

Baytemur v Margielos
2008 NY Slip Op 30925(U)
March 25, 2008
Supreme Court, Suffolk County
Docket Number: 0016351/2006
Judge: Martin J. Kerins
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SUPREME COURT - STATE OF NEW YORK
IAS PART 12 - SUFFOLK COUNTY

PRESENT:

Hon. MARTIN J. KERINS
J.S.C.

MOTION DATE 10-29-07
ADJ. DATE 1-10-08
Mot. Seq. # 002 - MD

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LOKMAM BAYTEMUR,	:	SIBEN & SIBEN, LLP
	:	Attorneys for Plaintiff
Plaintiff,	:	90 East Main Street
	:	Bay Shore, New York 11706
- against -	:	
	:	ABAMONT & ASSOCIATES
DIMITRIOS MARGIELOS and ADAMATIA	:	Attorneys for Defendants
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	:	P.O. Box 9050
Defendant.	:	Garden City, New York 11530-9250

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Upon the following papers numbered 1 to 16 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 8; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 9 - 12; Replying Affidavits and supporting papers 13 - 16; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (002) by defendants Dimitrios Margielos and Adamatia Margielos pursuant to CPLR 3212 for summary judgment dismissing the complaint on the issue that plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102(d) is denied.

This is an action wherein plaintiff seeks damages for personal injury alleged sustained in a motor vehicle accident which occurred on April 19, 2004 on Route 27 at or near the intersection with New Highway, Town of Babylon, County of Suffolk, New York.

Plaintiff claims that as a result of this accident he sustained a herniated disc at L3-4 with deformity of the ventral thecal sac and right sided neural foraminal narrowing; disc bulge at L2-3 which narrows the ventral aspect of the thecal sac; lumbosacral radiculopathy; lumbar spine sprain; sciatic neuritis; lumbar paravertebral myofascitis; and aggravation and/or exacerbation of degenerative joint disease of the left hip and pelvis.

Defendants seeks dismissal of the complaint asserting that plaintiff's injuries do not fall within the definition of serious injury set forth in Insurance Law §5102(d).

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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 Aeraxon 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” (*Rodriguez 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]).

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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]).

Plaintiff, Lockman Baytemur, testified at his examination before trial that he was driving his car when it was struck in the rear by defendants’ vehicle. He testified that approximately two days after the impact that he began to feel pain in his lower back for which his doctor ordered physical therapy which he attended once or twice a week for approximately five months. He testified he had about eight or ten injections of medication for the pain in his lower back. An MRI was performed. He denied prior injury to his lower back. Prior to the accident, he stated, he was working three to four days a week, eight or nine hours a day at a gas station pumping gas and full service. Since the accident, he testified, he experiences pain when he bends over and upon straightening up.

Plaintiff was examined for an independent orthopedic examination on September 12, 2004 by Dr. Arthur Bernhang whose history reveals he has back pain when sitting for long periods of time, groin pain and left hip pain, and pain across his lower back with lifting. Dr. Bernhang set forth the average range of motion in evaluating plaintiff’s dorsolumbar expansion, lateral flexion, lying supine straight leg raising, hip flexion, hip abduction and adduction, internal rotation, external rotation, knee extension and knee flexion. Based upon the foregoing, defendants have failed to demonstrate that plaintiff did not suffer a serious injury within the definition of Insurance Law §5102(d).

To establish entitlement to summary judgment on the issue of serious injury, the defendants were required to submit admissible medical evidence demonstrating that plaintiff’s range of motion in his lumbar spine was not significantly limited in comparison to the normal range of motion one would expect of a healthy person of the same age, weight, and height (*see, Frey v Fedorciuc*, 36 AD3d 587, 828 NYS2d 454 [2nd Dept 2007]; *Powell v Alade*, 31 AD3d 523, 818 NYS2d 600 [2d Dept 2006]). Here, the affirmed report of defendants’ examining orthopedic surgeon is deficient in that it failed to compare

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the degrees of range of motion in plaintiff's lumbar spine to the normal range of motion, thereby leaving the court to speculate as to what those findings were compared to normal ranges of motion (*see, id; Manceri v Bowe*, 19 AD3d 462, 798 NYS2d 441 [2d Dept 2005]). Defendants' examining physician's said findings together with the lack of spasms and the conclusion that plaintiff had essentially normal orthopedic examinations, without more, does not remedy the aforementioned deficits (*compare, Vasquez v Reluzco*, 28 AD3d 365, 814 NYS2d 117 [1st Dept 2006] [defendants submitted affirmed reports of neurologist who examined both plaintiffs and diagnosed them as "normal," finding no spasm and full range of motion of their cervical spines and negative straight-leg raising]; *see also, Rodriguez v Schickler*, 229 AD2d 326, 645 NYS2d 31 [1st Dept 1996], *lv denied* 89 NY2d 810, 656 NYS2d 738 [1997]). Additionally, although Dr. Bernhang noted the MRI results which st forth that plaintiff had "L3-L4 extruded intervertebral disc...broad-based disc bulge at L2-L3," Dr. Bernhang does not comment on causation of these injuries relative to the within accident.

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 the orthopedic surgeon's affirmed report nor the remainder of defendants' evidence excludes 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]). To prevail on their motion for summary judgment dismissing the complaint, the defendants were 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 Rent 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 defendants failed to establish their entitlement to judgment as a matter of law, it is not necessary to consider whether plaintiff's papers in opposition to defendant's motion were sufficient to raise a triable issue of fact (*see, Krayn v Torella*, 833 NYS2d 406, NY Slip Op 03885 [2nd Dept 2007]; *Walker v Village of Ossining*, 18 AD3d 867, 796 NYS2d 658 [2d Dept 2005]).

Accordingly, motion (002) for summary judgment dismissing the complaint on the issue that plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102(d) is denied.

Dated: March 25, 2008
RIVERHEAD, NY

Matt Ken
J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION