

Jantzen v Genoa

2007 NY Slip Op 33052(U)

September 18, 2007

Supreme Court, Suffolk County

Docket Number: 0007243/2005

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 6-28-07
ADJ. DATE 8-27-07
Mot. Seq. # 001 - MG; CASEDISP
002 - XMD

-----X		STEVEN COHN, P.C.
JENNIFER K. JANTZEN, an infant by her mother :	:	Attorneys for Plaintiffs
and natural guardian, SUZANNE JANTZEN, and :	:	One Old Country Road, Suite 420
SUZANNE JANTZEN, individually, :	:	Carle Place, New York 11514
:	:	
Plaintiffs, :	:	ABAMONT & ASSOCIATES
- against - :	:	Attorneys for Plaintiff on Counterclaim
:	:	200 Garden City Plaza, Suite 400
:	:	Garden City, New York 1153-9250
ILEEN B. GENOA and MARK GENOA, :	:	
:	:	JOHN P. HUMPHREYS, ESQ.
:	:	Attorneys for Defendants
Defendants. :	:	3 Huntington Quadrangle, P.O. Box 9028
-----X		Melville, New York 11747

Upon the following papers numbered 1 to 32 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-15; Notice of Cross Motion and supporting papers 16-26; Answering Affidavits and supporting papers 27-32; Replying Affidavits and supporting papers ___; Other ___; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that this motion (001) by defendants, Ileen B. Genoa and Mark Genoa, pursuant to CPLR 3212 and Insurance Law §5102(d) for summary judgment dismissing the complaint of Suzanne Jantzen and the infant plaintiff, Jennifer Jantzen on the basis that plaintiffs' injuries do not meet the serious injury threshold, is granted and the complaint is dismissed in its entirety with prejudice; and it is further

ORDERED that this motion (002) by the infant plaintiff on the counterclaim, Jennifer Jantzen, pursuant to CPLR 3212 granting summary judgment on liability on the basis the infant plaintiff bears no liability, has been rendered academic by dismissal of the complaint and is denied as moot.

This is an action sounding in negligence arising out of an automobile accident which occurred on January 13, 2005, on Hemingway Drive, 300 feet east of its intersection with Faulkner Drive, Town of Huntington, County of Suffolk, New York. The infant plaintiff, Jennifer Jantzen, was the operator of the vehicle owned by her mother, Suzanne Jantzen. Ileen Genoa was the operator of a vehicle owned by Mark Genoa.

As a result of this accident, the infant plaintiff, Jennifer Jantzen, claims to have sustained personal injury, including, *inter alia*, cervical sprain-strain with pain, tenderness, stiffness, and loss of range of motion; lumbosacral sprain-strain with pain, tenderness, stiffness, and loss of range of motion; and bilateral contusions of the shoulders. Suzanne Jantzen claims to have sustained chest pain, headaches, contusions to the chin, chest, ribs, trauma to chest, chipped tooth, temporomandibular joint dysfunction syndrome, lumbar sprain/strain and loss of range of motion of the lumbar spine.

In motion (001), Ileen B. Genoa and Mark Genoa, seek summary judgment dismissing the complaint on the issue that Suzanne Jantzen and the infant plaintiff, Jennifer Jantzen, did not sustain serious injury within the meaning of Insurance Law §5102(d). In support of this motion, defendants have submitted an attorney's affirmation; a copy of the pleadings, answer, verified answer to counterclaim; a copy of the verified bill of particulars; uncertified copy of a medical record from Island Musculoskeletal Care, MRI report of the cervical spine of March 7, 2005, and MRI report the lumbar spine of March 10, 2005, of Jennifer Jantzen; MRI report the thoracic spine of March 10, 2005, of Suzanne Jantzen; sworn reports of Dr. John Killian, orthopedist from August 24, 2006 and August 25, 2006 regarding both plaintiffs, Dr. John Keleman, neurologist from August 17, 2006 regarding Jennifer Jantzen and from August 25, 2006 regarding Suzanne Jantzen, and Dr. Esposito, oral and maxillofacial surgeon for Suzanne Jantzen dated October 6, 2006.

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 1979]) 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 only be granted 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]).

Insurance Law §5102(d) provides in pertinent part that "[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).

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

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]).

The MRI’s of Jennifer Jantzen’s cervical and lumbar spines indicated there were no bulging or herniated discs. The cervical MRI, however, did demonstrate straightening of the cervical lordosis. Jennifer Jantzen was examined by Dr. Killian, M.D., an orthopedist, on August 15, 2006, on behalf of defendants. He indicated that Ms. Jantzen complained of pain involving her entire back, but more in the midline, that her back cracks, that the pain is aggravated by sitting straight, and for pain relief she takes Motrin and goes for massage treatment. He quantified full range of motion of the cervical spine and lumbar spine, with no muscle restriction or muscle spasm, and found no positive objective physical findings to confirm her “subjective” complaints of pain. Dr. Killian further states that she has fully recovered from any alleged injuries to her back, requires no further orthopedic evaluation, follow up or treatment, and is capable of working at her normal capacity and performing all her usual activities of daily living without limitations due to any problems caused by injuries from this accident.

Dr. Keleman performed a neurological examination on Jennifer Jantzen on August 17, 2006. At the time of the examination, she complained of low back stiffness which is helped by twisting and cracking herself. She also complained of neck pain. Upon examination, he found no palpable paracervical or lumbar muscle spasm and set forth that various cranial and motor nerve examinations were either unremarkable, intact, or normal, and that motor examination was normal. His impression was that of status post cervical and lumbar strain. He found no evidence of neurological abnormality or disability from a neurological perspective.

Based upon the foregoing, defendants have demonstrated prima facie entitlement to summary judgment on the issue that Jennifer Jantzen did not sustain a serious injury within the meaning of Insurance Law §5102.

John Killian, M.D. performed an orthopedic examination of Suzanne Jantzen on August 15, 2006. He indicates that Suzanne Jantzen was working as the owner of a Dunkin Donut franchise, and although she continued working after the accident, she had to limit the type of work she did due to her injuries. Following the accident, she was taken to the emergency department at North Shore University Hospital at Plainview where she complained of right sided chest pain and that she hit her head. Physical examination at that time revealed a right parietal hematoma. Thereafter, she continued to experience pain in her back extending into the right thoracic rib cage with some restriction of motion. She now goes to a personal trainer for exercises for her back as she has pain in her low back radiating to the left thigh to the back of the knee. Dr. Killian's report indicates there are no records that suggest she sustained an injury to her back or that she had similar complaints, nor were any x-rays or diagnostic studies performed on her back. His examination revealed full range of motion of the cervical and thoracolumbar spines. He sets forth that her subjective complaints were not accompanied by positive objective findings to confirm those complaints. The MRI of Suzanne Jantzen's thoracic spine revealed no herniated or bulging discs. Dr. Killian found she has no impairment or disability from problems with her low back or thoracic spine, requires no further orthopedic evaluation, follow-up or treatment, and is capable of working at her normal capacity and performing all of her usual activities of daily living without limitations.

The examination report of October 6, 2006 by Dr. John Esposito, an oral and maxillofacial surgeon, indicates Suzanne Jantzen fractured an upper right tooth and a mobile bridge on the lower right side at the time of the accident. Both were repaired, but she still complains of soreness of the jaw upon chewing. He reviewed no dental records for the examination, and upon examination, found that auscultation of the temporal-mandibular joint was positive for significant crepitus upon opening and closing. His diagnoses was that of blunt trauma to the jaw and teeth resulting in apparent fracture of the maxillary right tooth and loosening of the mandibular right bridge; concomitant myofascial syndrome right masseter muscle area, internal derangement of the left TMJ which he feels is preexisting due to the amount of crepitus that can be heard and lack of symptoms in the TMJ. He states the only residual treatment would be the making of a bite guard appliance for the patient's jaw symptoms. This, he states, is causally related to the accident by virtue of patient history, documentation and physical examination. He states the prognosis seems excellent and that the minor myofascial symptoms can be alleviated by the judicious use of a bite guard appliance, especially for sleep along with three months of continued care for adjusting at one visit per two weeks to end all of her necessary dental treatment. In his January 4, 2007 addendum to the report of October 6, 2006, Dr. Esposito indicates he is now in possession of additional dental notes, and the note of March 1, 2005 indicates a loose crown on tooth #31 with decay at the gum line which requires replacement of the fixed bridge from teeth #27 to #31. He states this could constitute a preexisting condition and therefore the mandibular right bridge replacement is not causally related to the trauma. Addressing the question of a fractured maxillary right tooth, he states he drew the conclusion based on patient history only. Upon review of documentation, the only allusion to an injured tooth was tooth #3 which is the maxillary right first molar which was diagnosed by her dentist in 2004 which was prior to this accident.

Based upon the foregoing, defendants have demonstrated prima facie entitlement to summary judgment on the issue that Suzanne Jantzen did not sustain a serious injury within the meaning of Insurance Law §5102.

In opposing motion (001), plaintiffs have provided an attorney's affirmation; copies of the transcripts of the examinations before trial of Jennifer Jantzen and Suzanne Jantzen; and copies of the bill of particulars and verified supplemental bill of particulars.

Jennifer Jantzen testified that immediately following the accident, she began to experience pain in her back, mostly lower and mid back. She had no prior injuries or treatment to her back. She presented to North Shore Hospital emergency room for examination and was released. About a week later she presented to Dr. Terara, a chiropractor, with complaints of pain in her mid back, lower back and shoulders. The pain in her shoulders developed a little after the accident. She treated with Dr. Terara twice a week for about two months, then less frequently and then stopped after a month or two. Those treatments consisted of someone from his office massaging her back, heat applications, and exercises. She missed one day of classes from school and did not miss any physical education classes. She had been taking Yoga classes prior to the accident but stopped because of pain in her back.

Jennifer Jantzen has not demonstrated by the submission of competent proof that a prima facie case that such serious injury exists (*Gaddy v Eycler*, supra). Jennifer Jantzen has not submitted the affidavits or reports of any treating physicians in opposing defendants motion to raise a factual issue on the issue of serious injury. There has been no competent medical evidence submitted to demonstrate she suffered a serious injury within the meaning of Insurance Law §5102.

Accordingly, that part of motion (001) wherein defendants seek dismissal of the complaint of Jennifer Jantzen is granted.

Suzanne Jantzen testified at her examination before trial that she injured her head, chin, chest and back. She had no prior injuries or treatment to these parts of her body prior to the accident. She was treated at the North Shore Hospital emergency department after the accident and presented with complaints of injury to her head and chest. She did not complain about her chin, but the next day realized she had a big bruise on her chin and had chipped one of the molars on the right side. A few weeks later the dentist realized her bridge was loose from the impact. She had to have a crown placed on the chipped tooth and had to have a new bridge made. About a week after the accident she went to Island Musculoskeletal for pain in her chest and lower back and was prescribed physical therapy and Naprosyn for pain. She started the physical therapy two or three times a week for about a month or two, and then decreased to once a week for about another month or two. She had been receiving electrical stimulation and exercises, but stated it really did not help. She started having headaches which she had been previously treated with Fiorinal. She also went to a personal trainer for strength exercises in her back. She stated that she owned fourteen Dunkin Donuts, and would go to the stores to make sure they were running properly. She was responsible for operations and training. She did not miss time from work, but after the accident she could not lift things and could not push down even to make a carmel latte for three weeks. She could not help put away deliveries, mopping, or cleaning for three weeks. She was unable to do heavy lifting was "Maybe even longer." At the time of her deposition, she stated she still did not have her strength back and was still having problems with her jaw getting stuck in the middle of the night and

her lower back, but she was not treating with any doctors or health care providers.

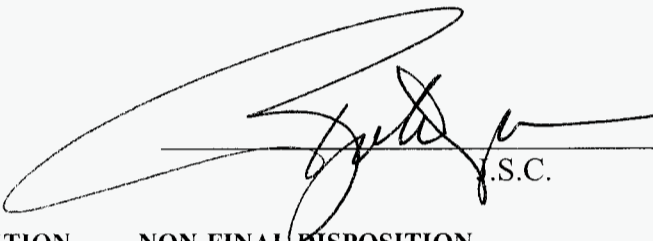
Suzanne Jantzen has not demonstrated by the submission of competent proof that a prima facie case of serious injury exists (*Gaddy v Eyler*, supra) or that there are factual issues in this regard. Suzanne Jantzen has not submitted the affidavits or reports of any treating physicians in opposing defendants motion, and there is no competent evidence to demonstrate she suffered a serious injury within the meaning of Insurance Law §5102.

Accordingly, that part of motion (001) wherein defendants seek dismissal of the complaint of Suzanne Jantzen is granted and that part of the complaint is dismissed.

In cross motion (002), the infant plaintiff, Jennifer Jantzen, seeks summary judgment dismissing the counterclaim of defendants on the basis that she bears no liability for the accident. In support of this motion, the infant plaintiff has submitted copies of the pleadings; answer with a counterclaim against Jennifer Jantzen for injuries to her mother, Suzanne Jantzen; answer to the counterclaim; copies of the transcripts of the examinations before trial of Jennifer Jantzen, Suzanne Jantzen, Ileen Genoa and non-party Charles Hirsch.

In light of this court granting dismissal of the complaint on the issue of serious injury, motion (002) has been rendered academic and is denied as moot.

Dated: SEP 18 2007


_____.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION