

Telesca v Lute

2007 NY Slip Op 31870(U)

June 28, 2007

Supreme Court, Ulster County

Docket Number: 0053923/2007

Judge: George B. Ceresia

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ULSTER

PAUL TELESKA,

Plaintiff,

-against-

Index No.: 05-3923
RJI No.: 55-06-00368

JOHANNA M. LUTE and BRADFORD BEAN,

Defendants.

All Purpose Term

Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding

Appearances:

STEVEN M. MELLEY, ESQ.

Attorney for Plaintiff

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Attorneys for Defendants

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DECISION/ORDER

George B. Ceresia, Jr., Justice

Plaintiff commenced the instant action seeking recovery for injuries sustained as a result of an automobile accident that occurred on October 24, 2004. Plaintiff was the driver of an automobile stopped at a traffic signal when an automobile driven by defendant Johanna Lute collided with the rear end of such car.

Defendants have made a motion for summary judgment pursuant to CPLR 3212 on

the ground that plaintiff has not suffered a serious injury within the meaning of Insurance Law § 5102(d). Defendants rely upon an affirmation of an orthopedic surgeon, medical records from plaintiff's treating health care providers and the transcripts of the parties' examinations before trial in support of the motion. Plaintiff has cross-moved for summary judgment on the issues of liability and serious injury. Plaintiff relies upon an affirmation of his treating physician, additional medical records and an affirmation from a medical doctor who performed an independent medical examination for plaintiff's no fault carrier.

The Court is mindful that summary judgment is a drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue (Sternbach v Cornell University, 162 AD2d 922, 923 [Third Dept., 1990]). The focus should be on issue identification rather than issue determination (Sternbach v Cornell University, supra). 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 in admissible form to demonstrate the absence of any material issues of fact (see Zuckerman v City of NY, 49 NY2d 557, 562 [1980]; Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; Ayotte v Gervasio, 81 NY2d 1062 [1993]). Once such a showing has been made, the burden shifts to the party opposing the motion for summary judgment to submit evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Zuckerman v City of NY, supra; Alvarez

v Prospect Hosp., supra; see also Wahila v Kerr, 204 AD2d 935, 936-937 [Third Dept., 1994]). The Court's function is to view the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of every reasonable inference, and determine whether there is any triable issue of fact outstanding (see Simpson v Simpson, 222 AD2d 984, 986 [Third Dept., 1995]; Boyce v Vazquez, 249 AD2d 724, 725 [Third Dept., 1998]).

Under Insurance Law § 5102 (d) a 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.

Plaintiff's bill of particulars alleges that he sustained significant disfigurement, a fracture, permanent loss of use of a body organ, member, function or system, a permanent consequential limitation of use of a body organ or member, a significant limitation of use of a body function or system and a medically determined injury or impairment which prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for 90 out of the first 180 days immediately following the accident based upon injuries to his neck, left shoulder and back.

As the moving party on the primary motion, defendants, in the first instance, are required to present evidence in admissible form sufficient to establish that plaintiff did

not suffer a serious injury within the meaning of Insurance Law § 5102 [d] (see Tankersley v Szesnat, 235 AD2d 1010, 1011 [Third Dept., 1997]; Tompkins v Burtnick, 236 AD2d 708 [Third Dept., 1997]; Podwirny v De Caprio, 194 AD2d 1057 [Third Dept., 1993]; Weaver v Derr, 242 AD2d 823, 824 [Third Dept., 1997]; Kristel v Mitchell, 270 AD2d 598 [Third Dept., 2000]). It is only if such a showing is made that the burden shifts to plaintiff to proffer competent medical evidence based upon objective medical findings and diagnostic tests to support his claim (see Gaddy v Eyler, 79 NY2d 955, 957 [1992]; Eisen v Walter & Samuels, 215 AD2d 149, 150 [First Dept., 1995]; Tankersley v Szesnat, *supra*; Jordan v Baine, 241 AD2d 894, 895 [Third Dept., 1997]). The requirements are reversed on plaintiff's cross-motion.

Defendants submitted an affirmation and medical report from John H. Buckner, M.D. Dr. Buckner conducted an examination of plaintiff more than two years after the accident. His review of the medical records showed no documentation of any fracture and plaintiff has never specified what was allegedly fractured. With respect to permanent loss of use of a body organ, member, function or system, in order to establish "permanent loss" it is necessary to prove a total loss of use of the affected organ, member, function or system, (Oberly v Bangs Ambulance, 96 NY2d 295 [2001]). Nothing in plaintiff's medical records, deposition transcripts or examination results can be construed to support a claim of a total loss of use of any part of his body or any function or system. Defendants have therefore met their burden on such claims.

However, Dr. Buckner found a “diminution in bulk of the left deltoid and left trapezius” and an almost 20% reduction in the normal range of motion for external rotation in plaintiff’s left shoulder. He then concluded that there was no evidence of permanency or disability related to the accident and further that plaintiff’s problems with his shoulder were degenerative in nature and not causally related to the motor vehicle accident. Dr. Buckner also opined that plaintiff was able to conduct his daily activities and work immediately after the accident, and missed minimal time from work. That portion of the affirmation is devoid of any factual basis for the opinion. It fails to state what portions of plaintiff’s medical records support the conclusions nor does it indicate the medical theory upon which it is based. Moreover, it completely fails to address the claims that plaintiff never experienced any problems with his shoulder before the accident and that any degenerative condition was entirely asymptomatic (see Mack v Pullum, 37 AD3d 1063 [Fourth Dept., 2007]; Martin v Fitzpatrick, 19 AD3d 954, 956 [Third Dept., 2005]) nor does it attempt to distinguish the injuries sustained in the accident from the pre-existing condition by objective evidence (see Pommells v Perez, 4 NY3d 566, 580 [2005]; Suarez v Abe, 4 AD3d 288, 289-290 [First Dept., 2004]; Pinkowski v All-States Sawing & Trenching, 1 AD3d 874, 875-876 [Third Dept., 2003]; Franchini v Palmieri, 307 AD2d 1056, 1057-1058 [Third Dept., 2003], affd 1 NY3d 536 [2003]). Dr. Buckner also fails to indicate how a documented rotator cuff tear was degenerative in nature, explain the muscle atrophy or mention the fact that plaintiff worked from home on

numerous occasions because of his injuries (see Hubert v Tripaldi, 307 AD2d 692 [Third Dept., 2003]). “Such conclusory statements do not constitute the prima facie evidentiary showing that is required of the proponent of a summary judgment motion (see, Winegrad v New York Univ. Med. Ctr., *supra*, at 852-853).” (Christiana v Benedictine Hosp. 248 AD2d 910, 913 [Third Dept., 1998]). Defendants have therefore failed to make a prima facie showing that plaintiff did not sustain a serious injury under any of the remaining claimed categories.

Plaintiff in opposition to the motion and in support of the cross-motion has submitted an affirmation from his treating orthopaedic surgeon, Gregory Chiaramonte, M.D. Dr. Chiaramonte first saw the plaintiff one month after the accident. He performed shoulder surgery approximately one week later. He opined that the shoulder injury was caused by the motor vehicle accident but did not set forth the factual basis for such opinion. He found that there was almost complete range of motion of the shoulder but concluded that there were significant permanent limitations in the function and use of the shoulder without providing any quantification. Moreover, in relating the limitations to plaintiff’s activities, he only found that plaintiff could no longer do body building exercises. It is noted that plaintiff’s examination before trial did not mention any such pre-accident activity. As with defendants’ doctor, his conclusions fail to indicate the specific facts and theory upon which they are based. The report from plaintiff’s no fault doctor is similarly conclusory. Accordingly, plaintiff has failed conclusively to establish

that he sustained a serious injury within the meaning of the Insurance Law.

Plaintiff has also cross-moved for summary judgment on the issue of liability. “A rear-end collision with a stopped or stopping vehicle creates a prima facie case of liability with respect to the operator of the moving vehicle and imposes a duty on that operator to rebut the inference of negligence to provide a non-negligent explanation for the collision (see Niyazov v Bradford, 13 AD3d 501; Russ v Investech Sec., 6 AD3d 602; Vecchio v Hildebrand, 304 AD2d 749, 750; McGregor v Manzo, 295 AD2d 487).” (Rainford v Han, 18 AD3d 638 [Second Dept., 2005]).

The descriptions of the accident as related by plaintiff and defendant Lute differ greatly. Plaintiff testified that he had been at a complete stop for a few seconds when he saw defendants’ car bearing down on him and believed it would not stop. Defendant’s car then struck his car, completely destroying the rear bumper and tail lights, and bending the trunk lid and one fender. The police report indicates that the damage exceeded \$1,000.

Defendant Lute testified that she saw plaintiff’s car stopped for the traffic light and came to a complete stop behind it. She waited for between 30 and 60 seconds, when she saw a green light out of the corner of her eye and saw plaintiff’s brake lights go off. She then accelerated, but saw that plaintiff’s car was not moving, and as a result, bumped into it. She further testified that she never saw plaintiff’s car actually start moving. She admitted that as a result of the collision she pushed plaintiff’s car most of the way through

the intersection.

Aside from the fact that defendant Lute's assertion that her small economy car was able to acquire so much momentum from a full stop in such a short distance is incredible, there is no factual basis in her testimony for her attorney's contention that plaintiff stopped suddenly. In fact, defendant Lute essentially testified that plaintiff's car was at a full stop at all relevant times before the collision. As such, defendants have failed to raise any triable issue of fact with respect to a non-negligent explanation for the accident.

Accordingly, it is

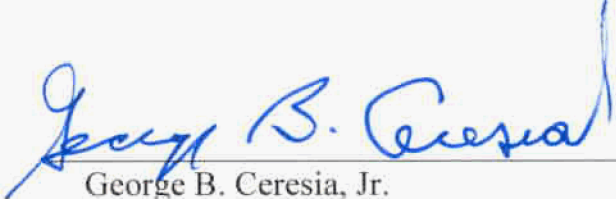
ORDERED, that defendants' motion for summary judgment dismissing plaintiff's complaint is hereby granted to the extent that it is determined that plaintiff did not sustain a fracture or a permanent loss of use but is otherwise denied, and it is further

ORDERED, that plaintiff's cross-motion for summary judgment on the issue of serious injury is hereby denied, and it is further

ORDERED, that plaintiff's cross-motion for summary judgment on the issue of liability is hereby granted

This shall constitute the Decision and Order of the Court. All papers are returned to the attorneys for the plaintiff, who are directed to enter this Decision/Order without notice and to serve defendants' counsel with a copy of this Decision/Order with notice of entry.

Dated: Troy, New York
June 28, 2007



George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

Notice of Motion dated January 26, 2007; Affidavit of Ryan T. Donovan, Esq. sworn to January 25, 2007 with Exhibits A-L annexed;

Affirmation of John H. Buckner, M.D. dated January 20, 2007 with Exhibits A and B annexed;

Memorandum of Law dated January 26, 2007;

Notice of Cross-Motion dated April 6, 2007; Affirmation of Steven M. Melley, Esq. dated April 6, 2007 with Exhibits A-D annexed;

Affirmation of Gregory Chiaramonte, M.D. dated April 2, 2007 with Exhibits annexed;

Reply Affidavit of Ryan T. Donovan, Esq., dated April 20, 2007.