Bentley v Conner
2008 NY Slip Op 31471(U)
May 19, 2008
Supreme Court, Suffolk County
Docket Number: 0003657/2005
Judge: Peter H. Mayer
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SHORT FORM ORDER

COPY

INDEX No. 05-3657
CAL. No. 07-02390-MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER MAYER
Justice of the Supreme Court

MOTION DATE 11-30-07
ADJ. DATE 1-4-08
Mot. Seq. # 002 - MG; CASEDISP

BRUCE BENTLEY, Plaintiff, - against - JEREMY CONNER and TOWN OF BROOKHAVEN, Defendants.	WALLACE, WITTY, FRAMPTON, et al. Attorneys for Plaintiff 600 Suffolk Avenue, Suite A Brentwood, New York 11717 LEWIS JOHS AVALLONE AVILES, LLP Attorneys for Defendants 21 East Second Street Riverhead, New York 11901

Upon the following papers numbered 1 to 24 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 - 22; Replying Affidavits and supporting papers 23 - 24; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that defendants' motion for summary judgment dismissing the complaint is granted; and it is further

ORDERED that defendants' counsel shall serve a copy of this order with notice of entry upon plaintiff's counsel within twenty (20) days of the date of this order.

Plaintiff Bruce Bentley commenced this action to recover damages for personal injuries allegedly sustained in a motor vehicle accident that occurred at the intersection of Lexington Avenue and Linden Avenue in the Town of Brookhaven on December 5, 2003. The collision happened when a snowplow traveling eastbound on Linden Avenue struck the passenger side of the vehicle operated by

plaintiff as it was traveling northbound on Lexington Avenue. The snowplow was operated by defendant Jeremy Conner, an employee of defendant Town of Brookhaven, who was plowing snow from Linden Avenue. It is undisputed that a snowstorm was in progress at the time of the accident, and that the subject intersection was controlled by stop signs on Linden Avenue. The bill of particulars alleges that plaintiff suffered various personal injuries as a result of the accident, including bilateral hip pain, aggravation of a herniated disc at level L4-L5, a bulging disc at level L1-L2, restricted movement in the cervical and lumbar regions, and "internal cervicothoracolumbar derangement." It further alleges that plaintiff, who was attending St. Joseph's College and working part-time at a gym at the time of the accident, was confined to home for three days due to his injuries.

Defendants now move for summary judgment dismissing the complaint on the ground that there is no evidence that defendant Conner acted with reckless disregard for other vehicles on the road as he approached the subject intersection. Alternatively, defendants argue that plaintiff is precluded under Insurance Law § 5104 from recovering for non-economic loss, as he did not suffer "serious injury" within the meaning of Insurance Law § 5102 (d). In support of the motion defendants submit, inter alia, copies of the pleadings, transcripts of the parties' deposition testimony, and sworn medical reports prepared by Dr. Michael Katz and Dr. Richard Pearl. At defendants' request, Dr. Katz, an orthopedist, and Dr. Pearl, a neurologist, conducted examinations of plaintiff in July 2007. Dr. Katz and Dr. Pearl also reviewed medical records relating to the injuries plaintiff allegedly sustained as a result of the subject collision, as well as various medical records concerning prior injuries to plaintiff's spine.

Plaintiff opposes the motion, asserting that triable issues of fact exist as to whether defendant Conner actually was engaged in snow removal activities at the time of the accident and, if so, whether his operation of the snowplow was reckless. Plaintiff also argues that defendants' submissions are insufficient to demonstrate their entitlement to judgment based on the failure to meet the serious injury threshold, as they fail to show prima facie that he did not suffer a nonpermanent injury as a result of the accident. Furthermore, plaintiff alleges that medical evidence presented in opposition to the motion raises triable issues as to whether he sustained a permanent loss of use, a permanent consequential limitation of use, a significant limitation of use, or a nonpermanent injury within the 90/180 category. In addition to the affirmation by counsel, plaintiff submits an affidavit by his treating chiropractor, Jane Whitaker; medical reports prepared by Dr. Whitaker in December 2003 and December 2007; an affirmed medical report prepared by Dr. Rubin, a physiatrist who examined plaintiff in March 2004; and a transcript of plaintiff's 50-h hearing.

Insurance Law § 5102 (d) defines "serious injury" as "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."

To recover under the "permanent loss of use" category, a plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance***, 96 Ny2d 295, 299,

727 NYS2d 378 [2001]). A plaintiff claiming injury within the "limitation of use" categories must substantiate his or her complaints of pain with objective medical evidence showing the extent or degree of the limitation of movement and its duration (*see* ***Laruffa v Yui Ming Lau***, 32 AD3d 996, 821 NYS2d 642 [2d Dept 2006]; ***Cerisier v Thibiu***, 29 AD3d 507, 815 NYS2d 140 [2d Dept 2006]; ***Meyers v Bobower Yeshiva Bnei Zion***, 20 AD3d 456, 797 NYS2d 773 [2d Dept 2005]). He or she must present medical proof contemporaneous with the accident showing the initial restrictions in movement or an explanation for its omission (*see* ***Bell v Rameau***, 29 AD3d 839, 814 NYS2d 534 [2d Dept 2006]; ***Suk Ching Yeung v Rojas***, 18 AD3d 863, 796 NYS2d 661 [2d Dept 2005]; ***Ifrach v Neiman***, 306 AD2d 380, 760 NYS2d 866 [2d Dept 2003]), as well as objective medical findings of restricted movement that are based on a recent examination of the plaintiff (*see* ***Laruffa v Yui Ming Lau***, *supra*; ***Murray v Hartford***, 23 AD3d 629, 804 NYS2d 416 [2d Dept 2005], *lv denied* 6 NY3d 713, 816 NYS2d 748 [2006]; ***Batista v Olivo***, 17 AD3d 494, 795 NYS2d 54 [2d Dept 2005]; ***Kauderer v Penta***, 261 AD2d 365, 689 NYS2d 190 [2d Dept 1999]). "Whether a limitation of use or function is 'significant' or 'consequential' * * * relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (***Dufel v Green***, 84 NY2d 795, 798, 622 NYS2d 900 [1995]; *see* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]). In addition, to qualify as a serious injury within the 90/180 category, there must be objective medical evidence of a medically-determined injury or impairment of a non-permanent nature, as well as evidence that plaintiff's activities were significantly curtailed due to such injury (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Hamilton v Rouse***, 46 AD3d 514, 846 NYS2d 650 [2d Dept 2007]; ***Ocasio v Henry***, 276 AD2d 611, 714 NYS2d 139 [2d Dept 2000]). Moreover, a plaintiff claiming serious injury who terminates treatment after the accident must offer a reasonable explanation for having done so (***Pommells v Perez***, 4 NY3d 566, 574, 797 NYS2d 380 [2005]; *see* ***Joseph v Layne***, 24 AD3d 516, 808 NYS2d 253 [2d Dept 2005]; ***Ali v Vasquez***, 19 AD3d 520, 797 NYS2d 528 [2d Dept 2005]; ***Batista v Olivo***, *supra*).

Further, a defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a "serious injury" (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, i.e., affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (***Pagano v Kingsbury***, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992]). A defendant also may establish entitlement to summary judgment using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (*see* ***Fragale v Geiger***, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; ***Torres v Micheletti***, 208 AD2d 519, 616 NYS2d 1006 [2d Dept 1994]; ***Craft v Brantuk***, 195 AD2d 438, 600 NYS2d 251 [2d Dept 1993]; ***Pagano v Kingsbury***, *supra*). Once a defendant meets this burden, the plaintiff must present proof in admissible form which creates a material issue of fact (*see* ***Gaddy v Eyler***, *supra*; ***Pagano v Kingsbury***, *supra*; *see generally* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

The evidence submitted by defendants establishes prima facie that plaintiff did not suffer a serious injury as a result of the subject accident (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra*; ***Morris v Edmond***, __ AD3d __, 850 NYS2d 641 [2d Dept 2008]; ***Washington v Cross***, __

AD3d __, 849 NYS2d 784 [2d Dept 2008]; ***Tarhan v Kabashi***, 44 AD3d 847, 844 NYS2d 89 [2d Dept 2007]; ***Baez v Rahamatali***, 24 AD3d 256, 808 NYS2d 171 [1st Dept 2005], *affd* 6 NY3d 868, 817 NYS2d 204 [2006]). Briefly stated, the report by Dr. Katz states, among other things, that plaintiff exhibited full range of motion in his cervical and lumbar regions, with no evidence of muscle tenderness or paravertebral muscle spasm, and that clinical tests for thoracic outlet syndrome and disc herniation in the lumbosacral spine were negative. It states that plaintiff demonstrated normal joint function in both shoulders, with no evidence of shoulder dislocation or impingement of the rotator cuff. It also states that plaintiff walked with a normal gait, and had full range of motion in his hip joints. Dr. Katz diagnoses plaintiff as having suffered cervical and thorocolumbosacral strains, as well as contusions to the hips and left rib, as a result of the accident. He concludes that such conditions have resolved without disability, and that plaintiff is capable of performing the normal activities of daily living. The report by Dr. Pearl states that examination of plaintiff's neurological systems revealed no abnormalities. It states that there is no objective evidence of any neurological injury or disability. Both Dr. Katz and Dr. Pearl indicate in their reports that plaintiff advised them that he had sustained spinal injuries in an earlier motor vehicle accident.

In addition, at a deposition conducted on April 12, 2007, plaintiff testified that he suffered lower back injuries in a motor vehicle accident that occurred in January 2003, and that he had received treatment for his injuries from Whitaker Chiropractic Center. Plaintiff testified that he could not recall how long he was treated for the injuries he suffered in January 2003. When questioned about the injuries he allegedly suffered in the December 2003 accident, plaintiff testified that he sought treatment for neck and back pain at the emergency department at Brookhaven Hospital the following day. He testified that he sought care for the injuries now at issue from various medical facilities, including Whitaker Chiropractic Center, but that he could not remember when or how many times he received such treatment. Plaintiff also testified that he could not remember how much time he missed from school and work due to the injuries he sustained in the subject accident, and that he was not confined to bed for any period of time.

The burden, therefore, shifted to plaintiff to raise a triable issue of fact (*see* ***Gaddy v Eyler***, *supra*). Contrary to the assertions by plaintiff's counsel, the evidence submitted in opposition is insufficient to defeat summary judgment. Significantly, the affidavit by Dr. Whitaker states that plaintiff was treated at her office for injuries he sustained in the December 2003 accident from December 15, 2003 to July 2004, and that she conducted a re-examination of plaintiff in November 2007. However, neither plaintiff nor Dr. Whitaker provide any explanation as to why chiropractic treatment was terminated in July 2004, and no evidence regarding care given by other medical providers was included with the opposition papers (*see* ***Pommells v Perez***, *supra*; ***Ning Wang v Harget Cab Corp.***, 47 AD3d 777, 850 NYS2d 537 [2d Dept 2008]; ***Verette v Zia***, 44 AD3d 747, 844 NYS2d 71 [2d Dept 2007]). Further, while Dr. Whitaker's medical report from December 2003 states that "all cervico-thoracic ranges of motion were limited by 50%," and the November 2007 report states that "thoracolumbar ranges of motion were limited by 40% upon flexion," the reports do not explain the objective tests performed on plaintiff to reach such conclusions (*see* ***Casas v Montero***, __ AD3d __, 2008 WL 526085 [2d Dept, Feb. 26, 2008]; ***Murray v Hartford***, 23 AD3d 629, 804 NYS2d 416 [2d Dept 2005], *lv denied* 6 NY3d 713, 816 NYS2d 748 [2006]; ***Kauderer v Penta***, 261 AD2d 365, 689 NYS2d 190 [2d Dept 1999]). Dr. Whitaker's report dated December 2003 also does not provide any evidence regarding the movement in plaintiff's thoracolumbar region shortly after the subject accident

(*see* ***Morales v Daves***, 43 AD3d 1118, 841 NYS2d 793 [2d Dept 2007]; ***Bestman v Seymour***, 41 AD3d 629, 838 NYS2d 645 [2d Dept 2007]; ***Rodriguez v Cesar***, 40 AD3d 731, 835 NYS2d 438 [2d Dept 2007]), and her report dated November 2007 states that the range of motion in plaintiff's cervical spine was "within normal limits. "

Moreover, Dr. Whitaker does not acknowledge in either her affidavit or her reports that plaintiff was suffering from preexisting spinal injuries at the time of the accident in question (*see* ***Penaloza v Chavez***, __ AD3d __, 2008 WL 458328 [2d Dept, Feb. 19, 2008]; ***Vidor v Davila***, 37 AD3d 826, 830 NYS2d 772 [2d Dept 2007]). In addition, absent from both the reports and the affidavit by Dr. Whitaker is any discussion as to the nature of the medical care provided to plaintiff for his alleged injuries (*see* ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]; ***Medina v Zalmen Reis & Assoc.***, 239 AD2d 394, 658 NYS2d 36 [2d Dept 1997]). Dr. Whitaker's affidavit and reports also fail to address in any way the claim that plaintiff suffered injuries in the subject accident that prevented him from performing substantially all of his normal daily activities for more than 90 of the 180 days following the accident. Thus, Dr. Whitaker's conclusions that plaintiff suffered permanent spinal injuries as a result of the December 2003 motor vehicle accident ,and that such injuries have resulted in a "partial spinal disability," are rejected as speculative and tailored to meet the statutory requirements of Insurance Law § 5102 (d) (*see* ***Penaloza v Chavez***, *supra*; ***Luciano v Luchsinger***, 46 AD3d 634, 847 NYS2d 622 [2d Dept 2007]; ***D'Alba v Yong-Ae Choi***, 33 AD3d 650, 823 NYS2d 423 [2d Dept 2006]; ***Moore v Sarwar***, 29 AD3d 752, 816 NYS2d 503 [2d Dept 2006]).

The medical report prepared by Dr. Rubin also fails to raise a triable issue of fact. The report shows that plaintiff exhibited full range of motion in his cervical, thoracic and lumbar regions during an examination conducted by Dr. Rubin just three months after the subject accident. Although the report also indicates that plaintiff complained of pain at the extremes of rotation during testing of his cervical and thoracic regions, and that mild spasm was detected in the paraspinal muscles in the thoracic region, such findings do not create a question as to whether plaintiff suffered injury within the "significant limitation of use" or the 90/180 category (*see* ***Scheer v Koubek***, 70 NY2d 678, 518 NYS2d 788 [1987]; ***Ranzie v Abdul-Massih***, 28 AD3d 447, 813 NYS2d 473 [2d Dept 2006]; ***Cennamo v Themistokleous***, 22 AD3d 700, 804 NYS2d 401 [2d Dept 2005]; ***Barrett v Howland***, 202 AD2d 383, 608 NYS2d 681 [2d Dept 1994]). Rather, Dr. Rubin opines in his report that plaintiff suffered only sprains in his cervical, thoracic and lumbar regions, and that such sprains had resolved at the time of his examination.

Finally, plaintiff failed to submit competent medical evidence demonstrating that he sustained a medically determined injury of a nonpermanent nature that prevented him from performing his usual and customary activities for at least 90 days of the 180 days immediately after the accident (*see* ***Casas v Montero***, *supra*; ***Morris v Edmond,*** *supra*; ***Sainte-Aime v Ho***, 274 AD2d 569, 712 NYS2d 133 [2d Dept 2000]). In fact, plaintiff's testimony at the 50-h hearing shows that he missed no school and only two weeks of work as a result of the injuries suffered in the December 2003 accident. Accordingly, summary judgment dismissing the action is granted based on plaintiff's failure to meet the serious injury threshold.

Dated: 5/19/08

Peter H. Mayer
J.S.C.

__X__ **FINAL DISPOSITION** ____ **NON-FINAL DISPOSITION**