Fuchs v Johnson
2007 NY Slip Op 33578(U)
October 31, 2007
Supreme Court, Wayne County
Docket Number: 0056740/2006
Judge: John B. Nesbitt
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STATE OF NEW YORK
SUPREME COURT COUNTY OF WAYNE

ORIGINAL

DEBRA S. FUCHS and STEVEN W. FUCHS, Individually and as Husband and Wife,

Plaintiffs,

-vs-

Index No. ~~5670~~ 56740 2006

JAMESON A. JOHNSON and ERIC A. JOHNSON,

Defendants.

APPEARANCES: EGGER & LEEGANT
(Jan P. Egger, Esq., of counsel)
Attorney for the Plaintiffs

THE BARNES FIRM, P.C.
(Elizabeth C. Clarke, Esq., of counsel)
Attorney for Defendants

MEMORANDUM - DECISION

John B. Nesbitt, J.

I. Introduction.

At issue and decided herein are the merits of summary judgment motions brought by both the plaintiffs and the defendants.[1] For the reasons that follow, the Court denies both motions, finding triable issues of fact whether plaintiff's alleged injury satisfies the threshold requirement of "serious injury" as required by the Insurance Law under the circumstances of this case. Further, the Court finds, based upon this record, and assuming plaintiff's injury qualifies as a "serious injury," that defendant's liability therefor cannot be established as a matter of law.

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[1] The Court hereinafter refers to plaintiffs collectively in the singular and similarly with the defendants.

II. Summary Judgment and the Judicial Function.

We start with the general proposition that a party's right to a jury trial in a civil case is no less fundamental than it is in a criminal case. This right is guaranteed in the federal courts by constitutional and statutory mandate. Indeed, as far back as 1882, the first Justice Harlan was able to say that "[i]t has often been said by this court that the trial by jury is a fundamental guaranty of the rights and liberties of the people" and it is "the province of the jury to pass upon the issues of fact [at issue] and the right of [a party] to have them do so" (*Hodges v Easton*, 106 US 408, 412 [1882]). Our state's commitment to the right to jury trial is no less. "This basic right guaranteed by the State Constitution and implemented by statutory mandate is one of substance and not mere form or procedure" (*Waldman v Cohen*, 125 AD2d 116, 121 [2d Dept 1987]). A Trial Judge must be very mindful of this fundamental right and not trespass upon the province of the jury to decide factual issues based upon the Judges's personal, albeit experienced, view of how those factual issues should be resolved.

This does not mean, however, that every grievance one citizen has against another needs to be or even should be resolved by trial, jury or otherwise. There are essentially two procedural devices by which a defendant may test the substantive merit of the plaintiff's claims to determine whether a trial is warranted.

The first of these devices is a pre-trial motion under CPLR §3211(a)(7) seeking dismissal of the complaint upon the ground that it fails to state a legally cognizable cause of action. Under such a motion, a plaintiff need only make sufficient allegations necessary to establish all the elements of a cognizable cause of action (*see Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976]). The plaintiff need not make any evidentiary showing to support his allegations; indeed, the court will assume that he can when and if necessary. The court's limited function is to determine, taking everything the plaintiff alleges as true, whether the law allows any relief. If not, there is no point to any trial.

In this case, defendants do not move pursuant to CPLR §3211(a)(7), essentially conceding for present purposes that plaintiffs state viable causes of action. Rather, it moves for dispositive relief pursuant to CPLR §3212 for summary judgment dismissing the complaint in this action. In brief, summary judgment "means that the court, after going through the papers pro and con on the

motion, has found that there is no substantial issue of fact in the case and therefore nothing to try" (Siegel, New York Practice §278 [4th ed 2005]). In other words, a party may **allege** sufficient facts to state a cause of action to survive to a CPLR §3211(a)(7) motion to dismiss, but fail in **proof** of those allegations.[2] Summary judgment serves the salutary purpose of weeding from the trial calendar those cases where proof (or lack of it) on an essential issue of fact is so decisive as a matter of law that the court can dispose of the case without trial (*see Andre v Pomeroy*, 35 NY2d 361, 363 [1974]).

In relevant part, CPLR §3212(b) provides that a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." To "establish sufficiently" the cause of action or defense, "the moving party has an obligation to come forth with evidence, as upon a trial ... [and] make a *prima facie* showing of entitlement to judgment as a matter of law" (7 Weinstein-Korn-Miller, New York Civil Practice §3212.09 [2d ed]). Stated more helpfully,

> "The fundamental question with respect to a motion for summary judgment is whether the pleadings, affidavits, and exhibits in support of the motion are sufficient to overcome the opposing papers, and to justify finding, as a matter of law, either that there is no defense to the action or that the action or defense is without merit. Summary judgment in favor of a plaintiff may and should be granted if on the same proof, undisputed, the plaintiff would be entitled to a directed verdict at trial. If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, the issue is for the fact finders to decide at trial, and not for determination by a judge on motion. ... Summary judgment must be denied the defendant if it is shown that there are issues of fact supporting an actionable claim" (97 NY Jur2d Summary Judgment §16).

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[2] In a summary judgment motion, "it is the duty of the Court, not to test the sufficiency of the pleadings, but rather to go behind them to the very substance of the action and distinguish matters of law from matters of fact, material issues from immaterial ones" (Wanger v Zeh, 45 Misc2d 93 [1965], aff'd 26 AD2d 729 [3d Dept 1966].

[* 4]

The meaning of the phrase "as a matter of law" in the context of a trial motion for a directed verdict under CPLR 4401 guides a court deciding a pretrial summary judgment motion for similar relief.[3]

> The only stated criterion is that the movant is entitled to judgment 'as a matter of law.' The standard has been phrased in these general terms to recognize the limitless variety of fact situations that can invoke it. The judge may grant the motion, which of course takes the case out of the jury's hands, only when convinced that the jury could not find for the other party by any rational process; when, in support of the party against whom it proposes to order judgment, the court can find 'no evidence and no substantial inferences': when reasonable minds reacting to the evidence could not differ and would have to conclude just one way. The court must accept as true all of the evidence offered by the party against whom the motion for judgment aims, and must even resolve in that party's favor all questions relating to the credibility of witnesses' (Siegel, New York Practice §402, p.689 [4th ed].

Judges must also be cognizant of an important practical difference between a pretrial motion for summary judgment and a trial motion for a directed verdict. In the latter case, "the trial judge has had the benefit of observing the comportment of the witnesses, which is of material aid in gauging their credibility, while the summary judgment judge must make a determination on papers alone" (7B McKinneys Consol. Laws CPLR 3212, C3223:5 at p.13). For this and other reasons, judges are are regularly reminded that summary judgment is a "drastic remedy and should not be granted where there is any doubt as to the existence of triable issues" (*Dal Construction Corp v City of New York.* 108 AD2d 892, 894 [2d Dept 1985]. "Issue finding rather than issue determination is the key to the procedure" (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1958]. Summary judgment is the procedural equivalent of a trial and should only be granted where "no reasonable view of the evidence" supports a claim or defense; for if "varying inferences are possible ..., the issue is one for the jury" (*Eddy v Syracuse University*, 78 AD2d 989, 990 [4th Dept 1980]). Accordingly, not only must the proof offered by the party opposing a motion for summary judgment "be accepted as true"

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[3] "The justification for granting a motion for summary judgment before trial under CPLR 3212 ... depends on whether the showing is such as would warrant the granting of a CPLR 4401 motion for judgment during trial. The grant of the CPLR 4401 motion depends in turn on whether, if the case were to go to the jury and the jury were to find the other way, the judge would have to grant judgment notwithstanding the verdict under CPLR 4404" (Siegel, New York Practice §408 [4th ed].

(*Durkin v Long Island Power Authority*, 37 AD3d 400 [2nd Dept 2007], "however improbable" (*Plastoid Cable Corp v TFI Companies*, 55 AD2d 930 [2nd Dept 1977]), such proof must be viewed "in the light most favorable" to that party (*Wallice v Waterpointe at Oakdale Shores, Inc*., 249 AD2d 383 [2nd Dept 1998]), including favorable inferences that may be drawn therefrom that are at least arguable (*Phillips v Joseph Kantor & Co.*, 31 NY2d 307 [1972]). Underlying all this is the notion that "[a] remedy that precludes a litigant from presenting his evidence for consideration by a jury, or even a judge, is necessarily one that should be used sparingly, for its mere existence tends to alter our jurisprudential concept of a 'day in court'" (*Wanger v Zeh*, 45 Misc2d 93, 94 [Sup Ct NY Co 1965] *aff'd* 26 AD 729 [3rd Dept 1966]), *quoted in* 7B McKinney's Consol. Laws CPLR 3212, C3212:1).

III. Merits of Pending Motions For Summary Judgment.

As indicated above, in a summary judgment motion, before the non-moving party is put to any burden, the moving party must put forward evidence that demonstrates a prima facie case for the relief requested. Here, that evidence consists of an expert opinion by Dr. Isaac Cohen, a board certified orthopedic surgeon, dated October 18 2005. This report contains a recitation of the records reviewed, and concludes as follows:

> Careful evaluation of all the records provided indicates that the claimant has multiple subjective complaints not corroborated by physical findings or objective laboratory testing. The workup performed was essentially unremarkable, specifically related to a cervical spine area where the EMGs as well as the MRI were totally within the normal ranges. The complaints about the right shoulder and right wrist were also not substantiated by the workup performed. An IME examination performed by Dr. Totero, on May 7, 2003 stated the claimant able to perform her normal work activities and there was no indication for additional testing or treatment.
>
> Based on the review of the extensive medical records, there is a clear indication that the claimant suffered a cervical sprain as a consequence of this motor vehicle accident that was treated aggressively with physical therapy and medications. She lost minimal time from work and is currently working. She has continued to perform her normal activities in an unrestricted fashion. Clearly no active medical management is indicated; there is no evidence of sequelae or permanency present.

The Court finds that defendants have met their burden of presenting a prima facie case for judgment in their favor, thus shifting the burden to plaintiffs to show evidence that would warrant

a jury finding in their favor on the issue of "serious injury" as defined in the Insurance Law. In attempting to meet that burden, the plaintiffs rely upon the opinion of Steven M. Ess, a chiropractor. He opines that, as a result of the motor vehicle accident, the plaintiff suffers from cervical spine instability that "poses significant painful limitations resulting in an altered state of functional capacity," and that:

> [I]t is my opinion that this patient has suffered a permanent injury to her cervical spine as a result of this crash. Had it not been for this collision, the patient's cervical spine would not have developed the significant changes that are painful and progressive as identified [in peer-reviewed literature stating that patients who suffer a traumatic event to the cervical spine will have a 60-70% rate of permanent change in the area of injury]. Due to the nature of this injury and the multiple levels involved, it is likely that this patient will continue to suffer as these changes become more progressive as discussed with this traumatic population. Please note that this patient follows the characteristic pattern of many of my patients who suffer this type of trauma and have been identified with chronic pain syndromes coupled with mechanical difficulties resulting in deterioration of the injured site.

The Court would make three observations. First, judgments and conclusions of this sort can only be made by a properly qualified medical professional. One may question whether a chiropractor is competent to make these types of judgments. Second, the opinion relies in part upon unspecified professional literature reporting that one who had suffered trauma to cervical spine is more likely than not to experience "permanent change in the area of injury." This, on its face, appears unremarkable, and does not constitute evidence that plaintiff in this case has experienced such "change," or that such "change" is more likely or not to rise to the level of significant limitation. Third, the procedures or "tests" undergone by the plaintiff with the chiropractor appear to rely upon the subjective experience of pain or restricted mobility reported by the subject. One may question whether this the required objective evidence that would support an expert opinion stated to a reasonable degree of medical certainty, and/or a jury finding, that the trauma experienced by the plaintiff resulted in a condition or conditions constituting a serious injury for purposes of the Insurance Law.

The Court starts with brief discussion of *Pommells v Perez* (4 NY3d 566 [2005]), which sets the context of the instant motion.

[* 7]

> "In 1973, the Legislature enacted the 'Comprehensive Automobile Insurance Reparations Act' - commonly known as the No-Fault Law - with the objective of promoting prompt resolution of injury claims, limiting cost to consumers and alleviating unnecessary burdens on the courts. Every car owner must carry automobile insurance, which will compensate injured parties for "basic economic loss" occasioned by the use or operation of that vehicle in New York, irrespective of fault. Only in the event of 'serious injury' as defined in the statute, can a person initiate suit against the car owner or driver caused by the accident.
>
> No-Fault thus provides a compromise: prompt payment for basic economic loss to injured persons regardless of fault, in exchange for a limitation on litigation to cases involving serious injury. Abuse nonetheless abounds ... in failing to separate 'serious injury' cases which may proceed to court, from the mountains of other auto accident claims, which may not. That "basic economic loss" has remained capped at $50,000 since 1973 provides incentive to litigate.
>
> In the context of soft-tissue injuries involving complaints of pain that may be difficult to observe or quantify, deciding what is a 'serious injury' can be particularly vexing. Additionally, whether there has been a '*significant*' limitation of use of a body function or system (the threshold statutory subcategory into which soft-tissue injuries commonly fall) can itself be a complex, fact-laden determination. Many courts have approached injuries of this sort with a well-deserved skepticism. Indeed, failure to grant summary judgment even where the evidence justifies dismissal, burdens court dockets nd impedes the resolution of legitimate claims" (*id.* at 571-572)(citations omitted)(emphasis in original).

The plaintiff in the instant case claims to have suffered a cervical sprain as a result of the auto accident involving the defendant, Neither the defendant nor his medical expert disputes this. In fact defendant's expert, Dr. Cohen, expressly states that the fact of the injury and its causation is "clear[ly] indicat[ed]." Thus, the issue before the Court is whether there is a legitimate issue of fact to be decided at trial whether the injury was "serious" as statutorily defined. There are nine categories of "serious injury" under Insurance Law §5102(d). In her Memorandum of Law, plaintiff pares down the categories qualifying her injury as "serious" to three. The first identified is "medically determined injury or impairment of a non-permanent nature that prevents the injured person from performing substantially all of the material acts that constitute such persons usual and customary daily activities for not less than ninety days during the 180 days immediately following the occurrence of the injury or impairment." The second is "permanent consequential limitation of use of a bodily organ or member." The third is "permanent ... significant limitation of use of a body function or system."

At the outset, the record does not show any competent medical evidence that plaintiff was unable to perform substantially all of her daily activities for not less than 90 of the first 180 days subsequent to the accident. As to the second and third category, the first issue is the scope of professional competence of a chiropractor to provide medical facts and opinions of the sort necessary to meet the statutory threshold. The courts of this State have recognized that information from a chiropractor can be used to meet a plaintiff's burden in a No-Fault case involving a soft-tissue injury. Thus, an affidavit from a chiropractor cannot be categorically discounted.

In *Harris v Carella* (42 AD3d 915 [4th Dept 2007]), the court found sufficient:

> "the affidavit of plaintiff's treating chiropractor, who stated that plaintiff had a loss of lordosis in his cervical spine, muscle spasms, and a loss of a range of motion in his cervical and lumbar spine. The chiropractor also stated that plaintiff's injury was significant, permanent, and causally related to the accident, thus raising a triable issue of fact whether plaintiff sustained a serious injury under the permanent consequential limitation of use and significant limitation of use categories. Contrary to defendant's contention, the chiropractor set forth the tests that he used to ascertain the degree of plaintiff's loss of range of motion and correlate that loss to the normal range of motion for the relevant areas of plaintiff's spine" (id. at).

The Fourth Department similarly found in *Moore v Gawell* (37 AD2d 1158 [4th Dept 2007] where it held that plaintiff "raised triable issue of fact with respect to [the permanent consequential and significant limitation] categories by submitting the expert opinion of his treating chiropractor who relied upon objective proof of plaintiff's injury, provided quantifications of plaintiff's loss of range of motion along with qualitative assessments of plaintiff's condition and concluded that plaintiff's injury was significant, permanent, and causally related to the accident" (id. at 1159). To be contrasted are those cases where "plaintiff's physician's findings of restrictions in motion [are] based solely upon the plaintiff's subjective complaints of pain" (*see Grant v Fofana*, 10 AD3d 446 [2nd Dept 2004]) and "the physician fail[s] to establish that any objective tests were performed to support the determination of certain restrictions in the plaintiff's range of motion" (*Nozine v Sav-On Car Rentals*, 15 AD2d 555 [2nd Dept 2005]). Merely saying that certain "tests" are "objective" is insufficient, for without "any description of the nature of the nature of the tests ... plaintiff's medical affidavit can only be deemed conclusory and apparently tailored to meet the statutory requirements" (Munoz v Hollingsworth, 18 AD3d 278 [1st Dept 2005]). A

plaintiff cannot play "hide the ball" by failing to reveal the nature of the range of motion tests performed and results quantifying loss of motion by comparing plaintiff's performance with medically accepted norms.

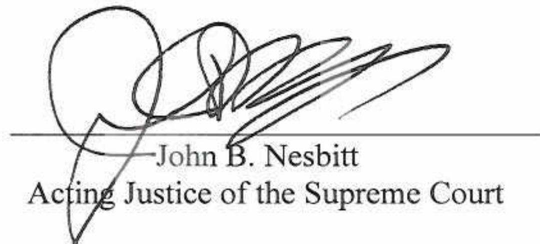
The medical affidavit here describes the nature of the tests, and asserts that the tests were capable of, and in fact did, yield, among other things, a result quantifying a 50 percent reduction in the cervical active range of motion, primarily in extension, lateral flexion and right rotation. Issues that one may raise as to the validity of the chiropractor's findings and conclusions go to the weight of the evidence, a matter to be resolved at trial and not by summary judgment.

Finally, as to plaintiff's cross-motion, the defendant's liability must also be determined at trial, given the factual issues of this case in particular and the nature of negligence claims in general.

IV. Conclusion

Accordingly, each of the pending motions for summary judgment are denied; however, that part of defendant's motion addressing plaintiff's 90/180 claim is granted. Defendant's counsel shall submit a proposed order upon proper notice to plaintiff's counsel.

Dated: October 31, 2007
Lyons, New York



John B. Nesbitt
Acting Justice of the Supreme Court