment of a non-permanent nature which prevented him from performing substantially all of the material acts which constitutes his usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident as defined by § 5102(d) of the New York State Insurance Law. Defendant JUAN RIVERA contends that the plaintiff's injuries are minor and do not fall within the parameters of serious injury § 5102(d) of the New York State Insurance Law. This Court has already denied defendant's summary judgment motion as to the 90 out of 180 days threshold in an interim order dated June 17, 2010, finding there to be a triable issue of fact; all that remains to be decided is the threshold question of significant limitation.

In seeking summary judgment on the issue of whether the serious injury threshold has been satisfied, the burden is initially on a defendant to establish as a matter of law that the plaintiff did not suffer a serious injury as the term is defined in Insurance Law § of 5102(d). (Andersen v. Persell, 708 N.Y.S.2d 499[3d Dep't 2000] (citing Cody v. Parker, 263 A.D.2d 866 [3d Dep't 1999])). After a defendant has met the burden of proving that the plaintiff's injuries do not rise to the level of serious injury, it is incumbent on the plaintiff to raise a triable issue of fact by submitting competent and admissible medical evidence based on objective medical findings and diagnostic tests which support a claim of serious injury. (see Cody v. Parker, *supra*). The expert must provide a basis for his or her conclusion by quantifying the loss or limitation, or otherwise demonstrating that it is meaningful. (see Andersen v. Persell, *supra* at 501 (citing Fountain v. Sullivan, 261 A.D.2d 795[3d Dep't 1999])). In the absence of such proof, a plaintiff's subjective complaints of pain are insufficient to create a triable issue of fact. (see Cody v. Parker, *supra* at 867).

One of the obvious goals of the Legislature's scheme of no-fault automobile reparations is to keep minor personal injury cases out of court. (Licari v. Elliot, 57 N.Y.2d 230, 236 [1982]). Therefore, the word "significant" as used in the statute pertaining to "limitation of a use of a body function or system" should be construed to mean something more than a minor, mild, or slight limitation of use. (Id.). As such, the Court requires objective proof of a plaintiff's injury in order to satisfy the statutory serious injury threshold. (see Toure v. Avis Rent A Car Systems, Inc., 98 N.Y.2d 345 [2002]). Additionally, the Court has previously held that whether a limitation of use or function is significant 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. (Id.; citing Dufel v. Green, 84 N.Y.2d 795 [1995]).

Defendant JUAN RIVERA has met his initial burden that the plaintiff did not suffer a significant limitation as defined by § 5102(d) of the New York State Insurance Law. The defendant presented affirmations by two physicians, an orthopedist and a neurosurgeon, both of whom found that the plaintiff was not suffering from any continuing injuries that would limit his usual work and activities. Robert L. Michaels, M.D., who conducted the orthopedic evaluation of plaintiff JAMES FALLUCCA on behalf of the defendant, concluded that the plaintiff is not disabled, he can seek employment without restrictions, and has no restrictions in the activities of daily living. Dr. Michaels reached a diagnosis that the plaintiff had suffered a contusion of the left tibia and fibula which had resolved and found that there was no evidence at that time of reflex sympathetic dystrophy or complex regional pain syndrome. Chandra M. Sharma, M.D., who conducted a neurological medical examination of plaintiff JAMES FALLUCCA on behalf of the defendant, concluded that the plaintiff has no casually related neurological problems and that he does not have any neurological limitations to his usual work and activities.

Dr. Michael's and Dr. Sharma's affirmations were sufficient to meet the defendant's initial burden to establish a prima facie case that plaintiff's alleged injuries did not meet the serious injury threshold under the significant limitation of a body organ, system or function. In response to the motion, the plaintiff submitted affirmations from two of the plaintiff's treating physicians and an affidavit of plaintiff JAMES FALLUCCA. Both physicians, Kevin Weiner, M.D., and Glen Babus, M.D., concluded that the plaintiff JAMES FALLUCCA is suffering from reflect sympathetic dystrophy and/or sympathetic pain syndrome of the left shin and complex mediated pain syndrome of the left lower extremity which is casually related to the accident. The description by the physicians as to the permanence of the plaintiff's injury satisfies the requisite description of the medical significance of the injury. Additionally, Dr. Babus has and

continues to administer nerve blocks to provide relief to the plaintiff, but the pain continues to return. In his affidavit, the plaintiff attests that he continues to experience pain in his left shin, which feels like “a grip” on the leg, that gets tighter and tighter at times. The plaintiff further attests that the pain always exists, but the severity increases with weather changes and increased activity, such as work, extended walking and standing, and is extremely tender to the touch. These allegations by the plaintiff as well as the affirmations of his treating doctors raise a question of fact as to the degree of the injury as compared to the normal function of the body part.

Since summary judgment deprives the litigant of his day in court it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues. (see Andre v. Pomeroy, 35 N.Y.2d 361, 364 [1974]). The disagreement between the plaintiff’s and defendant’s physicians and the plaintiff’s allegations raise a triable issue of fact as to whether he is suffering from a significant limitation of use of a body function or system.

Accordingly, it is

ORDERED, that defendant JUAN RIVERA’s motion for summary judgment is denied, in that this Court finds the plaintiff JAMES FALLUCCA has raised issues of fact on the thresholds of 90/180 days incapacity and significant limitation of use of a body function or system.

This shall constitute the decision and order of the Court.

E N T E R,

Dated: July 27, 2010

/s/ Philip G. Minardo
Philip G. Minardo
J.S.C.