

Basilone v Fucito

2007 NY Slip Op 32991(U)

September 4, 2007

Supreme Court, Suffolk County

Docket Number: 0016438/2005

Judge: Robert W. Doyle

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INDEX No. 05-16438
CAL. No. 07-00787-MV

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

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 6-28-07
ADJ. DATE 8-10-07
Mot. Seq. #003 - MD
004 - XMD
005 - XMG

| | | |
|---|---|--|
| -----X | | SIBEN & SIBEN, LLP |
| STEPHANIE M. BASILONE, an infant by her | : | Attorneys for Plaintiffs |
| mother and natural guardian, LISA D. BASILONE | : | 90 East Main Street |
| and LISA D. BASILONE, individually, | : | Bay Shore, New York 11706 |
| | : | |
| Plaintiff, | : | JOHN P. HUMPHREYS, ESQ. |
| | : | Attorney for Defendant Fucito |
| - against - | : | 3 Huntington Quadrangle, P.O. Box 9028 |
| | : | Melville, New York 11747 |
| JONATHAN PAUL FUCITO and C.H. | : | |
| CHAPELLE, III, | : | PICCIANO & SCAHILL, P.C. |
| | : | Attorneys for Defendant Chappelle |
| Defendants. | : | 900 Merchants Concourse, Suite 310 |
| -----X | | Westbury, New York 11590 |

Upon the following papers numbered 1 to 62 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 18 ; Notice of Cross Motion and supporting papers 19-29; 30-45 ; Answering Affidavits and supporting papers 46-58 ; Replying Affidavits and supporting papers 59-60; 61-62 ; Other ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that this motion (003) by defendant Jonathan Paul Fucito pursuant to CPLR 3212 and Insurance Law §5102(d) for summary judgment dismissing the complaint on the issue that plaintiff's injuries do not meet the serious injury threshold, is denied.

ORDERED that this motion (004) by defendant C.H. Chappelle, III pursuant to CPLR 3212 and Insurance Law §5102(d) for summary judgment dismissing the complaint on the issue that plaintiff's injuries do not meet the serious injury threshold, is denied.

ORDERED that this motion (005) by plaintiff Lisa D. Basilone, individually and on behalf of the infant, Stephanie M. Basilone, pursuant to CPLR 3212 and Insurance Law §5102(d) and §5104 for summary judgment on the issue that plaintiff's injuries do meet the serious injury threshold, is granted.

This is an action sounding in negligence arising out of a two-vehicle accident which occurred on March 19, 2005 on Commack Road at or near the intersection with Route 27 Service Road, Town of Islip, County of Suffolk, State of New York. The infant plaintiff, Stephanie M. Basilone, was riding as a

Basilone v Fucito
Index No. 05-16438
Page No. 2

passenger in the vehicle operated by defendant C.H. Chappelle, III (hereinafter Chappelle), when it became involved in a front-end collision with the vehicle operated by defendant Jonathan Paul Fucito. The complaint of this action sets forth a cause of action sounding in negligence on behalf of the infant plaintiff and a derivative cause of action on behalf of Lisa Basilone as mother of the child.

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

It is set forth in plaintiff's bill of particulars that the infant plaintiff, Stephanie Basilone, born July 15, 1988, sustained, inter alia, a depressed fracture of the lateral tibial plateau, left knee; left knee contusion; internal derangement of the left knee; laceration to the forehead requiring multiple sutures with resultant scarring and disfigurement; capsulitis of the left temporomandibular joint; disc bulges at L1-2, L2-3, L3-4, and L5-S1 with encroachment upon the ventral aspect of the thecal sac at those levels; lumbar myofascial derangement, sciatica; lumbar spine sprain; lumbar radiculopathy; disc bulge at T-10-11; disc bulges at C3-4, C4-5, C5-6 with encroachment upon the ventral aspect of the thecal sac at those levels; cervical spine sprain; cervical radiculopathy; cervical myofascial derangement; and upper chest wall contusion.

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 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.”

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 [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 (003) defendant Fucito has submitted, *inter alia*, a copy of the summons and complaint; defendant’s verified answer; a copy of the bill of particulars; uncertified x-ray report of Southside Hospital; unsworn letter and medical record of Harshad Bhatt, M.D. of Liberty Orthopedics; range of motion report; and letters/reports of Kuldip K. Sachdev, M.D. of January 17, 2006, S. Farkas, M.D. of November 2, 2006, Edward Weiland, M.D. of October 24, 2006, and Stephen Mendelsohn, M.D. of January 4, 20007.

