Benton v QRS II, Inc.
2007 NY Slip Op 32417(U)
July 26, 2007
Supreme Court, New York County
Docket Number: 0117173/2005
Judge: Deborah A. Kaplan
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.

SCANNED ON 8/6/2007

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: DEBORAH A. KAPLAN J.S.C.

PART 32

Index Number : 117173/2005

BENTON, STANDISH

vs

QRS II

Sequence Number : 003

SUMMARY JUDGMENT

Cal # 4

NO. ______

N DATE ______

N SEQ. NO. ______

N CAL. NO. ______

The following papers, numbered 1 to ______ were read on this motion to/for ______

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ✓ Yes No

Upon the foregoing papers, it is ordered that this motion and cross motions for summary judgment are decided in accordance with the Decision and Order, attached hereto.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED AUG 06 2007 NEW YORK COUNTY CLERK'S OFFICE

Dated: 7-26-07

Deborah Kaplan J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 22
--X

STANDISH BENTON,

Plaintiff,

INDEX NO. 117173/05

-against-

QRS II, INC., THE SIXTH TORO FAMILY LIMITED PARTNERSHIP d/b/a H&H BAGELS and JUAN A. PIZARRO,

Defendants.

--X

FILED
AUG 06 2007
NEW YORK
COUNTY CLERK'S OFFICE

DEBORAH KAPLAN, J.:

I. Introduction

This is an action for damages for personal injuries allegedly sustained by plaintiff, Standish Benton, on October 6, 2005, when the automobile he was operating was struck in the rear by a vehicle owned by defendant QRS II, Inc. ("QRS") and operated by defendant Juan A. Pizarro ("Pizarro") during the course of his employment by defendant The Sixth Toro Family Limited Partnership d/b/a/ H&H Bagels ("H&H").

QRS and H&H (collectively "the defendants") move pursuant to CPLR 3212 for an order granting summary judgment dismissing all claims and cross-claims against them on the ground that plaintiff did not sustain a "serious injury" as defined by Insurance Law § 5102(d). Pizarro cross-moves for the same relief. Plaintiff cross-moves pursuant to CPLR 3212 for an order granting summary judgment in his favor on the issue of liability.

II. Motion and Cross-Motion for Summary Judgment
on the Issue of "Serious Injury"

To prevail on a motion for summary judgment, the moving party must produce evidentiary proof in admissible form sufficient to show the absence of any material issue of fact and the right to judgment as a matter of law. (See Kosson v Algaze, 84 NY2d 1019 [1995]; Alvarez v Prospect Hospital, 68 NY2d 320 [1986]; Winegrad v New York Univ. Med Ctr., 64 NY2d 851 [1985]; Zuckerman v City of New York, 49 NY2d 557 [1980]). Where, as here, a defendant seeks summary judgment on the threshold "serious injury" issue under the "No-Fault" Law (Insurance Law § 5102[d]), he or she bears the initial burden of establishing the absence of a "serious injury" as a matter of law. That is, "[i]n order to recover damages for non-economic loss related to a personal injury allegedly sustained in a motor vehicle accident, a plaintiff is required to present competent, non-conclusory expert evidence sufficient to support a finding, not only that the alleged injury is 'serious' within the meaning of Insurance Law § 5102(d), but also that the injury was proximately caused by the accident at issue" (Carter v. Full Service, Inc., 29 AD3d 342, 344 [1st Dept 2006], lv den 7 NY3d 709 [2006]). "[T]here must be objective medical evidence which connects the injuries and subjective complaints to the accident" (Sanchez v. Romano, 292 AD2d 202, 203 [1st Dept 2002]. The plaintiff must come forward with objective proof of his or her injury to raise a triable issue. (See Toure v Avis Rent A Car Systems, 98 NY2d 345 [2002]; Dufel v Green, 84 NY2d 795 [1995]). Subjective complaints alone are not sufficient. (See Toure v Avis Rent A Car Systems, supra; Gaddy v Eyler, 79 NY2d 955 [1992]).

Insurance Law § 5102(d) defines serious injury as follows:

> "Serious injury" means 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.

"Only in the event of a 'serious injury' as defined in the statute, can a person initiate suit against the car owner or driver for damages caused by the accident" (Pommells v. Perez, 4 NY3d 566, 571 [2005], citing Insurance Law § 5104[a]).

In support of their motion, defendants first argue that plaintiff testified at his deposition that he stopped receiving medical treatment in July 2006 and had no further treatment since then. They then contend that plaintiff missed less than 90 days of work because he returned to his job as a sanitation worker in January 2006 (plaintiff testified "the end of January"). Defendants have submitted affirmations from their doctors, Dr. William J. Kulak ("Kulak"), an orthopaedic surgeon, and Dr. Allen Rothpearl ("Rothpearl"), a radiologist.

Kulak, who examined plaintiff on September 25, 2006, made the following findings: plaintiff had no objective evidence of an ongoing disability; he had a full range of motion and normal reflexes and alignment; plaintiff's left knee presented no signs of swelling, increased heat or fluid, no symptoms at all laterally, no findings to the patella or femoral condyles and no findings to the ligament or tendon area. Kulak also performed Lachman's, Clarke's and McMurray's tests on plaintiff, all of which were negative (see defendants' exhibit E). Rothpearl reviewed MRIs of plaintiff's lumbar spine, cervical spine and left knee on September 14, 2006,

and concluded that in his left knee plaintiff had compartmental degenerative joint disease which was not associated with the accident of October 6, 2005 (see defendant's exhibit F). Defendants then point to a January 12, 2006 report from plaintiff's treating physician, Dr. Jonathan Gordon, who concluded that plaintiff's left knee showed full range of motion and no instability (see defendants' exhibit H) and to a report by Dr. Stanley Ross regarding his Peer Review performed at the request of an insurer to address the necessity/causality of surgery and other medical services. Dr. Ross' report states that he was unable to establish a direct causal relationship between the accident and the left knee arthroscopic surgery that plaintiff had on November 28, 2005 (see defendants' exhibit I).

"In determining a motion for summary judgment where the issue is whether plaintiff has sustained a serious injury defined by Insurance Law § 5102(d), the defendant bears the initial burden to present competent evidence that the plaintiff has no cause of action" (Brown v. Achy, 9 AD3d 30, 31 [1st Dept 2004]). With the foregoing evidence, defendants have met this initial burden and succeeded in shifting the burden "to plaintiff to produce competent medical evidence creating a genuine factual issue concerning the existence of such a serious injury" (Daisernia v. Thomas, 12 AD3d 998, 999 [3d Dept 2004]) in order to defeat defendants' motion for summary judgment. As discussed below, the court finds that plaintiff has met this burden.

The bill of particulars states that plaintiff suffered serious injury to his left knee which required extensive surgery, and bulges and herniations in various discs with radiculopathy. According to plaintiff, "[a]s a result of the impact ... [his left] knee hit the dashboard ... and it got twisted. [His] body flew forward and flew back[, h]itting the ... head rest" (EBT, p 19, ll 11-18, at movants' exhibit D). He subsequently sought treatment for pain in his knee, back and left side

from Dr. Jonathan Gordon, who performed surgery on plaintiff's left knee (id., pp 31, 33). A couple of weeks after the surgery plaintiff started physical therapy and continued it until his insurance benefits were terminated, and then relied on prescription drugs to relieve the pain (id., pp 34-38). Despite the surgery and treatment he has received, he can no longer dance, go for long walks, play with his grandchildren or even "[w]alk with [his] wife down the street" (id., p 41).

Plaintiff's medical evidence reflects that he suffered the following injuries: internal derangement, lateral and medial tears to the meniscus in the left knee, status post-operative arthroscopy, November 28, 2005; patellofemoral chondromalacia, left knee; synovitis, left knee; traumatic patellofemoral chondromalacia to the left knee; thoracic disc herniation, T1-T2, with impingement cord deformity and radiculopathy and cervical derangement with radiculopathy; annular disc bulge, L2-L3 impinging upon the left L2 nerve root with radiculopathy; annular disc bulge, L3-L4 with disc material extending into the neural foramen bilaterally impinging the L3 nerve root with radiculopathy; annular disc bulge, L5-S1 impinging upon the left L5 and S1 nerve roots with radiculopathy; and chronic pain syndrome involving the cervical, thoracic and lumbar spine and left knee (see Cooper opposing affirmation, Goldstein reports at exhibits C, pp 5-6, and D, pp 9-10; Beth Israel records at exhibit E). An October 19, 2005, MRI of plaintiff's left knee reflected "a tear of the posterior horn and body of the medial meniscus and partial tear of the anterior cruciate ligament" (see id., exhibit B, p 4; see also exhibit A to Cooper reply affirmation).

Furthermore, Kulak, defendants' own doctor, states that his physical examination of plaintiff revealed "[e]xtension is limited to 5 degrees with the normal being 55 to 60 degrees, left rotation limited to 20 degrees and right rotation limited to 25 degrees with the normal for this age

group being 75 to 80 degrees. Left tilt is 5 degrees and right tilt is essentially 0, with the normal being 40 degrees" (defendants' exhibit E, p 3). Although Kulak attempts to trivialize these findings as "subjective" they are consistent with the findings of plaintiff's doctor, Robert S. Goldstein (see Cooper opposing affirmation, exhibit B, pp 5-6).

"Evidence of range of motion limitations is sufficient to defeat summary judgment" (Brown v. Achy, *supra*, 9 AD3d 30, 32). Plaintiff also raised issues of fact as to whether he sustained a 'serious injury' with his doctor's opinion that the tears in the meniscus of his left knee were sustained as a result of the accident (Engles v. Claude, 38 AD3d 357 [1st Dept 2007], citing Noriega v. Sauerhaft, 5 AD3d 121 [1st Dept 2004]), and that plaintiff's radiculopathy was permanent and caused by the accident (see Barragan v. Granelli, 13 Misc 3d 137(A) [App Term, 1st Dept 2006]). To the extent that there are inconsistencies in the various medical affidavits, such inconsistencies merely raise more issues of fact to be determined by the jury (Kawaski v. Hertz Corporation, 199 AD2d 46 [1st Dept 1993]; Cavallaro v. Baker, 187 AD2d 976 [4th Dept 1992]).

III. Cross-Motion for Summary Judgment on the Issue of Liability

Plaintiff's cross-motion for partial summary judgment on the issue of liability is based on the fact that he was rear-ended by Pizarro while he was stopped in traffic at a red light.

The driver of a motor vehicle is expected to drive at a safe rate of speed, taking into account weather and road conditions, and to maintain a safe distance from the vehicle in front of him (see Vehicle and Traffic Law §§1129[a];1180[a]; Mitchell v Gonzalez, 269 AD2d 250 [1st

Dept. 2000]). "[T]his rule imposes on [drivers] a duty to be aware of traffic conditions, including vehicle stoppages." (Johnson v Philips, 261 AD2d 269, 271 [1st Dept. 1999]). "The law is well settled that a rear-end collision with a stopped vehicle creates a presumption that the operator of the rear vehicle was negligent. Thus, the injured occupant of the front vehicle is entitled to summary judgment on liability unless the driver of the second vehicle provides a non-negligent explanation for the collision (Somers v. Condlin, 39 AD3d 289 [1st Dept 2007]; Ferguson v. Honda Lease Trust, 34 AD3d 356 [1st Dept 2006]; Woodley v. Ramirez, 25 AD3d 451, 452 [1st Dept 2006]). The non-negligent reason proffered by defendants is that the brakes did not work when Pizarro tried to apply them.

Plaintiff argues that such excuse is unavailable to defendants because by an order of this court (Tingling, J.), dated January 29, 2007, they have been precluded from offering any evidence on that issue. Defendants counter that since oral testimony is not specifically mentioned, Judge Tingling's order does not preclude Pizarro's pre-trial testimony, which in itself suffices to raise a triable issue of fact. In fact, plaintiff's reading of the decision (mot seq. no. 001) is inaccurate. While the court clearly had the power to resolve the entire issue in plaintiff's favor (CPLR 3126[1]), it chose not to do so and instead punished defendants' discovery infractions with the less stringent alternative of precluding defendants from using specific documents as evidence (CPLR 3126[2]):

> [D]efendants are hereby precluded from using any pre-accident or post-accident inspections, testing, examinations, repair, service and or maintenance records and documents including any of the aforementioned relative to the brakes and braking system of the defendants' 1997 Suburban motor vehicle involved in the accident of October 6, 2005 which is the subject of the suit herein for a period of six months prior and post accident. The basis of same is clear in the moving papers. (exhibit L to cross-moving papers).

Nevertheless, defendants' accurate reading of the order is unavailing to them, since they cannot point to any testimony by Pizarro in which he specifically says that the brakes failed or that the van had any mechanical problem. The testimony relied on by defendants (exhibit A to Martin opposing affirmation) merely states that he applied the brakes "slowly" (p 49, ll 13-15) but his car did not stop in the three or four seconds between the time he applied the brakes and the cars collided (p 44, ll 12-18). Only inspired extrapolation could equate this with mechanical failure, and "[r]ank speculation is no substitute for evidentiary proof in admissible form that is required to establish the existence of a material issue of fact" so as to defeat a motion for summary judgment (Tungsupong v. Bronx-Lebanon Hospital Center, 213 AD2d 236, 237 [1st Dept 1995]). In any event, Pizarro's deposition is unsigned. An unsigned deposition does not constitute evidence in admissible form and will not suffice as the requisite proof to defeat a motion for summary judgment (see CPLR 3116; McDonald v Mauss, AD3d , 2007 WL 853030 [2nd Dept. March 20, 2007]; Reilly v Newireen Associates, 303 AD2d 214 [1st Dept. 2003]; Horowitz v. Kevah Konner, Inc., 67 AD2d 38, 41 [1st Dept 1979]; Palumbo v Innovative Communications Concepts, Inc., 175 Misc 2d 156 [Sup Ct, NY County 1997]).

IV. Conclusion

Accordingly, defendants' motion pursuant to CPLR 3212 for summary judgment based on plaintiff's lack of a "serious injury" as defined by Insurance Law § 5102(d) is denied in its entirety.

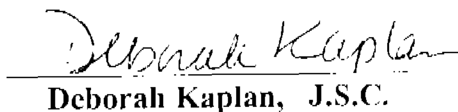
Pizarro's cross-motion for the same relief is also denied in its entirety.

Plaintiff's cross-motion pursuant to CPLR 3212 for an order granting summary judgment in his favor on the issue of liability is granted.

The parties are directed to appear for a pre-trial conference on September 6, 2007, at 9:30 a.m. in Part 22, 80 Centre Street, Room 136.

This constitutes the Decision and Order of the Court.

DATED: July 26, 2007



Deborah Kaplan, J.S.C.

DEBORAH A. KAPLAN
J.S.C.

FILED
AUG 06 2007
NEW YORK
COUNTY CLERK'S OFFICE