

**Rivas v Bexley-Exeter, Inc.**

2007 NY Slip Op 31611(U)

June 12, 2007

Supreme Court, Richmond County

Docket Number: 0102453/2005

Judge: Philip G. Minardo

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND**

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**JULIO RIVAS,** :  
  
**Plaintiff,** : **PART 6**  
  
: **Present:**  
  
**-against-** : **HON. PHILIP G. MINARDO**  
  
**BEXLEY-EXETER, INC., G. MANAGEMENT** : **DECISION AND ORDER**  
**CO., INC., AND IRFAN ALI,** :  
  
: **Index No. 102453/05**  
  
**Defendants.** : **Motion No. 009-001**  
  
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The following papers numbered 1 to 3 were used on this motion the 29th day of March 2007.

Notice of Motion and Supporting Papers . . . . .	1
Affirmation in Opposition . . . . .	2
Affirmation in Reply . . . . .	3

Upon the foregoing papers, defendants’ motion for summary judgment is decided as follows.

Plaintiff Julio Rivas (hereinafter “Plaintiff”) has brought this action to recover monetary damages for injuries he allegedly suffered on February 12, 2005, following a motor vehicle accident in the eastbound lanes of the Verrazano Narrows Bridge. Plaintiff contends that at approximately 5:30 a.m. he was driving across the bridge when the “check engine” light illuminated in his automobile. As plaintiff applied his hazard lights and brakes, he was allegedly struck from behind by defendant’s vehicle. As a result, plaintiff claims that his car was forced

into the guardrail, at which time he lost consciousness. Among the injuries which plaintiff alleges as a result of this accident are joint space narrowing on the right knee and right second finger, disc space narrowing at L4-5, L5-S1, C5-6, straightening of the upper cervical curvature, partial meniscal tear, suprapatella effusion, disc bulges at C5-6, C6-7, L4-5 and L5-S1, deformation of the thecal sac, nerve root and spinal cord straightening, bilateral cervical radiculopathy, bilateral lumbosacral radiculopathy, suspicious focal hemorrhage in the right partial lobe, loss of consciousness, neck pain with radiation to left shoulder, mid back pain with radiation to lower back, low-back pain with radiation to bilateral buttocks, numbing and tingling sensations to the left side of the back, frontal headaches, left shoulder pain, right knee pain with buckling, restricted cervical range of motion in flexion, extension, right and left lateral flexion and right rotation, as well as tenderness at C4-C5-C6-C7 on the left (*see* Defendants' Exhibit C).

In moving for summary judgment dismissing the complaint as against it pursuant to CPLR 3212, defendants claim that plaintiff's injuries are not "serious" within the meaning of Insurance Law § 5102 (d). In opposition to the motion, the plaintiff contends that he did, in fact, suffer serious injuries, and has submitted the affirmations of Drs. Robert S. Schepp and Walter F. Pizzi in support.

In deciding whether summary judgment is warranted, the court's main function is issue identification, not issue determination (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The party seeking summary judgment bears the initial burden of establishing its right to judgement as a matter of law (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "[O]n a motion for summary judgment, the evidence is to be viewed in a light most favorable to the party opposing the motion, giving [it] the benefit of every favorable

inference” (*Cortale v Educational Testing Serv.*, 251 AD2d 528, 531 [2d Dept 1998]).

Nevertheless upon a prima facie showing by the moving party, a party opposing the motion must “produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*see Alvarez v Prospect Hosp.*, 68 NY2d at 324; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Insurance law § 5102 (d) provides for the recovery of noneconomic losses by covered persons who sustain “serious injuries” in an automobile accident. For these purposes, “serious injury” is defined 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 (Insurance Law § 5102 [d]).

Here, plaintiff alleges four categories of “serious injury”, i.e., permanent loss of use, permanent consequential limitation of use, significant limitation of use, and/or a medically determined injury which prohibited him from performing substantially all of his usual and customary activities for not less than ninety (90) days of the first 180 days after the subject accident (Insurance Law § 5102 [d]).

In this case, plaintiff has presented sufficient evidence in admissible form to create a triable issue of fact on the question of whether he sustained a serious injury in the “permanent

consequential limitation of use” and a “significant limitation of use” categories of Insurance Law § 5102 (d). Specifically, the affirmations of Drs. Robert S. Schepp and Walter F. Pizzi opine that plaintiff has sustained, e.g., a partial meniscal tear involving the posterior horn of the medial meniscus and suprapatella effusion extending into the joint space, disc space narrowing, spinal curvature, disc bulges, deformation of the thecal sac and restricted ranges of motion, each of which was confirmed in objective testing (*cf. Kearse v New York City Tr. Auth.*, 16 AD3d 45, 49 [2d Dept 2005]). However, plaintiff has failed to provide sufficient evidence to establish a “permanent loss of use” (*see Bangs v Oberly Ambulance*, 96 Ny2d 295 [a “permanent loss of use” must be total]).

Accordingly, it is

ORDERED, that defendants’ motion for summary judgment is denied except as to plaintiff’s claim of injury under the permanent loss of use category of serious injury; and it is further

ORDERED that the above category of injury should not be considered at trial.

Dated: June 12, 2007

E N T E R ,

s/ Philip G. Minardo

J.S.C.