

Bohn v Babylon Iron Works, Inc.

2007 NY Slip Op 30782(U)

March 27, 2007

Supreme Court, Suffolk County

Docket Number: 0018150/2005

Judge: Robert W. Doyle

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By their bill of particulars, plaintiffs allege that as a result of the subject accident, plaintiff George Valentino sustained serious injuries including, traumatic injuries to the head, right hand, cervical and lumbar spines; post-concussion syndrome; traumatic migraine headaches; inflammation in left sphenoid sinus; cervical disc bulges at C3-4, C4-5, C5-6; loss of range of motion of the cervical spine; lumbar disc herniation at L5-S1 with spinal stenosis; loss of range of motion of the lumbar spine; lumbar radiculopathy radiating down the lower extremities; and various abrasions and bruises throughout various parts of the body. In addition, plaintiffs allege that plaintiffs Glenn Bohn and George Valentino were treated and released from Brookhaven Memorial Hospital and that plaintiff George Valentino was confined to bed and home for approximately six (6) weeks immediately following the accident and intermittently thereafter. Both plaintiffs are Construction/Maintenance repair workers employed by the Suffolk County Water Authority. The Court's computer records indicate that the note of issue in this action was filed on August 14, 2006.

Defendants now move for summary judgment dismissing the claims of plaintiff George Valentino and Jennifer Valentino on the grounds that plaintiff George Valentino did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). In support of their motion, defendants submit, among other things, the summons and verified complaint; defendants' answer; plaintiffs' verified bill of particulars; plaintiff's report of an MRI of the lumbar spine of plaintiff George Valentino performed on July 10, 2006; an affirmed report of defendants' examining neurologist Frederick S. Mortati, M.D. based on an examination of plaintiff George Valentino on June 30, 2006; the affirmed report dated June 20, 2006 of defendants' examining orthopedist Benjamin Nachamie, M.D. based on an evaluation of plaintiff George Valentino on said date; and unaffirmed reports dated June 9, 2006 of MRI's of the cervical spine and the lumbosacral spine of plaintiff George Valentino.

Insurance Law § 5102 (d) defines "serious injury" as "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 eighty days immediately following the occurrence of the injury or impairment."

In order to recover under the "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (*Oberly v Bangs Ambulance Inc.*, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis,

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correlating plaintiff's limitations to the normal function, purpose and use of the body part (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]).

It is for the court to determine in the first instance whether a prima facie showing of "serious injury" has been made out (*see, Tipping-Cestari v Kilhenny*, 174 AD2d 663, 571 NYS2d 525 [2d Dept 1991]). 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 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once defendant has met the burden, plaintiff must then, by competent proof, establish a prima facie case that such serious injury exists (*Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]). Such proof, in order to be in a competent or admissible form, shall consist of affidavits or affirmations (*Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). The proof must be viewed in a light most favorable to the nonmoving party, here, the plaintiff (*Cammarere v Villanova*, 166 AD2d 760, 562 NYS2d 808 [3d Dept 1990]).

Here, defendants failed to make a prima facie showing that plaintiff George Valentino did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (*see, Volpetti v Yoon Kap*, 28 AD3d 750, 814 NYS2d 236 [2d Dept 2006]). The MRI report of plaintiff's cervical spine indicated mild disc bulges at the C3-4, C4-5 and C5-6 levels and defendants' examining orthopedist, Dr. Nachamie, found that plaintiff had restrictions in the range of motion of his cervical spine approximately one and a half years after the subject accident (*see, id.*; *see also, Alma v Samedy*, 24 AD3d 398, 805 NYS2d 417 [2d Dept 2005]). Dr. Nachamie recorded limited range of motion of the cervical spine with flexion to 30 degrees (45 normal), extension to 10 degrees (45 normal), right rotation to 30 degrees (70 normal), left rotation to 30 degrees (70 normal), right lateral flexion to 25 degrees (45 normal), and left lateral flexion to 25 degrees (45 normal). Said findings of significant limitation of motion created an issue of material fact as to whether plaintiff had sustained a significant limitation of use of a body function or system (*see, Hall v Barth*, 36 AD3d 1050, 825 NYS2d 922 [3d Dept 2007]). In addition, defendants' examining neurologist and orthopedist both failed to set forth the objective tests that they used to determine range of motion restrictions (*see, Tolstocheev v Bajrovic*, 28 AD3d 473, 811 NYS2d 785 [2d Dept 2006]). Inasmuch as defendants failed to establish their prima facie entitlement to judgment as a matter of law based on whether plaintiff George Valentino sustained a serious injury, it is unnecessary to consider whether plaintiffs' opposition papers were sufficient to raise a triable issue of fact on that matter (*see, Nembhard v Delatorre*, 16 AD3d 390, 791 NYS2d 144 [2d Dept 2005]; *McDowall v Abreu*, 11 AD3d 590, 782 NYS2d 866 [2d Dept 2004]; *Coscia v 938 Trading Corp.*, 283 AD2d 538, 725 NYS2d 349 [2d Dept 2001]).

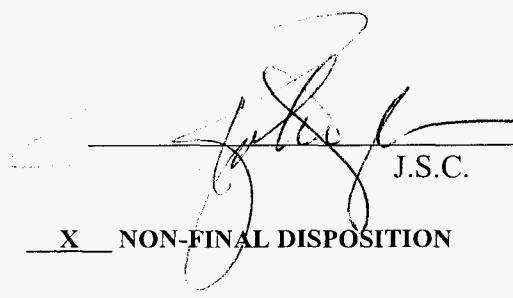
Plaintiffs now cross-move for summary judgment in their favor on the complaint on the issue of liability. Defendants oppose the cross motion as being untimely under CPLR 3212 (a).

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Here, as defendants correctly point out, plaintiffs' cross motion for summary judgment is untimely inasmuch as it was not served within 120 days of the filing of the note of issue, that is, December 12, 2006 (*see*, CPLR 3212 [a]). Instead, the affidavit of service of plaintiffs' cross motion is dated December 27, 2006, 15 days after the deadline to file the cross motion for summary judgment. Plaintiffs' counsel has provided no explanation or "good cause" for serving the cross motion 15 days late, and thus, the Court has no discretion to entertain it on the merits (*see, Brill v City of New York*, 2 NY3d 648, 781 NYS2d 261 [2004]; *Thompson v Leben Home for Adults*, 17 AD3d 347, 792 NYS2d 597 [2d Dept 2005]). Therefore, plaintiff's motion for summary judgment on the issue of liability is denied. It so follows that plaintiffs' additional requests for an immediate trial pursuant to CPLR 3212 (c) on damages are denied.

Accordingly, the motion and cross motion are denied.

Dated: MAR 27 2007



J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION