

Brausch v Berman

2007 NY Slip Op 33714(U)

November 13, 2007

Supreme Court, Suffolk County

Docket Number: 0006687/2005

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.

ORDERED that the cross motion by plaintiff for partial summary judgment in his favor on the issue of liability is denied.

Plaintiff Daniel Braush commenced this action to recover damages for personal injuries allegedly sustained on January 25, 2003, when a vehicle parked in a restaurant parking lot rolled down a slope and hit him as he was waiting for the valet. The vehicle which struck plaintiff is owned by defendant Bruce Berman and had been parked in the lot by his son, defendant Robert Berman, who was working that night as the parking lot valet. The restaurant, Louis XVI in Patchogue, is owned by defendant First Harbor Restaurant, Inc. By his bill of particulars, plaintiff alleges, among other things, that defendants were negligent in failing to properly park the Berman vehicle in the restaurant's parking lot. Plaintiff further alleges that he suffered various personal injuries as a result of the accident, including aggravation of bilateral rotator cuff tendinitis; "large, broad disc ridge complex with cord flattening" at level C5-6; right brachial neuritis; "exacerbation and aggravation" of degenerative changes in the left shoulder; and "exacerbation of pre-existing cervical spine dysfunction and pre-existing degenerative disc disease of the cervical lumbar spine."

Defendant First Harbor Restaurant now moves for summary judgment dismissing all claims against it on the grounds that there is no evidence that the parking lot was in an unsafe condition or that any alleged condition on the premises contributed to the subject accident. Defendant First Harbor Restaurant further asserts that it can not be held liable for the acts of defendant Robert Berman, as it did not employ Mr. Berman or supervise his work as a parking lot valet. Defendants Bruce and Robert Berman cross-move for summary judgment dismissing the claims against them, arguing that plaintiff is precluded under Insurance Law § 5104 from recovering for non-economic loss, as he did not suffer a "serious injury" within the meaning of Insurance Law § 5102 (d). Defendants' submissions in support of the cross motion include copies of the pleadings; excerpts of plaintiff and defendant Robert Berman's deposition testimony; various medical records from plaintiff's treating doctors; and a sworn medical report prepared by Dr. Arthur Bernhang. At defendants' request, Dr. Bernhang, an orthopedist, examined plaintiff in February 2007 and reviewed certain medical records and reports concerning the alleged injuries.

Plaintiff opposes the motion by the Berman defendants and cross-moves for partial summary judgment against them on the issue of liability. In opposition to defendants' cross motion, plaintiff argues, among other things, that defendants' submissions are insufficient to establish prima facie that plaintiff did not suffer significant limitations in his cervical spine or left shoulder as a result of the subject accident. Alternatively, plaintiff asserts that evidence submitted in opposition to defendants' cross motion raises triable issues of fact as to whether he sustained new injuries and an exacerbation of pre-existing injuries within the "limitation of use" categories. Plaintiff's submission in opposition to defendants' cross motion include an affidavit by plaintiff's treating chiropractor, Michael Aliquo, and an affirmed report by plaintiff's treating orthopedist, Dr. Philip Schrank. As to the cross motion for partial summary judgment in favor of plaintiff on the issue of liability, plaintiff alleges that the deposition testimony establishes as a matter of law that Robert Berman's negligence was the sole proximate cause of the subject accident.

Defendant First Harbor Restaurant's motion for summary judgment is denied. The Court's computerized records indicate that a stipulation discontinuing the action with prejudice against

defendant First Harbor Restaurant, dated June 21, 2007, was filed with the Court. The motion by defendant First Harbor Restaurant, therefore, is denied, as moot.

Defendant Bruce and Robert Berman's motion for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) is denied. Insurance Law § 5102 (d) defines "serious injury" as "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."

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a "serious injury" (*see, Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 746 NYS2d 865 [2002]; *Gaddy v Eycler*, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, i.e., affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (*Pagano v Kingsbury*, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992]). A defendant also may establish entitlement to summary judgment using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (*see, Fragale v Geiger*, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; *Torres v Micheletti*, 208 AD2d 519, 616 NYS2d 1006 [2d Dept 1994]; *Craft v Brantuk*, 195 AD2d 438, 600 NYS2d 251 [2d Dept 1993]; *Pagano v Kingsbury*, *supra*). Once a defendant meets this burden, the plaintiff must present proof in admissible form which creates a material issue of fact (*see, Gaddy v Eycler*, *supra*; *Pagano v Kingsbury*, *supra*; *see, Grasso v Angerami*, *supra*; *see generally, Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

Here, the medical proof presented by the Berman defendants in support of their cross motion is insufficient to demonstrate prima facie that plaintiff did not suffer "serious injury" due to the accident. The medical report prepared by Dr. Bernhang states that plaintiff presented with complaints of intermittent neck and back pain, pain and a "burning sensation" in his shoulders, and numbness and an inability to hold his five-month-old child. It states, among other things, that during range of motion testing plaintiff exhibited 35 degrees of cervical flexion, 55 degrees of cervical extension, "35/35" degrees of lateral flexion, and "70/75" degrees of cervical rotation. The report states that, according to the American Academy of Orthopaedic Surgeons, the "average range of joint function" in the cervical spine is 38 degrees of cervical flexion, 38 degrees of cervical extension, 43 degrees in lateral flexion, and 45 degrees in cervical rotation. It further states that plaintiff exhibited the following ranges of motion in his shoulders: "145/145" degrees of active shoulder abduction out of the average motion of 170 degrees; "140/140" degrees of active shoulder forward flexion out of the average motion of 158 degrees; "85/85" degrees of external rotation out of the average motion of 90 degrees; and "25/45" degrees of internal rotation out of the average motion

of 70 degrees.

In addition, Dr. Bernhang's report states that the examination of plaintiff revealed no fibromyalgia, trigger point or spasm in the cervical or shoulder musculature. It states that while there were arthroscopic portal scars on plaintiff's left shoulder, there was no evidence of atrophy of the deltoid muscles and no crepitation detected during passive range of motion testing of the shoulders. Further, the report states that, despite a 2002 report by Dr. Shrank indicating that plaintiff suffers osteoarthritis of the left glenohumeral joint, there was no evidence of restricted movement in such joint. The Court notes that other than range of motion testing, the report by Dr. Bernhang does not indicate the clinical tests, if any, performed on plaintiff's shoulder region. Dr. Bernhang concludes in his report that his examination revealed "no objective orthopaedic evidence of any residual of injuries said to have occurred to the cervical spine, lumbar spine nor evidence of trochanteric bursitis." He also opines that any soft tissue injuries sustained by plaintiff "appear to have resolved without residual," and that plaintiff's complaint that he is unable to hold his child "would appear due to his pre-existing glenohumeral arthritic changes."


Although Dr. Bernhang concludes that the orthopedic examination of plaintiff revealed no evidence of any residual effects of the alleged spinal injuries, he offers no conclusion regarding plaintiff's alleged shoulder injuries. Significantly, having conducted range of motion testing that revealed limitations in abduction, flexion and rotation in both of plaintiff's shoulders, Dr. Bernhang inexplicably failed to compare such findings to what is normal, or to explain why such limitations did not demonstrate a traumatic aggravation of plaintiff's prior left shoulder injury or a new injury to plaintiff's right shoulder (see, *McLaughlin v Rizzo*, 38 AD3d 856, 832 NYS2d 666 [2d Dept 2007]; *Harman v Busch*, 37 AD3d 537, 829 NYS2d 680 [2d Dept 2007]; *Iles v Jonat*, 35 AD3d 537, 825 NYS2d 540 [2d Dept 2006]; *Fryar v First Student, Inc.*, 21 AD3d 525, 800 NYS2d 582 [2d Dept 2005]). Moreover, in view of his findings of limited movement in plaintiff's shoulders and his apparent failure to perform any clinical tests for shoulder instability or lesions, Dr. Bernhang's vague, conclusory statement that any soft tissue injuries "appear to have resolved without residual" is considered speculative and tailored to meet the statutory requirements (see, *Washington v Delossantos*, ___ AD3d ___, 843 NYS2d 186 [2d Dept 2007]; *Sullivan v Johnson*, 40 AD3d 624, 835 NYS2d 367 [2d Dept 2007]). Thus, contrary to the assertions by defense counsel, the evidence submitted in support of the Berman's cross motion raises questions as to whether the 2003 accident aggravated a pre-existing pathology in plaintiff's left shoulder and caused new injuries in plaintiff's right shoulder (see, *Cebrularz v Diorio*, 32 AD3d 975, 822 NYS2d 118 [2d Dept 2006]; *Gentile v Snook*, 20 AD3d 389, 799 NYS2d 230 [2d Dept 2005]; cf., *Passaretti v Ping Kwok Yung*, 39 AD3d 517, 835 NYS2d 224 [2d Dept 2007]; *Meyers v Bobower Yeshiva Bnei Zion*, 20 AD3d 456, 797 NYS2d 773 [2d Dept 2005]). Accordingly, the cross motion by defendants for summary judgment dismissing the complaint based on plaintiff's failure to meet the serious injury threshold is denied.

Finally, plaintiff's motion for partial summary judgment in his favor on the issue of liability is denied. CPLR 3212(a) provides that if no date for making a summary judgment motion has been set by the court, such a motion "shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown." Absent a showing of good cause for the delay in filing a summary judgment motion, a court lacks the authority to consider even a meritorious, non-prejudicial application for such relief (see, *Miceli v State Farm Mut. Auto. Ins.*

Brausch v Berman
Index No. 05-6687
Page 5

Co., 3 NY3d 725, 786 NYS2d 379 [2004]; *Brill v City of New York*, 2 NY3d 648, 781 NYS2d 261 [2004]; *Soltes v 260 Waverly Owners, Inc.*, 42 AD3d 565, 840 NYS2d 412 [2d Dept 2007]). The Court's computerized records show that the note of issue was filed in this action on April 4, 2007. The motion by plaintiff for partial summary judgment on the issue of liability was made on August 10, 2007, the date which it was served on defendants (*see*, CPLR 2211). As there is no explanation in the papers for the delay in making the application, the Court must deny plaintiff's cross motion for summary judgment motion on the basis that it was made more than 128 days after the filing of the note of issue (*see, Miceli v State Farm Mut. Auto. Ins. Co., supra; Soltes v 260 Waverly Owners, Inc., supra*).

Dated: NOV 13 2007



J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION