

Schneider v Dlugos

2008 NY Slip Op 30929(U)

March 25, 2008

Supreme Court, Suffolk County

Docket Number: 0023786/2005

Judge: Martin J. Kerins

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CAL. No. 07-01990-MV

SUPREME COURT - STATE OF NEW YORK
IAS PART 12 - SUFFOLK COUNTY

PRESENT:

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

MOTION DATE 1-30-08
ADJ. DATE 2-13-08
Mot. Seq. # 001 - MD

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DONALD G. SCHNEIDER,	:	KUJAWSKI & DELLICARPINI
	:	Attorneys for Plaintiff
Plaintiff,	:	1637 Deer Park Avenue, P.O. Box 661
	:	Deer Park, New York 11729-0661
- against -	:	
	:	ROBERT J. PASSARELLI & ASSOCIATES
JODI A. DLUGOS,	:	Attorneys for Defendant
	:	122 West Main Street, Suite 202
Defendant.	:	Babylon, New York 11702
-----X		

Upon the following papers numbered 1 to 20 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 14; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 15 - 17; Replying Affidavits and supporting papers 18 - 20; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (001) by defendant Jodi Dlugos 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.

Plaintiff asserts that motion (001) is untimely. The Note of Issue was filed in this action on August 24, 2007, and pursuant to CPLR 3212(a) and CPLR 3402(a), it is determined that this motion was timely served within 120 days of filing the Note of Issue in that it was served on December 21, 2007. Therefore, plaintiff's assertion that the motion is untimely is without merit.

This is an action wherein plaintiff seeks damages for personal injury and property damage alleged to have been sustained in a motor vehicle accident which occurred on June 17, 2005 on Route 110 at or near the intersection with Schwab Road, Town of Huntington, County of Suffolk, New York.

Plaintiff claims that as a result of this accident he sustained a displaced fracture of the right anterior inferior glenoid rim with a bony Bankart, Hill-Sachs injury, fracture of the greater tuberosity, circumferential tear of the labrum, traumatic tendonitis of the supraspinatus with interstitial defect at the level of the myotendinous junction, joint effusion and intrarticular loose bodies and/or blood clots with

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the bicipital sheath as evidenced by MRI.

Defendants seeks dismissal of the complaint asserting that the aforementioned injury was not sustained in the motor vehicle accident of June 17, 2005, but instead occurred on June 12, 2005 when plaintiff fell off a ladder.

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

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(*DeAngelo v Fidel Corp. Services, Inc.*, 171 AD2d 588, 567 NYS2d 454, 455 [1st Dept 1991]). 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 Eyley*, 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]).

In support of this motion, plaintiff has submitted, inter alia, an uncertified copy of the Huntington Hospital emergency room record; an unsigned, unsworn copy of an MRI of plaintiff’s right shoulder dated July 15, 2005; the reports of Dr. A. Robert Tantleff dated March 7, 2006, Dr. Craig Ordway dated May 9, 2007, and a letter and medical records from Dr. David J. Weissberg to Dr. Ernest Vomero dated June 21, 2005.

In that plaintiff is claiming he sustained a displaced fracture of the right anterior inferior glenoid rim with a bony Bankart, Hill-Sachs injury, fracture of the greater tuberosity, circumferential tear of the labrum, traumatic tendonitis of the supraspinatus with interstitial defect at the level of the myotendinous junction, joint effusion and intrarticular loose bodies and/or blood clots with the bicipital sheath as evidenced by MRI, it is determined that the claimed injury falls within the definition of serious injury as defined by Insurance Law §5102(d). Therefore, the issue of proximate cause must be addressed at this time.

Plaintiff was examined at Huntington Hospital on June 12, 2005 at which time x-rays were taken of Mr. Schneider’s right shoulder which x-rays Dr. Steven Tuzinkiewicz of Huntington Hospital Department of Radiology read and interpreted as showing no evidence of fracture or dislocation, the articular surfaces are intact, and the soft tissues present a normal appearance.

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On March 7, 2006 Dr. Tantleff performed an independent radiology review of the MRI of plaintiff's right shoulder and opined that there was a fracture of the inferior bony glenoid involving the anterior inferior aspect with associated bone marrow contusion; a recent Hill-Sachs deformity with a gouge defect involving the posterior superior aspect of the humeral head with associated bone marrow edema/contusion, consistent with anterior inferior shoulder dislocation and anterior inferior fracture of the bony glenoid representing osseous Bankart lesions; the rotator cuff reveals focal punctate lucent brightening at its insertion at the greater tuberosity consistent with a partial tear of the distal supraspinatus tendon; a SLAP-tear of the labrum with healing defects in the bicipital sheath consistent with a blood clot; non specific fluid in the biceps sheath; and mild osteoarthritic change of the acromioclavicular joint. Dr. Tantleff set forth his impression that the MRI examination reveals findings related to direct-impact injury.

On May 9, 2007, Dr. Craig Ordway performed an independent medical examination of Donald Schneider and set forth in his report that five days prior to the motor vehicle accident on June 17, 2005 that Mr. Schneider fell through or from a ladder approximately ten feet landing on his right shoulder. He stated Mr. Schneider was seen at the emergency room of Huntington Hospital with findings of crepitus in the right shoulder with decreased range of motion with pain, and x-rays taken at the time were read as negative for fracture. Dr. Ordway indicates that following the accident of June 17, 2005, Mr. Schneider was examined by Dr. Weissberg. The CT scan of June 24, 2005, he states, identifies a fracture of the inferior and anterior glenoid and that Dr. Weissberg performed a surgical debridement of the right shoulder. Dr. Ordway opines that upon his reading the x-ray films taken at Huntington Hospital on June 12, 2005 that the fracture deformity is clearly demonstrated on three of the four views of the right shoulder which was simply missed by the attending radiologist at Huntington Hospital. He further states that its presence is confirmed by the findings on the CT scan which demonstrate the fracture to be exactly in the same place.

In that defendant's reviewing radiologist did not render an opinion on the x-rays taken at Huntington Hospital, and in that Dr. Steven Tuzinkiewicz read the x-rays of plaintiff's right shoulder taken June 12, 2005 as negative, and in that Dr. Ordway opines that the x-rays taken at Huntington Hospital were read as negative and that he opines that these same x-rays actually reveal a fracture in Mr. Schneider's right shoulder prior to the accident of June 17, 2005, defendant has actually raised a material factual issue in the moving papers concerning proximate cause of the claimed injury to preclude summary judgment in this action.

Accordingly, motion (001) 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

Maull Ken
J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION