

Kenny v Scourby

2007 NY Slip Op 31405(U)

May 21, 2007

Supreme Court, Suffolk County

Docket Number: 0018397/2005

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 3-12-07 (#001)
3-8-07 (#002)
ADJ. DATE 3-26-07
Mot. Seq. # 001 - MD
002 - MD

-----X
RYAN J. KENNY, :
 :
 :
 Plaintiff, :
 :
 - against - :
 :
 PETER J. SCOURBY, JR., MONTALBANO :
 PROPERTIES, INC. and MICHELE BOVE, :
 :
 Defendants. :
-----X

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Upon the following papers numbered 1 to 37 read on these motions for summary judgment ; Notice of Motion/
Order to Show Cause and supporting papers 1 - 15; 16 - 24 ; Notice of Cross Motion and supporting papers ; Answering
Affidavits and supporting papers 25 - 29; 30 - 37 ; Replying Affidavits and supporting papers ; Other ; ~~(and~~
~~after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that this motion (001) by defendant Michele Bove pursuant to CPLR 3212 and Insurance Law § 5102(d) for an order granting summary judgment dismissing the complaint, asserting plaintiff's injuries do not meet the serious injury threshold, opposed by plaintiff, is denied, and it is further

ORDERED that this motion (002) by defendant Peter J. Scourby and Montalbano Properties, Inc. pursuant to CPLR 3212 for an order granting summary judgment dismissing the cross claim asserted by co-defendant Michael Bove has been rendered academic by all parties signing the stipulation of discontinuance of the complaint by plaintiff as against defendants Scourby and Montalbano and the cross claim asserted by defendant Bove against defendants Scourby and Montalbano, and is denied as moot.

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This is an action sounding in negligence arising out of an multi-vehicle accident which occurred on March 31, 2005 on Express Drive North at or near Lakewood Avenue, County of Suffolk, State of New York, in which plaintiff claims to have sustained serious injury within the meaning of Insurance Law §5102(d).

Defendant Michele Bove claims entitlement to an order granting summary judgment dismissing the complaint, asserting plaintiff did not sustain serious injury sufficient to meet the threshold pursuant to Insurance Law of the State of New York § 5102(d).

Plaintiff has set forth in his bill of particulars (defendants' exhibit E) that he sustained the following injuries, inter alia: disc herniation at C5-6 effacing the ventral aspect of the thecal sac; disc herniation at C6-7 effacing the ventral aspect of the thecal sac; EMG/NCV diagnosed sensorimotor axonal peripheral neuropathy of the bilateral median nerves indicative of carpal tunnel syndrom; trigger point injections under anesthesia to areas in relation to the cervical region; loss of motion, flexion, extension, strength and use of the back and neck; sprains, strains, spasm with derangement of the neck and back; and severe pain and suffering with inflammation, stiffness and swelling in the neck and back.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center*, supra). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499, 538 NYS2d 843 [2nd Dept 1989]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2nd Dept 1981]). Summary judgment shall be granted only when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]).

Pursuant to Insurance Law § 5102(d), " '[s]erious injury' means a personal injury which results in 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."

The term “significant” as it appears in the statute has been defined as “something more than a minor limitation of use,” and the term “substantially all” has been construed to mean “that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment (*Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570).

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, 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 Eycler*, 79 NY2d 955, 582 NYS2d 990 [1992]).

In support of motion (001) defendant Bove has submitted, inter alia, a copy of the summons and complaint; defendant’s verified answer with cross claim against defendant Peter J. Scourby, Jr. and Montalbano Properties, Inc.; a copy of a stipulation dated October 23, 2006 discontinuing the complaint and any and all cross claims by co-defendant Bove with prejudice and without costs, signed by attorney for plaintiff Ryan J. Kenny and attorneys for defendants Bove, Scourby and Montalbano; a copy of the bill of particulars and a supplemental verified bill of particulars; unsigned copy of the deposition of plaintiff, Ryan J. Kenny; an uncertified copy of a Stony Brook Hospital record; uncertified MRI report of the lumbar spine; and sworn letters of defendant’s examining physicians: orthopedist Joseph P. Stubel, M.D., dated June 20, 2005; neurologist Richard Pearl, M.D. dated September 7, 2006; and orthopedist Jay Nathan, M.D., dated October 9, 2006.

Dr. Pearl, defendant’s examining neurologist, examined plaintiff on September 6, 2006 (defendant’s exhibit L). It was his opinion that plaintiff sustained a cervical and lumbosacral sprain and states there were no objective findings to indicate neurological injury, need for neurological healthcare, testing or neurological injury to correlate with any alleged findings on testing. He found claimant had a history of a pre-existing work injury. Dr. Pearl indicates normal objective range of motions based upon his physical examination of plaintiff, but it is noted that his examination of plaintiff’s cervical spine revealed 60 degrees lateral rotation with 80 degrees being normal. Dr. Pearl does not comment on this finding. He does not comment on the results of MRI scans either, and suggests a neuroradiological review of the same.

Dr. Stubel performed an orthopedic examination of plaintiff on behalf of defendant on July 15, 2005 (defendant's exhibit J). He indicates plaintiff complained of neck and lower back pain and that he sometimes gets numbness into his fingers and hands. He has been doing physical therapy and chiropractic treatment about three times per week, has been taking Motrin, and had one injection treatment. Dr. Stubel's report indicates he reviewed a no-fault application form, billing forms, and an emergency room record from Stony Brook Hospital from March 31, 2005. Dr. Stubel's examination revealed no quantified limitations of movement of the lumbar and cervical spine. His diagnosis was that of neck and back sprains. It was his opinion that the accident of March 31, 2005 has a causal relationship to the symptoms described by plaintiff, and based upon his findings at the time of the examination, it was determined there were no objective signs of disability with reference to the injuries claimed in the accident. Dr. Stubel further opined that there was no need for further orthopedic treatment or physical therapy, and no need for surgery, further diagnostic testing, household help, medical supplies or transportation; and that he can perform his usual activities of daily living and his usual work. He does not comment on the MRI results of plaintiff's cervical and lumbar spine and his report indicates he did not review any x-rays or the MRI's of June 16, 2005 and June 20, 2005.

Defendant Bove has also submitted the report of orthopedist, Dr. Jay Nathan, who examined plaintiff on his behalf (defendant's exhibit K). He examined plaintiff on October 9, 2006 for complaints of neck and back pain. Dr. Nathan opines, after physical examination, that Mr. Kenny had a cervical and lumbar sprain, has no disability and is able to work and perform activities of daily living without restrictions. He does not comment on the results of the MRI's of plaintiff's lumbar and cervical spine although he set forth the findings based upon his "Review of Medical Records."

Based upon the foregoing, defendant has demonstrated prima facie entitlement to an order granting summary judgment on the issue of serious injury.

Plaintiff, in opposing the motion, has submitted, inter alia, a copy of a medical record from Stony Brook Emergency Department; affidavit and supplemental affidavit of Dr. Samir Haddad, M.D.; copy of plaintiff's deposition transcript; copy of a report for a cervical MRI; Electrodiagnostic Report of Long Island Integrated Medical, P.C.; and plaintiff's Expert Witness Disclosure.

Dr. Samir Haddad, M.D., neurologist, sets forth in his affidavit (plaintiff's exhibit 3) that he has treated Ryan J. Kenny for the injuries he sustained as a result of the motor vehicle accident of March 31, 2005 since April 29, 2005 through March 5, 2007, and that when he examined plaintiff, he complained of pain in his neck, down the shoulders, associated with numbness in the right and left hands, with loss of motion of approximately 40% in all ranges. Spasm and guarding were also noted upon digital examination. Testing was performed on each visit with a 40% loss of range of motion in flexion, extension, and rotation in his neck on most occasions, with neck spasms, but the lower back problem improved with time. MRI's were obtained on plaintiff's lumbar and cervical spine in June, 2005. Dr. Haddad states his readings of the MRI films agree with the treating radiologist, Dr. Melissa Sapan, M.D., that Mr. Kenny sustained a herniated disc at C5-6 which effaces the ventral aspect of the thecal sac, and a herniated disc at C6-7 which effaces the ventral aspect of the thecal sac, which are consistent with his clinical exam findings of muscle spasm and tenderness. No degenerative changes were found on the MRI's. Using the MRI results together with the medical records, Dr. Haddad states he reached a diagnosis of severe cervical flexion-extension injury with a herniated disc at C5-6 which effaces the

ventral aspect of the thecal sac, and a herniated disc at C6-7 which effaces the thecal sac, which have resulted in an approximate loss of motion of 40% in all cervical fields of motion. He states the patient received in total, 46 modality treatments and that he reached maximum benefit from organized physical therapy and chiropractic care. Therefore, plaintiff was discharged from his care and instructed to continue home exercises which Dr. Haddad provided to him. Dr. Haddad also administered multiple trigger point injections under anesthesia to his cervical spine to alleviate some of the pain.

On March 14, 2007, Dr. Haddad again examined Mr. Kenny and found he still has approximately 40% loss of motion in all fields in the cervical spine. He stated that this is a significant loss of motion which does improve or worsen depending on weather, activity level and how he is feeling. Dr. Haddad states the herniated discs will not improve with any further type of therapy, and therapy will only strengthen the surrounding musculature. He has been prescribed another round of physical therapy. Dr. Haddad further states he makes his diagnosis with a reasonable degree of medical certainty and further states the condition is expected to worsen with time. It is also Dr. Haddad's opinion with a reasonable degree of medical certainty that these herniated discs and resultant loss of significant motion are traumatically induced and not degenerative in nature. He advised Mr. Kenny to avoid lifting heavy objects and excessive bending and to take periodic breaks during the day so as not to aggravate his condition. Continued home exercise is being done. Dr. Haddad also set forth that it is his opinion with a reasonable degree of medical certainty that Mr. Kenny's injuries are permanent in nature and will significantly affect his ability to perform daily tasks and activities which require bending and lifting.

Disc herniation and limited range of motion based on objective findings may constitute evidence of serious injury (*Jankowsky v Smith*, 294 AD2d 540; 742 NYS2d 876). Plaintiff has demonstrated the existence of two herniated cervical discs as set forth above. Neither of defendant's experts refute the existence of the herniated discs or causation relating to the accident of March 31, 2005. Based upon the factual issues raised in the report of Dr. Haddad submitted by plaintiff in opposition to defendant's motion for summary judgment on the issue of serious injury, it is determined that plaintiff has met his burden by clearly demonstrating that there are factual issues concerning whether plaintiff has sustained a serious injury within the meaning of Insurance Law § 5102(d) and whether these injuries are permanent in nature.

Accordingly, defendant Bove's application seeking dismissal of the complaint on the issue of serious injury is denied in its entirety.

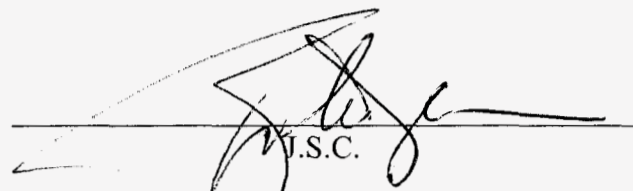
Turning to motion (002), defendants Peter J. Scourby, Jr. and Montalbano Properties, Inc. seek an order granting dismissal of the cross claim asserted by co-defendant Michele Bove against defendants Peter J. Scourby and Montalbano Properties, Inc. A stipulation dated October 23, 2006 was signed by counsel for plaintiff, defendant Bove, and defendants Scourby and Montalbano wherein the parties stipulated and agreed that the plaintiff's complaint and any and all cross claims as to defendants Peter Scourby, Jr. and Montalbano Properties, Inc. were discontinued with prejudice and without costs to defendants Scourby and Montalbano. Therefore, motion (002) has been rendered academic and is denied as moot.

Accordingly, the complaint of this action as asserted by plaintiff against defendants Scourby and Montalbano and the cross claim as asserted by defendant Bove against codefendants Scourby and

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Montalbano are dismissed as per the stipulation and agreement of October 23, 2005.

Dated: MAY 21 2007



J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION