Sherack v Cantwell
2008 NY Slip Op 30526(U)
February 20, 2008
Supreme Court, Suffolk County
Docket Number: 0024820/2005
Judge: Peter Fox Cohalan
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SHORT FORM ORDER

INDEX No. 05-24820

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY

PRESENT:

Hon. PETER FOX COHALAN
Justice of the Supreme Court

MOTION DATE 11-1-07
ADJ. DATE 1-3-08
MNEMONIC: 002 - MD
003 - XMG

---X

ROBERT SHERACK,

Plaintiff,

- against -

BRIAN CANTWELL and CHRISTOPHER GALVEZ,

Defendants.

---X

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Upon the following papers numbered 1 to 30 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13 ; Notice of Cross Motion/ Order to Show Cause and supporting papers 14 - 21 ; Answering Affidavits and supporting papers 22 - 25 ; Replying Affidavits and supporting papers 26 - 30 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (002) by defendants, Brian J. Cantwell and Christopher Galvez, pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis the plaintiff has not sustained a “serious injury” within the meaning of Insurance Law §§ 5102 and 5104. opposed by the plaintiff, is denied; and it is further

ORDERED that this cross-motion (003) by plaintiff, Robert Sherack (hereinafter Sherack), pursuant to CPLR 3212 for summary judgment on the basis that he bears no liability for the happening of the accident, is granted. The plaintiff is directed to serve a copy of this decision with notice of entry upon the defendants and the Clerk of Supreme Court within thirty days of the date of this order, and the Clerk of the Court is directed to immediately place this matter on the ready trial calendar for a trial on damages.

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff in a motor vehicle accident which occurred on November 7, 2002 at County Road 16 at or near CR 83, Town of Brookhaven, County of Suffolk, State of New York wherein the vehicle owned by Christopher Galvez and operated by Brian J. Cantwell (hereinafter Cantwell)and the vehicle operated by Sherack came into contact.

The plaintiff has set forth in his bill of particulars that, as a result of the accident, he has been prevented from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the accident and that he has sustained "serious injury" in the nature of cervicogenic headaches; cervical, thoracic and lumbar spine joint pathomechanics; myofascitis; myofascitis trigger points; C5-6 central intervertebral disc herniation; posterior bulge at C3-4; spondylosis with developmental wedging in the thoracic spine; mild spondylosis of the lumbar spine with disc narrowing at the L5 level; postural weakness of the cervical, thoracic and lumbar spinal musculature; uncovertebral and facet arthrosis and mid lower cervical spine; and facet arthrosis of the lumbar spine.

The defendants now seek summary judgment dismissing the complaint on the basis that plaintiff has not sustained a "serious injury" as that term is defined by Insurance Law § 5102 and § 5104. The plaintiff, by way of cross-motion, seeks summary judgment on basis that he bears no liability for the happening of the accident.

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]).

The defendants, in motion (002), seek an order pursuant to CPLR 3212 and Insurance Law §§ 5102 and 5104 granting summary judgment as the plaintiff's alleged injuries fail to meet the threshold limits.

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

On a motion for summary judgment to dismiss a complaint for failure to set forth a prima facie case of "serious injury" as defined by Insurance Law § 5102(d), the initial burden is on the defendant to "present evidence in competent form, showing that plaintiff has no cause of action" (***Rodriquez v Goldstein,*** 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once defendant has met the burden, the plaintiff must then, by competent proof, establish a *prima facie* case that such "serious injury" exists (***DeAngelo v Fidel Corp. Services, Inc.***, 171 AD2d 588, 567 NYS2d 454, 455 [1st Dept 1991]). Such proof, in order to be in competent or admissible form, shall consist of affidavits or affirmations (***Pagano v Kingsbury,*** 182 AD2d 268, 587 NYS2d 692 [2nd Dept 1992]). The proof must be viewed in a light most favorable to the non-moving party, here the plaintiff (***Cammarere v Villanova,*** 166 AD2d 760, 562 NYS2d 808, 810 [3rd Dept 1990]).

In support of their motion for summary judgment on the issue of "serious injury", the defendants have submitted, inter alia, an attorney's affirmation; a copy of the summons and complaint, defendants' answer, and plaintiff's bill of particulars; copy of the unsigned, unsworn transcript of the examination before trial of Robert Sherack; a copy of the report dated December 20, 2002 of Stephen G. Zolan, M.D., defendant's examining orthopedist concerning an orthopedic examination on that date; a copy of the report dated January 29, 2003 of Burton Diamond, M.D., defendant's examining neurologist concerning a neurological examination on that date; a copy of the report dated February 24, 2003 of Gerald Silverman, D.C., defendant's examining chiropractor concerning a chiropractic examination on that date; a copy of the report dated February 28, 2007 of Joseph Stubel, M.D., defendant's examining orthopedist concerning an orthopedic examination on that date; and a copy of the report dated September 25, 2007 of Melissa Sapan Cohn, M.D., defendants' radiologist concerning a review of an MRI of the cervical spine performed on December 17, 2002.

Sherack testified at his examination before trial that he was wearing a seatbelt at the time of the accident and as a result of the impact to his vehicle, which he described as heavy and which totaled his vehicle, he was thrown against the side of the door; the left side of his head and his left shoulder hit the window and his left leg hit the door. By the next morning he started feeling pain in his neck, the lower part of his back, his left shoulder, and his head. About four to seven days after the accident, he stated, he went to see a chiropractor which he did for a few months, two to three times a week, for adjustments and diathermy to his back and neck. He stated he also had MRI's of his neck and back, and due to a problem with a disc, he was referred to a neurologist. He testified that the heavy pain lasted for a few weeks in his neck and back, and he still gets neck pain if he turns his head a certain way. He stated he also gets headaches and backaches sometimes. He stated he is retired now and prior to the accident he

went fishing and golfing. He stated he was a poor golfer before the accident and is still a poor golfer, but if he swings the wrong way, it bothers his back. He had to give up golf for the first few months after the accident and expressed difficulty in playing with his grandchildren, (especially with his eight year old grandson) because of his back pain.

Stephen Zolan, M.D. D.O.S. (hereinafter Zolan) performed an orthopedic examination on Sherack on December 20, 2002, and, by way of his report, dated December 20, 2002, stated Sherack was still experiencing neck pain, but his back pain has improved. Sherack denied any specific prior injuries to his neck or back. Zolan indicated in his report that he examined Sherack's cervical and lumbar spine and found no restrictions, spasms or tenderness in the cervical spine, and no lumbar spasm or tenderness. He stated Sherack's prognosis was good and diagnosed him with cervical spasm, resolved and lumbar sprain, resolved. Zolan found a causal relationship between the injuries sustained and the accident of November 7, 2002.

Burton Diamond, M.D. (hereinafter Diamond) performed a neurological examination on Sherack on January 29, 2003, and, by way of his report, dated January 29, 2003, stated Sherack continued with physical therapy and chiropractic treatments several times a week, and that his neck and back pain was much better. He stated there are no radicular complaints, and there was excellent range of motion of the plaintiff's neck and lower back with no paravertebral spasms. Diamond's diagnosis was cervical and lumbar sprains, that had resolved and he stated the symptoms are causally related to the motor vehicle accident of November 7, 2002.

Gerald Silverman performed a chiropractic examination of Sherack on February 24, 2003 and stated he previously examined Sherack on December 16, 2002, but has not provided a report concerning that examination. At the February 24, 2003 examination, Sherack complained of occasional numbness in his fingertips in the morning. Upon examination, he found Sherack performed cervical and lumbar ranges of motion within normal limits. His impression was that Sherack sustained strains/sprains to his lumbar and cervical spines, which had resolved, without objective evidence of residuals or permanency. He further stated that if the history of the accident was correct, then there is a causal relationship between the complaints and accident of November 7, 2002.

Joseph Stubel, M.D. (hereinafter Stubel) performed an orthopedic examination of Sherack on February 28, 2007 and indicated Sherack still had occasional neck and back pain. Examination of Sherack's cervical spine revealed extension 45 degrees (normal 45), flexion 45 degrees (normal 45) rotation 80 degrees (normal 80), and lateral flexion bilaterally 45 degrees (normal 45); biceps, triceps and brachioradialis reflexes bilaterally symmetrical and 2+. Vascular examination of the upper extremities was found to be grossly intact. Examination of Sherack's lumbar spine revealed forward bending 90 degrees (normal 90), lateral flexion bilaterally 30 degrees (normal 30), lateral rotation 60 degrees (60 normal); straight leg raising 80 degrees (normal 80), Achilles and patella tendon reflexes bilaterally symmetrical and 2+, and vascular exam of the lower extremities was grossly normal. Stubel's impression was neck and back sprains with no objective signs of disability, and that Sherack could perform his usual activities of daily living.

The report of Melissa Sapan Cohen, M.D., (hereinafter Cohen), dated September 25, 2007, set forth that the MRI of Sherack's cervical spine, performed December 17, 2002 revealed mild disc bulging at C3-C4; anterior osteophytes and central disc herniation which mildly effaced the ventral aspect of the thecal sac at C5-C6. Cohen sets forth that the disc bulging was unrelated to trauma and that the disc herniation, as suggested by osteophyte formation, was chronic in nature.

Based upon the foregoing, it is determined that defendants have not demonstrated prima facie entitlement to summary judgment on the issue of whether Sherack sustained a "serious injury" within the meaning of Insurance Law §5102 and §5104.

Neither Zolan, Diamond, or Silverman quantified their range of motion findings or set forth findings compared to what is deemed normal. By failing to compare the results that were reported to the normal range, or by failing to quantify their range of motion findings in degrees, the reports of defendants' examining physicians leave it to this Court to speculate as to whether the ranges of motion reported are normal or abnormal (*see,* ***Rodriguez v Schickler***, 229 AD2d 326, 645 NYS2d 31 [1st Dept 1996], *lv denied* 89 NY2d 810, 656 NYS2d 738 [1997]). Thus the defendants have failed to establish prima facie entitlement to judgment as a matter of law that the plaintiff did not sustain a "serious injury" within the meaning of Insurance Law §5102 and §5104 (***Avashkova v Paul,*** 2007 NY Slip Op 8170, 844 NYS2d 445, 2007 NY App. Div. Lexis 11054; ***Hypolite v International Logistics Management, Inc.***, 43 AD3d 461, 842 NYS2d 453 [2nd Dept 2007]; ***Somers v Macpherson,*** 40 AD3d 742, 836 NYS2d 620 [2nd Dept 2007]; ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2nd Dept 2006]). In that the reports of the defendants' examining physicians do not exclude the possibility that plaintiff suffered a "serious injury" in the accident, the defendants are not entitled to summary judgment (*see,* ***Peschanker v Loporto***, 252 AD2d 485, 675 NYS2d 363 [2d Dept 1998]).

Disc herniation and limited range of motion based on objective findings may constitute evidence of "serious injury" (***Jankowsky v Smith,*** 294 AD2d 540; 742 NYS2d 876 [2nd Dept 2002]). A disc bulge may constitute a "serious injury" within the meaning of Insurance Law §5102 (***Hussein, et al. v Harry Littman, et al.,*** 287 AD2d 543, 731 NYS 2d 477 [2nd Dept 2001]). The reports of all the defendants' examining physicians find a causal relation between the accident and the claimed injuries, and none of the reports address the issue of plaintiff's herniated disc or bulging disc. Stubel, although he reviewed plaintiff's MRI report, did not comment on the disc herniation at C5-6 and the bulging disc at C3-4; however, he did find that Sherack's symptoms were causally related to the accident. Although Cohen sets forth in her report that there was osteophyte formation at the C5-6 level, which she stated is an attempt by the spine to stabilize itself, and stated conclusively that the disc herniation was chronic in nature, she failed to address the issue of causation and did not state that it was not causally related to the accident of November 7, 2002. Thus, the defendants have failed to eliminate material factual issues related to the plaintiff's claim of a herniated cervical disc and its causal relationship to the accident. The defendants' reports concerning the examinations of Zolan, Diamond and Silverman do not eliminate factual issues concerning whether the plaintiff was unable to substantially perform his activities of daily living for ninety out of one hundred eighty days following the accident. The plaintiff, although retired, testified in his examination before trial transcript submitted by the defendants as to his limitations concerning his usual activities of daily living.

Accordingly, motion (002) by the defendants is denied.

In support of plaintiff's motion for summary judgment on the issue of liability, plaintiff has submitted an attorney's affirmation; an amended, uncertified copy of an MV 104 Police Accident Report; unsigned, unsworn copies of the transcripts of the examinations before trial of the plaintiff Sherack and the defendant Cantwell; and copies of the pleadings.

With regard to the cross-motion for summary judgment on the issue of liability for the subject accident, the parties rely primarily upon the deposition testimony given by each of them. The copies of the deposition transcripts submitted to the Court by the plaintiff are unsigned and unsworn and therefore not in admissible form. The defendants have objected to their use on the instant motion. However, this Court will consider them as the defendants submitted and relied upon the same deposition transcript of the plaintiff in motion (002). Further, with regard to Cantwell's testimony, the defendants have failed to set forth how the Cantwell's transcript is not reliable and have failed to submit an affidavit from Cantwell setting forth any changes or averring how such testimony is not reliable. Accordingly, the defendants' objection to the use of these transcripts is found to be without merit.

Initially, the Court notes that the unsworn MV-104 police accident report constitutes hearsay and is inadmissible (*see*, ***Lacagnino v Gonzalez***, 306 AD2d 250, 760 NYS2d 533 [2d Dept 2003]; ***Hegy v Coller***, 262 AD2d 606, 692 NYS2d 463 [2d Dept 1999]).

At his examination before trial, Sherack testified he was en route to pick up his grandson to take him to preschool on November 7, 2002, which he described as a clear, nice, dry day. The accident occurred on Portion Road at or about its intersection with the United Parcel Service(hereinafter UPS) driveway. He was traveling eastbound on Portion Road (Horse Block Road) in the left lane, and described that portion of the roadway as having two eastbound lanes. There was a tractor trailer traveling along side his vehicle to his right. The driveway for UPS was on the right hand side of the road. The tractor trailer began slowing down when suddenly his vehicle was struck between the two doors on the passenger side of his vehicle by the front of the defendant's vehicle. Sherack testified that he believed the car which struck his vehicle came across in front of the tractor trailer, striking his vehicle. He believed the tractor trailer was going to turn right into the UPS driveway.

At his examination before trial, the defendant Cantwell testified he was driving his grandfather's vehicle with his permission at the time of the accident, which occurred on County Road 16, Horse Block Road, a two lane road, at a driveway for UPS, where he worked. He was leaving work; it was a sunny day, and the roads were dry. He thought there was a stop sign at the end of the UPS's driveway. He stated the first time he saw the other vehicle, which was traveling eastbound on County Road 16, was when it hit his truck. He stated the accident occurred just outside the UPS's driveway. Cantwell testified he observed a box truck about twenty to thirty yards from the driveway before he reached the end of the driveway. That box truck was making a right hand turn into the UPS's driveway. Cantwell testified that when he reached the end of the driveway, he stopped his vehicle for about one or two seconds. As he pulled out of the driveway, the front of his vehicle hit the front passenger fender of plaintiff's vehicle. During his examination before trial, Cantwell was shown a copy of a statement he wrote and signed at the scene, which statement was

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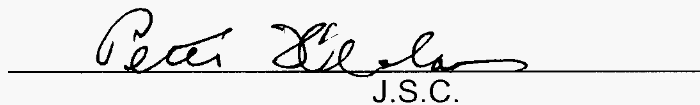
part of the MV 104 Police report. He stated at that examination that although he wrote "I hit a black car," he was not comfortable with that line because it wasn't true. He testified, "I didn't even know the car was there so I don't think I could physically hit it with my knowledge if I didn't know it was there."

The uncontroverted testimony establishes that Cantwell's vehicle did not yield to the plaintiff's vehicle before it entered onto the roadway from the UPS driveway. He stopped his vehicle for one to two seconds at the end of the driveway, and then pulled out across the front of the truck which was turning into the driveway. His vehicle then struck the plaintiff's vehicle on the passenger side with the front of his vehicle as he was crossing over the eastbound travel lanes. The plaintiff's vehicle was in the left hand eastbound travel lane of Horse Block Road at the time of the impact. The New York Vehicle and Traffic Law §1143 provides that "The driver of a vehicle about to enter or cross a roadway from any place other than another roadway shall yield the right of way to all vehicles approaching on the roadway to be entered or crossed." Entering the roadway and failing to yield the right of way to plaintiff's vehicle is deemed negligence as a matter of law (***Scarcella v Gertz, Jr.,*** 1Misc3d 131A, 781 NYS2d 628 [2nd Dept 2003]). Moreover, drivers have a duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident (***Fillippazzo v Santiago,*** 277 AD2d 419, 716 NYS2d 710 [2nd Dept 2000]). What was there to be seen by Cantwell as his vehicle crossed over the right travel lane of Horse Block Road and began crossing the left hand travel lane, was Sherack's vehicle traveling to the left of the tractor trailer truck, which vehicle Cantwell stated he never saw prior to the accident. Based upon the foregoing, it is determined, as a matter of law, that the plaintiff is entitled to summary judgment on liability.

Accordingly, plaintiff's motion (003) for summary judgment on liability is granted, as a matter of law.

Dated: FEB 20 2008



J.S.C.

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**