

Polacsek v Davis

2007 NY Slip Op 33848(U)

November 15, 2007

Supreme Court, Suffolk County

Docket Number: 0009100/2003

Judge: Robert W. Doyle

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

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 7-20-07
ADJ. DATE: 9-18-07
Mot. Seq. # 003 - MD
004 - XMD

-----X
JOANNE POLACSEK and JOANNE POLACSEK, :
as a parent and natural guardian of NICHOLAS :
DOYLE, :
Plaintiffs, :
- against - :
MARIEL DAVIS and RUTH KESSINGER, :
Defendants. :
-----X

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Upon the following papers numbered 1 to 17 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-8; Notice of Cross Motion and supporting papers 9-10; Answering Affidavits and supporting papers 11-15; Replying Affidavits and supporting papers 16-17; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (003) by plaintiff on the counterclaim, Joanne Polacsek, pursuant to CPLR 3212 and Insurance Law §5102(d) for summary judgment dismissing the complaint of her son, infant plaintiff, Nicholas Doyle, on the basis the infant plaintiff's injuries do not meet the serious injury threshold, is denied; and it is further

ORDERED that this motion (004) by defendants, Mariel Davis and Ruth Kessinger, pursuant to CPLR 3212 granting summary judgment on the basis the infant plaintiff, Nicholas Doyle, has not sustained serious injury as defined by Insurance Law §5102(d), is denied; and it is further

ORDERED that Lee Wiedl, Esq., counsel for the infant plaintiff Nicholas Doyle, is directed to move for substitution of the child's natural or legal father as guardian and parent of Nicholas Doyle, or for appointment of a guardian ad litem on behalf of the infant plaintiff, in place and instead of Joanne Polacsek. within thirty days of the date of this order.

This is an action sounding in negligence arising out of an automobile accident which occurred on January 3, 2003, on County Road 21 approximately 100 feet south of its intersection with Route 25, Rocky Point, Town of Brookhaven, County of Suffolk, New York. The infant plaintiff, Nicholas Doyle, was a passenger in the vehicle operated by his mother, Joanne Polacsek. As a result of this accident, the infant plaintiff claims to have sustained personal injury, including, *inter alia*, acute lumbar sprain, aggravation of preexisting arthritis, traumatic arthritis, pain, stiffness and limitation of use and motion, mental anguish, anxiety, and personality changes.

In motion (003) plaintiff on the counterclaim, Joanne Polacsek, seeks summary judgment on the serious injury threshold asserting the infant plaintiff has not sustained a serious injury within the meaning of Insurance Law §5102. In support of this motion, plaintiff on the counterclaim has submitted an attorney's affirmation; a copy of the answer to the counterclaim; a copy of the Note of Issue; a copy of the verified bill of particulars; unsigned copy of the transcript of the examination before trial of Nicholas Doyle with an uncertified copy of a medical record from St. Charles Hospital Emergency Department; and a copy of her transcript of the examination before trial.

In cross motion (004), defendants Mariel Davis and Ruth Kessinger seek summary judgment on the basis that the infant plaintiff, Nicholas Doyle, did not sustain an injury within the meaning of Insurance Law §5102. In support of this motion, defendants have submitted merely an attorney's affirmation and incorporate by reference all the facts, evidence, testimony, proof, law and arguments contained in motion (002).

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.*, 45 NY2d 1065, 416 NYS2d 790 [1979]).

CPLR 3212(b) provides in pertinent part that “[a] motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. Neither plaintiff on the counterclaim nor defendants have submitted copies of the summons and complaint, or answer as set forth in CPLR 3212(b). This court, however, has searched the records and determined that the infant plaintiff, in opposing this motion, has provided a copy of the summons and complaint and the answer with the counterclaim as asserted by Mariel Davis and Ruth Kessinger.

It is also noted that defendants in cross motion (004) have relied on the submissions, arguments and evidence submitted by plaintiff on the counterclaim. CPLR 3212(b) does not provide for a party to adopt the arguments and submissions of another party, but again, this court will search the records and decide the motion and cross motion on their merits.

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 Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]).

It is determined that neither plaintiff on the counterclaim, Joanne Polacsek, nor defendants, Mariel Davis and Ruth Kessinger, have presented evidence in competent form showing that plaintiff has no cause of action upon which to base a claim for serious injury as they have not provided the affidavits of any physician supporting their claim (*Rodriguez v Goldstein*, supra). Therefore, they have failed to eliminate any material issues of fact in this regard, precluding summary judgment.

The testimony of the infant plaintiff at his examination before trial, submitted by the moving parties, raises factual issue to preclude summary judgment. Nicholas Doyle testified he injured his right hip, neck and back in the accident. This injury caused him to feel constant pressure and pain in his right hip for a couple of months following the accident, preventing him from playing sports until the springtime. He missed gym for two weeks following the accident. He missed tryouts for the basketball team and was unable to play for the season, which he planned on doing before the accident occurred. Joanne Polacsek testified at her examination before trial that Nicholas complained of pain in his hip and neck for about six to eight months after the accident and received therapy and chiropractic treatment for three months after the accident. Therefore, plaintiff on the counterclaim and defendants have raised factual issues concerning whether the infant plaintiff was able to perform “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.” Therefore, defendants and plaintiff on the counterclaim, have not demonstrated prima facie entitlement to summary judgment by the evidence submitted in support of their claim.

Accordingly, motion (003) and cross motion (004) are denied.

It is noted that this action was commenced by the law office of Johannesen & Johannesen on behalf of Joanne Polacsek individually and as parent and natural guardian on behalf of her infant son who was ten years of age at the time of the accident. While none of the parties have set forth the procedural history of this case, it is further noted that two previous motions were submitted wherein dismissal was sought, but both motions were withdrawn. Now appearing for the infant plaintiff is the law office of Lee Wiedel. The law office of Gordon & Silber is now appearing for the infant’s mother, Joanne Polacsek, as plaintiff on the counterclaim. The law office of Robert Tusa has been appearing on behalf of defendants Davis and Kessinger. On the original complaint, the law office of Johannesen & Johannesen were, and are still, representing Joanne Polacsek as plaintiff (*see, Ganiev v Nazi*, 189 Misc 2d 83, 730 NYS2d 661 [2nd Dept 2001]). The relief sought in motion (003) involves an adverse interest or conflict between the interests of the infant plaintiff and his mother/guardian. Joanne Polacsek commenced this action on her son’s behalf asserting he has sustained injury. She now seeks to dismiss his action on the basis the infant has not sustained a serious injury. No one has moved to appoint a guardian to substitute for Joanne Polacsek (*see, Boyd v Trent*, 287 AD2d 475, 731 NYS2d 209 [2nd Dept 2001]).

A parent may be removed as natural guardian if he or she has an interest adverse to the infant or if the infant’s natural guardians have irreconcilable differences with each other (*Sthal and Besunder v. Rhee*, 220AD2d 39, 643 NYS2d 148 [2nd 1996]; *Dicupe v City of New York et al*, 124 AD2d 542, 507 NYS2d 687 [2nd Dept 1986]); CPLR 1202). CPLR 1202 eliminates the mandatory requirement that a guardian ad litem be appointed where the infant appears by a parent who is adequately able to represent

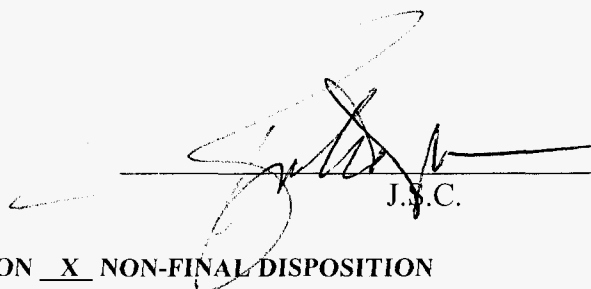
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the infant's interest (*Klein v Motor Vehicle Accident Indemnification Corporation*, 48 Misc2d 82, 264 NYS2d 268 [New York County 1965]). A guardian ad litem must have not interest adverse to that of the child (*Taaha Shaikh, an infant by his Mother and Natural Guardian, Rizwana Shaikh, v Waiters*, 185 Misc 2nd 51, 710 NYS2d 873 [Nassau County 2000]). A disability for infancy terminates when a personal representative is appointed to protect the interests of the infant or a potential personal representative acts affirmatively to protect the legal interests of the infant (*Wright, and Infant by His Mother and Natural Guardian, Carolyn Wright v Area Bus Corp.*, 179 Misc2d 289, 684 NYS2d 841 [Kings County 1998]). It is determined by this court that in the instant action Joanne Polacsek is not acting affirmatively to protect the legal interests of the infant Nicholas Doyle, her son. The infant plaintiff could have been well advised to assert a claim against Joanne Polacsek, the driver of the vehicle he was a passenger in, who now moves to dismiss his action (*see, Taaha Shaikh, an infant by his Mother and Natural Guardian, Rizwana Shaikh, v Waiters*, supra; *In re: Michele Bruno*, 327 B.R. 104, 2005 Bankr. LEXIS 1300 [Eastern Dist. of N.Y. 2005]). There has been no action asserted on behalf of the infant plaintiff against his mother, who was the operator of the vehicle in which he was a passenger. Merely because the infant plaintiff fails to assert a counterclaim against his mother does not resolve the issue of her negligence, so to eliminate the potentially "differing interests" of co-plaintiffs (*Taaha Shaikh, an infant by his Mother and Natural Guardian, Rizwana Shaikh, v Waiters*, supra). A parent as guardian ad litem cannot do anything that would prejudice the child's rights (*Barbara Lee, an Infant, by Gim Lee, Her Guardian ad Litem v Gucker*, 16 Misc 2d 346, 186 NYS2d 700 [New York County 1959]). In bringing this motion to dismiss the action of Nicholas Doyle, Joanne Polacsek, as parent and guardian, is prejudicing the child's rights.

Because Joanne Polacsek, as parent and natural guardian of Nicholas Doyle, is found to have adverse and conflicting interests in this action with those interests of her son, counsel for the infant, Lee Wiedl, Esq., is directed to move for substitution of the child's natural or legal father as guardian and parent of Nicholas Doyle, or for appointment of a guardian ad litem on behalf of the infant plaintiff, in place and instead of Joanne Polacsek, within thirty days of the date of this order.

"Substitution of a parent and natural guardian, or failure to appoint a guardian ad litem, "affects the regularity of procedure but not the jurisdiction of the court. Where a verdict has been rendered, the judgment shall not be stayed, impaired or affected by reason of the appearance, by attorney, or an infant party, if the verdict or judgment is in his favor, and confers ample power upon courts of record to afford relief against irregularities of every nature, unless it should be contrary to the right and justice of the matter or should alter the issue between the parties. It is not an absolute prerequisite to jurisdiction of an action by an infant that he should sue by guardian ad litem or next friend, but a failure to appoint a guardian ad litem or next friend for an infant plaintiff merely affects the regularity of the proceedings, and the defect is one which before verdict is amendable and after verdict and judgment is cured" (*Gussie De Groat, as Guardian of Mary De Groat, et al v Tompkins Bus Corporation*, 142 Misc. 528, 254 NYS2d 878, [Manhattan 1932]).

Dated: NOV 15 2007



 J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION