

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D32882
G/kmb

_____AD3d_____

Submitted - October 25, 2011

REINALDO E. RIVERA, J.P.
DANIEL D. ANGIOLILLO
ARIEL E. BELEN
SHERI S. ROMAN, JJ.

2010-09749
2010-10513

DECISION & ORDER

Francois Edouazin, appellant, v Theodore Champlain,
et al., respondents.

(Index No. 37808/07)

Brian P. Neary, P.C., Huntington, N.Y., for appellant.

Marshall, Dennehey, Warner, Coleman & Goggin, New York, N.Y. (Michael Gallagher and John T. Cofresi of counsel), for respondents Theodore Champlain and Ryder Truck Rental.

Hammill, O'Brien, Croutier, Dempsey, Pender & Koehler, P.C., Syosset, N.Y. (Anton Piotroski of counsel), for respondents Terrence Watts and Cove Plumbing Supply, Inc.

Cascone & Kluepfel, LLP, Garden City, N.Y. (Rendon P. Sangalang of counsel), for respondents James C. Malico and JPM Trucking, Inc.

In an action, inter alia, to recover damages for personal injuries, the plaintiff appeals (1), as limited by his brief, from so much of an order of the Supreme Court, Suffolk County (Molia, J.), entered September 9, 2010, as granted the cross motion of the defendants James C. Malico and JPM Trucking, Inc., for summary judgment dismissing the complaint insofar as asserted against them on the ground that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d), denied, as academic, the alternative branch of his motion which was for summary judgment on the issue of liability against the defendants James C. Malico and JPM Trucking, Inc.,

November 15, 2011

Page 1.

EDOUAZIN v CHAMPLAIN

and granted those branches of the separate cross motions of the defendants Terrence Watts II and Cove Plumbing Supply, Inc., and the defendants Theodore Champlain and Ryder Truck Rental, which were for summary judgment dismissing the complaint insofar as asserted against each of them on the ground that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d), and (2) from a judgment of the same court entered September 24, 2010, which, upon the order, is in favor of the defendants Terrence Watts II and Cove Plumbing Supply, Inc., dismissing the complaint insofar as asserted against them.

ORDERED that the appeal from so much of the order as granted that branch of the cross motion of the defendants Terrence Watts II and Cove Plumbing Supply, Inc., which was for summary judgment dismissing the complaint insofar as asserted against them on the ground that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) is dismissed; and it is further,

ORDERED that the order is reversed insofar as reviewed, on the law, the cross motion of the defendants James C. Malico and JPM Trucking, Inc., and those branches of the separate cross motion of the defendants Theodore Champlain and Ryder Truck Rental, which were for summary judgment dismissing the complaint insofar as asserted against each of them on the ground that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) are denied; and it is further,

ORDERED that the judgment is reversed, on the law, and that branch of the cross motion of the defendants Terrence Watts II and Cove Plumbing Supply, Inc., which was for summary judgment dismissing the complaint insofar as asserted against them on the ground that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) is denied, and the order entered September 9, 2010, is modified accordingly; and it is further,

ORDERED that the matter is remitted to the Supreme Court, Suffolk County, to determine the alternative branch of the plaintiff's motion, that branch of the separate cross motion of the defendants Theodore Champlain and Ryder Truck Rental which was for summary judgment on the issue of liability, on the merits, and that branch of the cross motion of the defendants Terrence Watts II and Cove Plumbing Supply, Inc., which was for summary judgment on the issue of liability, on the merits; and it is further,

ORDERED that one bill of costs is awarded to the plaintiff payable by the defendants James C. Malico and JPM Trucking, Inc., the defendants Terrence Watts II and Cove Plumbing Supply, Inc., and the defendants Theodore Champlain and Ryder Truck Rental.

The appeal from so much of the order as granted that branch of the cross motion of the defendants Terrence Watts II and Cove Plumbing Supply, Inc., which was for summary judgment dismissing the complaint insofar as asserted against them on the ground that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) must be dismissed, as the right of direct appeal from that part of the order terminated with the entry of the judgment entered September 24, 2010 (*see Matter of Aho*, 39 NY2d 241, 248). The issues raised on the appeal from that portion of the order have been considered on the appeal from the judgment (*see CPLR 5501[a]*).

All of the defendants, in support of those branches of their respective cross motions which were for summary judgment on the issue of serious injury, relied upon, inter alia, the affirmed medical report of Dr. Robert Pearl, their expert neurologist. This report failed to eliminate a triable issue of fact, thereby preventing the defendants from meeting their prima facie burdens. Dr. Pearl examined the plaintiff on August 12, 2009, nearly three years post-accident. During his examination of the plaintiff, he noted significant limitations in the ranges of motion of the cervical and lumbar regions of the plaintiff's spine (*see Grisales v City of New York*, 85 AD3d 964; *Torres v Torrano*, 79 AD3d 1124; *Mondevil v Kumar*, 74 AD3d 1295).

While the defendants also relied on the affirmed medical report of Dr. Scott S. Coyne, their radiology expert, his report was also insufficient to enable the defendants to meet their prima facie burdens in this case. The plaintiff, in his bill of particulars, alleged exacerbations of preexisting injuries to the cervical and lumbar regions of his spine. While it is true that Dr. Coyne opined that the pathology he observed in the plaintiff's December 2006 MRI films was degenerative in nature and unrelated to the subject accident, the defendants failed to show that the limitations noted by Dr. Pearl were the result of a prior accident, rather than from exacerbations caused by the subject one (*see Pero v Transervice Logistics, Inc.*, 83 AD3d 681, 682-683; *Rabinowitz v Kahl*, 78 AD3d 678; *Washington v Asdotel Enters., Inc.*, 66 AD3d 880; *McKenzie v Redl*, 47 AD3d 775, 776).

Since the defendants failed to meet their respective prima facie burdens of showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d), this Court need not determine whether the papers submitted by the plaintiff in opposition were sufficient to raise a triable issue of fact (*see Grisales v City of New York*, 85 AD3d at 965; *Pero v Transervice Logistics, Inc.*, 83 AD3d at 683; *Coscia v 938 Trading Corp.*, 283 AD2d 538).

In light of our determination, the matter must be remitted to the Supreme Court, Suffolk County, to determine the alternative branch of the plaintiff's motion, and those branches of the cross motions of the defendants Theodore Champlain and Ryder Truck Rental, and the defendants Terrence Watts II and Cove Plumbing Supply, Inc., which were for summary judgment on the issue of liability, on the merits (*see Alvarez v Dematas*, 65 AD3d 598, 600).

RIVERA, J.P., ANGIOLILLO, BELEN and ROMAN, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court