In support of motion (004) defendant Chappelle has submitted, *inter alia*, a copy of the summons and complaint; defendant’s verified answer; a copy of the bill of particulars; letters/reports of Kuldip K. Sachdev, M.D. of January 17, 2006, S. Farkas, M.D. of November 2, 2006, Edward Weiland, M.D. of October 24, 2006, and Stephen Mendelsohn, M.D. of January 4, 20007; and a copy of the transcript of the examination before trial of Stephanie Basilone.

In reviewing defendant’s submissions, it is determined that defendants Fucito and Chappelle have failed to demonstrate prima facie entitlement to summary judgment dismissing the complaint on the issue of serious injury. The letter/report of November 2, 2006, submitted by both defendants, prepared by Dr. Farkas, M.D., an orthopedist, sets forth that plaintiff has a clinically healed left tibial plateau fracture for which she was treated with a leg brace for six weeks. Dr. Farkas states in his report that he reviewed the MRI of plaintiff’s left knee. The moving defendants have failed to submit this MRI report of plaintiff’s left knee for the court’s review, but did submit the radiograph report in which Dr. Mendelsohn opined

there was no fracture of the knee. Dr. Farkas' review of the MRI and his report, confirms the left tibial fracture. Dr. Farkas made no clinical finding of disability at the time of the examination. He notes plaintiff sustained a laceration to her forehead, but does not comment on whether or not there is scarring. Dr. Sachdev, M.D., a neurologist, indicates in his report submitted by defendants, that plaintiff also sustained a laceration to her left leg which received six sutures to close it. He does not comment on scarring.

Insurance Law §5102 lists significant disfigurement and fracture in the definition of serious injury. Based upon the foregoing, it is determined that the fracture of plaintiff's left tibial plateau constitutes a serious injury as defined by Insurance Law §5102. Therefore, defendants' motions must fail on that injury alone. There is a factual issue concerning whether or not the laceration to plaintiff's forehead or left leg is considered a significant disfigurement as there has been no medical testimony submitted on this issue by defendants, precluding summary judgment to defendants.

Defendants have additionally submitted the letter/reports of Dr. Mendelsohn, M.D. who states he is in partial agreement with the interpretation provided by Dr. John Himelfarb insofar as neither of them finds evidence of a focal cervical disc herniation or focal lumbar disc herniation. However, Dr. Mendelsohn states he feels all of the multiple bulges Dr. Himelfarb is reporting in plaintiff's cervical and lumbar spine represent patient's normal developmental appearance. Dr. Mendelsohn does not dispute their existence, only that this is the patient's normal developmental appearance. This opinion is conclusory and does not set forth a basis set forth upon which this opinion by Dr. Mendelsohn rests. Accordingly, defendants have failed to demonstrate prima facie entitlement to summary judgment on the issue of whether plaintiff sustained bulging discs claimed in her bill of particulars as a result of the motor vehicle accident.

Plaintiff testified at her examination before trial on July 13, 2006, that prior to this accident she jogged, but is no longer able to do so because of the pain in her back and left leg. She also experiences pain when she bends down to do laundry or to carry heavy things. She cannot cross her legs for too long, and cannot stand too long as it starts to hurt. She complains of headaches still, describing them as migraines, wherein she cannot look at a light and she has to lay down. She did not previously sustain any injuries to her head, neck, back and left knee prior to this accident and was not being treated for any prior conditions. She was unable to participate in gym at school from the date of the accident through the remainder of the school year. Based upon the foregoing, defendants have not demonstrated plaintiff was able to substantially perform all of the material acts which constituted her usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident. Defendants' examining physicians did not examine plaintiff 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 her 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 Eyler*, 79 NY2d 955, 582 NYS2d 99-0, 591 NE 1176). Here, defendants failed to satisfy the burden of establishing, prima facie, that plaintiff 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]).

Accordingly, motions (003) and (004) by defendants for summary judgment on the issue that plaintiff did not sustain a serious injury pursuant to Insurance Law §5102 are denied.

In motion (005), plaintiffs seek summary judgment on the issue that plaintiff has met the threshold limits set by New York State Insurance Law §§5102 and 5104. In support of this motion, plaintiff has submitted, inter alia, affirmations and MRI reports of Dr. John Himelfarb for plaintiff’s left knee, cervical and lumbar spine; affirmations and reports of Dr. Kerin Hausknecht, M.D., Dr. Harshad Bhatt, Dr. Luz Del Carmen Cespedes; affirmed reports of Dr. August DaSilva, M.D., and affirmed independent medical reports of Dr. Farkas, and Dr. Philip Lewis; and a photograph of the scar on plaintiff’s forehead.

Dr. Himelfarb, M.D. indicates in his report of April 11, 2005 that the MRI performed on plaintiff’s cervical spine reveals plaintiff has straightening of the curvature of the cervical spine with loss of lordosis, posterior disc bulges at C3-4, C4-5, and C5-6, all encroaching upon the anterior epidural fat and ventral aspect of the thecal sac and lateral recesses bilaterally. Dr. Himelfarb, M.D. indicates in his report of April 11, 2005 that the MRI performed on plaintiff’s lumbar spine reveals plaintiff has a mild right convex thoracolumbar scoliosis, posterior disc bulge at the L1-2 level favoring the right side and encroaching upon the ventral aspect of the thecal sac and lateral recesses bilaterally with the right side greater than the left; posterior disc bulges at L2-3, and L3-4 encroaching upon the ventral aspect of the thecal sac and lateral recesses bilaterally; and a posterior disc bulge at the T10-11 level encroaching upon the ventral aspect of the thecal sac and lateral recesses bilaterally, abutting the ventral aspect of the cord without definite underlying signal changes.

Dr. Kerin Hausknecht, M.D., a diplomat of the American Board of psychiatry and neurology, examined plaintiff and issued a report dated April 6, 2005. His examination of plaintiff reveals a scar along the top of her forehead in the frontal region of the skull near the hairline, however, Dr. Hausknecht does not set forth the measurements or appearance of the scar. Reflexes at both knees were found to be slightly increased, but depressed at the ankles. He found a 15-20% painful restriction of mobility on cervical rotation in both directions with a 20% limitation of mobility on cervical flexion. He found mild loss of the lumbar lordosis with a 25 % limitation of lumbar flexion and a 15% loss on the extension. Dr. Hausknecht indicates the MRI of April 1, 2005 of plaintiff’s left knee reveals a depressed lateral tibial plateau fracture with a large amount of surrounding edema and joint effusion. Plaintiff was referred to a plastic surgeon for the laceration/scar on her forehead, and to an orthopedist for treatment of the knee fracture.

Dr. Hausknecht, M.D.'s report of May 27, 2005 indicates plaintiff has been using a left knee brace to ambulate and has been attending physical therapy and rehabilitative treatment with Dr. Hernandez. Upon examination, he found tenderness with loss of mobility on cervical rotation in both directions and on cervical flexion. Examination of the lumbar regions revealed tenderness with slight spasm from L3 to S1, with moderated limitation of mobility on lumbar flexion and extension. Straight leg raise testing was weakly positive on the right side. Dr. Hausknecht, M.D. noted the findings set forth above in the MRI reports of plaintiff's lumbar and cervical spine, and due to the diagnosis of bulging discs, assessed her with cervical and lumbar spine intervertebral disc derangement and recommended physical therapy and rehabilitative treatment for the injuries to her neck, back and knee.

On July 22, 2005, Dr. Hausknecht, M.D. notes a "disfiguring scar" on plaintiff's forehead and multiple bulging discs in plaintiff's cervical and lumbar spines with slow improvement in pain in the neck, back and knee. Mild tenderness was still noted in the left TMJ region. As previously advised at her prior visits, she was again instructed to restrict repetitive and heavy lifting and exertional activities the best she can.

Plaintiff was again examined on September 16, 2005 by Dr. Hausknecht, at which time she was found to have a 15-20% loss of mobility on lumbar flexion and a 15-20% loss of extension. Mild to moderate restriction of mobility was found on cervical rotation in both directions and on cervical flexion. She has been undergoing chiropractic treatment since July, 2005.

On November 4, 2005, plaintiff was found to have recurrent back pain traveling into the buttocks region, with stiffness of the back and difficulty bending, sitting and walking for long periods of time. Examination of the cervical spine revealed a 20-25% loss of mobility on rotation in both directions. Thoraco-lumbar tenderness was found with some trigger points at L4-5 and L5-S, with mild spasm in the lower lumbar paraspinal areas. Dr. Hausknecht stated she might benefit from a trial of trigger point injections and stated her prognosis for full functional recovery, at this point, remains somewhat guarded.

The report of Dr. Bhatt dated March 24, 2005 reveals quantified limited range of motion, right and left, on lumbar and cervical flexion, extension, lateral flexion and rotation, and range of motion of the left knee on flexion and extension. She was found to have a partial disability, with findings causally related to the accident of March 19, 2005. The follow up reports of Dr. Bhatt of April 7, 2005, April 12, 2005, and May 24, 2005, make similar finding of a partial disability causally related to the accident of March 19, 2005.

Dr. Cespedes found plaintiff to be partially disabled with a mild disability of 25-49% on March 28, 2005. Orthopedic consultation was recommended and anti-inflammatory medication was prescribed.

Plaintiff submitted the report of Dr. Farkas, M.D. referred to in motions (003) and (004) which set forth the clinically healed left tibial plateau fracture. Dr. Farkas' examination on November 2, 2005 did not reveal any limitation in range of motion of the cervical or lumbar spine or of the left knee. He did not set forth any findings based upon the MRI reports of the lumbar spine, cervical spine, chest or brain and did not comment on them. He did state that he found no orthopedic impairment based upon the physical examination at this time and did not find plaintiff needed physical therapy or orthopedic treatment at this time. He does opine that it appears that plaintiff's original reported injuries are causally related to the

Basilone v Fucito
 Index No. 05-16438
 Page No. 7

motor vehicle accident.

Plaintiff also submitted the report of Dr. Lewis, D.O. dated April 19, 2005 who performed a physical examination of plaintiff but did not quantify his findings with regard to range of motion of her knee or any part of her body. He diagnosed her with a forehead laceration, fracture of the left fibular head and left knee sprain. He found her mildly disabled but found her capable of attending school, but restricted from participating in gym. He stated she is capable of performing activities of daily living, but recommends continued physical therapy twice a week for six weeks. He states no further testing or medical equipment is necessary. He further opines that the injuries sustained are causally related to the accident.

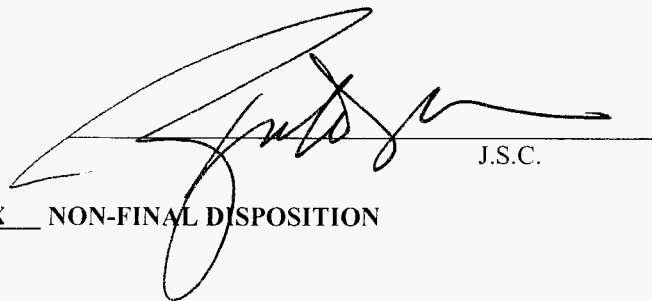
Dr. Lewis' comment that plaintiff is capable of performing activities of daily living is inconsistent with his finding that she be restricted from participating in gym at school, his further finding that she is mildly disabled, and his recommendation that she continue physical therapy for an additional six weeks.

Based upon the foregoing, it is determined that plaintiff has demonstrated prima facie entitlement to summary judgment in that she suffered a laceration causing "disfiguring scarring" to her forehead, multiple herniated cervical and lumbar discs as set forth above, and a fracture or medically determined injury or impairment of a non-permanent nature which prevented her from performing substantially all of the material acts which constitute her 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.

Defendant Fucito has not submitted opposition to plaintiff's cross motion, but has submitted a Reply which merely sets forth defendant Fucito has demonstrated there are no triable issues of fact which preclude summary judgment being granted to defendant Fucito. Defendant Chappelle has submitted a Reply/Affirmation in opposition to plaintiff's cross motion, but has submitted no new evidence for this court to review. Therefore, this court searches the records submitted in motions (003) and (004) and concludes defendants have raised no triable issues of fact to preclude summary judgment in plaintiff's favor on the issue that plaintiff has sustained serious injury within the meaning of Insurance Law §5102.

Accordingly, motion (005) is granted on the issue that plaintiff has sustained serious injury within the meaning of Insurance Law §5102.

Dated: SEP 04 2007



 J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION