

Thomas v Becker

2007 NY Slip Op 32303(U)

July 24, 2007

Supreme Court, Suffolk County

Docket Number: 0008550/2005

Judge: Robert W. Doyle

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT:

Hon ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 5-1-07
ADJ. DATE 6-25-07
Mot. Seq. # 002 - MD

-----X	:		
EDGAR THOMAS,	:		KAHN GORDON TIMKO & RODRIQUES, P.C.
	:		Attorneys for Plaintiff
	:	Plaintiff,	20 Vesey Street, Suite 300
	:		New York, New York 10007
	:		
- against -	:		
	:		NICOLINI, PARADISE, FERRETTI, et al.
THOMAS A. BECKER,	:		Attorneys for Defendant
	:		114 Old Country Road, P.O. Box 9006
	:	Defendant.	Mineola, New York 11501-9006
-----X	:		

Upon the following papers numbered 1 to 15 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 10; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 11-13; Replying Affidavits and supporting papers 14-15; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (002) by defendant Thomas A. Becker pursuant to CPLR 3212 and Insurance Law §5102(d) for an order granting summary judgment dismissing the complaint on the basis that plaintiff's injuries do not meet the serious injury threshold, is denied.

This is an action sounding in negligence arising out of a two-vehicle accident which occurred on July 22, 2003 on Old Nichols Road at or near 906B, Village of Islandia, County of Suffolk, State of New York, when the vehicles operated by plaintiff and defendant came into contact with each other. The complaint of this action sets forth a cause of action sounding in negligence.

Defendant 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, Edgar Thomas, has set forth in his bill of particulars that he sustained the following injuries, *inter alia*: severe and blunt trauma to the cervical spine; cervical spine derangement; cervical sprain; radiating pain and paresthesia to the shoulders and upper extremities; and internal derangement of the right shoulder with radiculopathy, sprain and strain.

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 Elliot*, 57 NY2d 230, 455 NYS2d 570 [1982]).

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* (supra).

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 has submitted, *inter alia*, a copy of the summons and complaint; defendant’s verified answer; a copy of the bill of particulars; copy of the examination before trial of Edgar Thomas; copies of letters/reports of S. Farkas, M.D., and Naunihal Sachdev Singh, M.D.

Dr. S. Farkas, defendant’s examining orthopedist, has set forth in his letter/report dated October 24, 2006 to counsel for defendant that plaintiff is a twenty three year old male involved in a motor vehicle accident on July 22, 2003 as a seat-belted driver who states he sustained injuries to his head, neck, and right shoulder. He was initially treated at St. Catherine’s Hospital emergency room and released. He subsequently treated with physical therapy, chiropractic care, and acupuncture. Dr. Farkas does not set forth the duration of such treatment.

Dr. Farkas set forth quantified ranges of motions upon examination of plaintiff’s cervical spine and right shoulder. At the sensory examination, he sets forth that claimant states feeling more about the left than the right upper extremity circumferentially. It was Dr. Farkas’ clinical impression that plaintiff sustained a cervical sprain and right shoulder sprain, both of which were resolved. He found no orthopedic disability at the time of the examination, and stated claimant may perform usual duties of his occupation and may carry out the activities of daily living without restrictions. He did not comment on causation of the injuries and did not indicate he reviewed any medical records or tests concerning plaintiff’s care and treatment.

Dr. Singh, who performed a neurological examination of plaintiff on October 17, 2006, stated claimant was the seat-belted driver whose vehicle was struck on the driver’s side. He stated claimant was in and out of consciousness until was placed in the ambulance and transported to St. Catherine Hospital emergency room where he offered complaints of trauma to his head, neck, back and right shoulder from the impact. X-rays were taken of his head, neck, back and right shoulder. He was prescribed a cervical collar and pain medication and released. He followed up in a Medical Center and started on a course of physical therapy, chiropractic and acupuncture treatment three times a week for six months. He had been evaluated by a neurologist and underwent MRI’s of his neck and back. He presented to Dr. Singh with complaints of pressure headaches in his forehead once or twice a month, lasting about ten minutes. He had right shoulder pain and sometimes gets numbness of his right arm.

Dr. Singh did not indicate he reviewed any medical records or MRI reports or films, but did review the physical therapy progress notes for the examination. Dr. Singh examined plaintiff’s cervical spine, thoracic spine, lumbar spine, and shoulder joints, and set forth his quantified findings in his report. He indicated there was no neurological disability found, and claimant does not need any household help. He stated claimant is working without restrictions, is able to return to his pre-loss activity levels, including occupational status. It was his impression that Mr. Thomas sustained cervical and lumbar sprains which were resolved and suffers from tension headaches. He did not set forth a diagnosis with

regard to Mr. Thomas' alleged shoulder injury.

Plaintiff testified at his examination before trial on September 7, 2006, that he has been employed for five years at Sports Plus as supervisor of their game floor forty hours a week. He has also worked for one year for SOS Security securing their network operation center forty hours a week. He was out of work for four weeks following the accident. When the accident occurred, his head hit the interior of his car and he lost consciousness initially. At the hospital he felt like his head was splitting down the middle. He also had pain in his shoulder and back. He had x-rays taken and was discharged with a cervical collar which he wore for three weeks following the accident. He followed up with Dr. Jaeger a few days later and was prescribed physical therapy which he received three times a month for a month. He had MRI's of his neck and upper back. He received chiropractic care and treatment at Back to Health Chiropractic from Dr. Pisciotta three times a week through November, 2003. He had two acupuncture treatments to his neck and shoulder. He testified this relieved some of the pain. He still experienced neck pain at the time of the deposition and was using a T.E.N.S. unit once a month or every three months for extreme pain. He experiences pain mostly when it rains, or if he uses his arm for sports or working out. He suffers migraine headaches since the accident, about two to three times a month.

Plaintiff testified he returned to work after one month and was put on light duty for about another month and a half to two months. Then he returned to his normal work duties. He also testified that as a result of the injuries, he cannot work out in the gym, has not returned to the gym since the accident, but did start working out at home. He uses lighter weights and does less repetitions. He has a machine from Sears and does leg curls, arm curls and the butterfly. He does not use the shoulder press. He is unable to play basketball or football as long as he used to as he sometimes has pain if he is reaching. At the time of his examination before trial, he testified he still cannot perform his activities in the gym or participate in sports as he was able to do before the accident. He still experienced neck pain at the time of the deposition and was using a T.E.N.S. unit once a month or every three months for extreme pain. He suffers migraine headaches since the accident, about two to three times a month.

Based upon the foregoing, it is determined that defendants have not demonstrated entitlement to summary judgment on the issue of serious injury. Defendant's examining physicians examined plaintiff more than three years after the accident and not during the statutory period of 180 days following the accident, thus rendering defendant physicians' affidavits insufficient to demonstrate entitlement to summary judgment on the issue of whether plaintiff was unable to substantially perform all of the material acts which constituted his usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident (*Blanchard v Wilcox*, 283 AD2d 821, 725 NYS2d 433 [3rd Dept 2001]).

To prevail on their motion for summary judgment dismissing the complaint, the defendant was required to make a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102(d) (*see, Toure v Avis Rent a Car Sys.*, 98 NY2d 345, 746 NYS2d 865, 774 NE2d 1197; *Gaddy v Eyster*, 79 NY2d 955, 582 NYS2d 99-0, 591 NE 1176). Here, defendant failed to satisfy his burden of establishing, prima facie, that plaintiffs did not sustain a "serious injury" within the meaning of Insurance Law §5102 (d) (*see, Agathe v Tun Chen Wang*, ___ NYS2d ___, 2006 WL 2965205, 2006 NY Slip Op 07434 [NYAD 2 Dept Oct 17, 2006]; *see also, Walters v Papanastassiou*, 31 AD3d 439, 819 NYS2d 48 [2d Dept 2006]).


Since defendants failed to establish their entitlement to judgment as a matter of law as set forth above, the burden has not shifted to plaintiff to establish that there are issues of fact to preclude an order granting summary judgment (CPLR 3212[b]; *Zuckerman v City of New York*, supra), and it is unnecessary to reach the question of whether or not plaintiff has raised a triable issue of fact (*Krayn v Torella*, 833 NYS2d 406, NY Slip Op 03885 [2nd Dept 2007]). However, in reviewing plaintiffs' opposing papers, it is determined plaintiff has raised triable issues of fact to preclude summary judgment on the issue of whether plaintiff was able to substantially perform all of the material acts which constituted his usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident.

In opposing this motion, plaintiff has submitted an attorney's affirmation and the affirmation of Dr. Robert Jaeger, M.D., and copies of his office records.

The office record of Dr. Jaeger contains a letter from Dr. Sansone, Physical Therapist, dated July 30, 2003, which sets forth that Edgar Thomas, upon examination, had 2+ muscle spasm throughout the posterior cervical musculature. He had ROM (range of motion) limitations of 50 degrees of rotation, 45 degrees of side bending, 40 degrees of flexion and 10 degrees extension. Handgrasp decreased 90 lb. on the left and 97 lb. on the right. Dr. Jaeger sets forth he treated Mr. Thomas through August 10, 2003 for the injuries sustained in the accident, referred him to Thomas Sansone, P.T. and Dr. Pisciotta for chiropractic adjustments. The MRI report of Dr. Albert Zilkha, dated September 9, 2003, revealed straightening of the cervical spine consistent with muscular spasm, and there was no evidence of a herniated disc. Based upon the foregoing, and in considering plaintiff's testimony at his examination before trial, plaintiff has demonstrated limitations in range of motion during the 180 day period following the accident and has raised factual issues concerning whether he was able to substantially perform all of the material acts which constituted his usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident.

Accordingly, defendants' motion (001) for an order granting summary judgment on the issue of serious injury is denied.

Dated: JUL 24 2007



J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION