Benjamin v Noto
2008 NY Slip Op 30783(U)
March 13, 2008
Supreme Court, Suffolk County
Docket Number: 0009343/2006
Judge: Elizabeth H. Emerson
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SHORT FORM ORDER

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INDEX NO.: 9343-06

SUPREME COURT - STATE OF NEW YORK

TRIAL TERM, PART 8 SUFFOLK COUNTY

PRESENT: Hon. Elizabeth Hazlitt Emerson

MOTION DATE: 10-29-07
SUBMITTED: 1-17-08
MOTION NO: 001-MD

---x

MELVIN BENJAMIN and JOAN BENJAMIN,

Plaintiffs,

-against-

JAMES NOTO,

Defendant.

---x

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Upon the following papers numbered 1 to 9 read on this motion for summary judgment ; Notice of Motion and supporting papers 1-9 ; Notice of Cross Motion and supporting papers___; Answering Affidavits and supporting papers___; Replying Affidavits and supporting papers___; it is,

ORDERED that this motion (001) by defendant, James Noto, pursuant to CPLR 3212 and Insurance Law §5102(d) for summary judgment dismissing the complaint on the issue that plaintiff, Melvin Benjamin, did not sustain serious injury, unopposed by plaintiffs, is denied.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff, Melvin Benjamin, in a motor vehicle accident which occurred on September 24, 2005, on the westbound travel lane of Route 347, at or near its intersection with Gibbs Pond Road, Town of Smithtown, County of Suffolk when his vehicle was struck in the rear by defendant's vehicle. A derivative claim has been asserted by Joan Benjamin, spouse of Melvin Benjamin. Melvin Benjamin claims to have sustained economic loss in excess of the basic economic loss, and serious injury, as defined by Insurance Law §5102.

Melvin Benjamin claims in his bill of particulars that as a result of this accident he was caused to sustain a compression fracture of the T12 vertebrae, disc herniations at L1-2 through L3-4, supraspinatuus and subscapularis tendinitis of the right shoulder; an anterior glenoid labral tear of the right shoulder, tingling and numbness down the right arm, cervical and lumbosacral sprain, aggravated lumbar and thoracic disc disease, limited forward flexion of the lumbar spine, and difficulty ambulating, sitting, lying down and lifting.

Defendant, James Noto, seeks summary judgment dismissing the complaint arguing that plaintiff Melvin Benjamin did not sustain serious injury within the definition set forth in Insurance Law § 5102. In support of this motion, defendant has submitted a copy of the pleadings; copies of the transcripts of the examinations before trial of Melvin Benjamin and James Noto; a copy of an uncertified hospital record; a report of Dr. Ralph Parisi, plaintiff's treating physician; and an affirmed report of Dr. William Healy, III, M.D. dated January 3, 2007.

Plaintiff has not opposed this motion.

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]).

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 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 [2002]). 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]). Such proof, in order to be in a competent or admissible form, shall consist of affidavits or affirmations (**Pagano v Kingsbury,** 182 AD2d 268, 587 NYS2d 692 [2d 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 [3d Dept 1990]).

Melvin Benjamin testified at his examination before trial that he was driving his vehicle when it was struck in the rear by defendant's vehicle. He thereafter sought medical care at North Shore Plainview Hospital where he was x-rayed and referred to an orthopedic surgeon for complaints of pain in his back, shoulder and neck. He followed up with Dr. Parisi on or about October 12, 2005, and was prescribed Naprosyn and physical therapy. He continued the physical therapy through March, 2006. Prior to this accident, he stated he did not sustain injury to his right shoulder, neck, low back or to the middle or thoracic area of his back. About three or four years prior to this accident, he woke up one morning with low back pain and was treated with pain medication for a week. He testified that since the accident he still continues to have pain in his neck and right shoulder and is to have surgery to his right shoulder. He missed about two weeks from work and states he cannot work as quickly with the scissor cutting lace as he could before the accident. Plaintiff is self-employed as a lace cutter.

Defendants have submitted a report prepared by Dr. Ralph Parisi who treated Mr. Benjamin after the accident. Dr. Parisi indicated in his report that Mr. Benjamin developed neck and back pain after the accident, and x-rays taken of his back showed degenerative disc disease at L5-S1 as well as a compression deformity of T12, which, he states, was probably chronic. Limited rotation of the cervical spine was found on flexion and extension of the neck upon examination, and trapezius spasm was noted.

Dr. Healy set forth in his report of January 3, 2007 that he performed an independent orthopedic examination of Mr. Benjamin relating to complaints of injuries to his neck, back and right shoulder alleged to have arisen out of the motor vehicle accident of September 5, 2005. Dr. Healy sets forth that he reviewed the report dated February 9, 2006 of the MRI of Mr. Benjamin's right shoulder which impression was: hypertrophic changes of the acromioclavicular joint extending to impress the supraspinatuus; anteriorly and laterally down sloping acromion extending to abut the supraspinatuus; supcrolateral humeral marginal spurs underlying the supraspinatus; supraspinatuus suggestive of calcific tendinitis in the supraspinatuus, tendinosis and tendinopathy of the supraspinatus and subscapularis, anterior glenoid labral tear and anterior glenoid spurring and possible cyst.

Dr. Healy states that the impression on the MRI report of the thoracic spine dated March 3, 2006 is a compression fracture identified superior to the T12 vertebral body with anterior vertebral wedging, and L1-2 through L3-4 posterior disc herniations extending to narrow the foramen. Dr. Healy states the radiographic report of the lumbar spine from September 24, 2005 shows no acute findings; three views of the cervical and lumbosacral spine demonstrate no fracture or spondylolisthesis, mild to moderate degenerative disc disease at L5-S1, and sclerotic compression deformity at the superior end plate of T12, chronic.

Dr. Healy also states that he reviewed reports from Dr. Parisi, which set forth, inter alia, that x-rays of Mr. Benjamin's right shoulder showed large calcific deposits which were probably there prior to the accident, or could have been aggravated by the accident which may have also caused a partial tear of the cuff because he has limited motion, pain and weakness in abduction. Dr. Healy also reviewed the medical note of Dr. Dines who also saw Mr. Benjamin for complaints concerning his right shoulder and who opined that the MRI shows a full-thickness rotator cuff tear and some degenerative changes, and that he has failed conservative treatment, injection and PT. Dr. Dines recommended arthroscopic rotator cuff repair, decompression and possible labral repair. Dr. Healy also states that a radiograph included with the MRI of the right shoulder does not indicate a rotator cuff tear, but there is a question of an anterior labral tear. Dr. Healy states that an MRI of the thoracic spine dated March 2, 2006 reveals a question of some disc bulging at L1-2 and 2-3.

Upon examination of Mr. Benjamin's right shoulder, Dr. Healy states he found full active and passive range of motion, tenderness at the extremes of full extension and internal rotation of the right shoulder versus the left, there was no active impingement findings, but there were mildly positive O'Brien's test, crank test. and cross arm test.

Based upon the foregoing, it is determined that defendant has failed to demonstrate

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prima facie entitlement to summary judgment on the issue of whether plaintiff sustained a serious injury within the meaning of Insurance Law §5102(d).

Dr. Healy's report does not eliminate factual issues with regard to the herniations disclosed in the MRI of Mr. Benjamin's lumbar spine, the fracture at T12, and the right shoulder injury, and whether it is a rotator cuff tear or an anterior glenoid labral tear. Dr. Healy sets forth conclusively, without setting forth a basis, that Mr. Benjamin's compression fracture at T12 is a chronic injury that preceded the accident. Dr. Healy states that there were findings on Mr. Benjamin's MRI consistent with acromioclavicular degenerative changes as well as a possible labral tear and tendinopathy of the supraspinatuus tendon, but then states that there were no findings on his review of the MRI and/or in the formal reports consistent with a rotator cuff tear as suggested by Dr. Dines. He states that the only findings are consistent with mild degenerative changes, mild labral findings, and mild impingement findings, and he cannot fully relate this injury and these findings to the accident. However, Dr. Healy does not set forth that these injuries were not caused by the accident. In that Dr. Healy's findings upon examination reveal objective findings of the mildly positive O'Brien's test, mildly positive crank test, and mildly positive cross arm test in Mr. Benjamin's right shoulder, without conclusively ruling out either a labral tear or rotator cuff tear, and without determining that this injury is not causally related to the accident, defendant has not demonstrated prima facie entitlement to summary judgment on the issue of whether plaintiff sustained a serious injury with the meaning of Insurance Law §5102(d).

In addition, the evidence adduced during plaintiff's examination before trial does not, by itself, establish defendants' prima facie entitlement to judgment (*see*, **Malary v New York City Tr. Auth.**, 232 AD2d 380, 648 NYS2d 319 [2d Dept 1996]). Inasmuch as neither Dr. Healy's orthopedic report nor the remainder of defendant's evidence excludes the possibility that plaintiff suffered a serious injury in the accident, the defendant is not entitled to summary judgment (*see*, **Peschanker v Loporto**, 252 AD2d 485, 675 NYS2d 363 [2d Dept 1998]).

To prevail on their motion for summary judgment dismissing the complaint, the defendant was required to make a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102(d) (*see,* **Toure v Avis Renta A Car Sys.,** 98 NY2d 345, 746 NYS2d 865, 774 NE2d 1197; **Gaddy v Eyler,** 79 NY2d 955, 582 NYS2d 990 [1992]. Here, defendant failed to satisfy that burden of establishing, prima facie, that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law 5102 (d) (*see*, **Agathe v Tun Chen Wang**, 33 AD3d 737, 822 NYS2s 766 [2nd Dept 2006]; *see also*, **Walters v Papanastassiou**, 31 AD3d 439, 819 NYS2d 48 [2d Dept 2006]).

Since defendant failed to establish entitlement to judgment as a matter of law as set forth above, the burden has not shifted to plaintiff to establish that there are issues of fact to preclude an order granting summary judgment (CPLR 3212[b]; **Zuckerman v City of New York**, supra), and it is unnecessary to reach the question of whether or not plaintiff has raised a triable issue of fact (**Krayn v Torella,** 833 NYS2d 406, NY Slip Op 03885 [2nd Dept 2007]).

Accordingly, motion (001) is denied.

HON. ELIZABETH HAZLITT EMERSON

DATED: March 13, 2008

J. S.C.