

Daniels v Greenspon
2008 NY Slip Op 31723(U)
June 13, 2008
Supreme Court, Suffolk County
Docket Number: 0007453/2006
Judge: Ralph F. Costello
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

COPY

INDEX No. 06-7453
CAL. No. 07-02166-MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 27 - SUFFOLK COUNTY

P R E S E N T :

Hon. RALPH F. COSTELLO
Justice of the Supreme Court

MOTION DATE 2-7-08
ADJ. DATE 3-20-08
Mot. Seq. # 001 - MD

-----X		
MERCEDES DANIELS,	:	ANDREA & TOWSKY
	:	Attorneys for Plaintiff
Plaintiff,	:	320 Old Country Road
	:	Garden City, New York 11530
- against -	:	
	:	ABAMONT & ASSOCIATES
ROBERT A. GREENSPON and ELLEN H.	:	Attorneys for Defendants
MINTZ,	:	200 Garden City Plaza, Suite 400
	:	P.O. Box 9250
Defendants.	:	Garden City, New York 11530-9250
-----X		

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 - 11 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 12 - 16 ; Replying Affidavits and supporting papers ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (001) by defendants Robert A. Greenspon and Ellen H. Mintz pursuant to CPLR 3212 and Insurance Law §5102(d) for summary judgment dismissing the complaint on the issue that plaintiff's injuries do not meet the serious injury threshold, is denied.

This is an action for damages for personal injuries and consequential damages sustained by the plaintiff, Mercedes Daniels, arising out of a two-vehicle accident which occurred on January 19, 2006, on Plainview Road approximately fifty feet south of Old Country Road, Town of Oyster Bay, County of Nassau, State of New York, wherein it is claimed that defendants' vehicle came into contact with plaintiff's vehicle, causing plaintiff to suffer personal injury. Jurisdiction is premised upon plaintiff's residence in the County of Suffolk.

Defendant claims entitlement to an order granting summary judgment dismissing the complaint, asserting the plaintiff did not sustain serious injuries sufficient to meet the threshold pursuant to Insurance Law of the State of New York §5102(d).

It is set forth in plaintiffs' bill of particulars that as a result of the within incident, Mercedes Daniels sustained posterior disc herniation at L4-L5; posterior disc herniation at L5-S1; posterior disc bulge at L2-L3; posterior disc bulge at L3-L4; free fluid in the lumbar cul-de-sac; internal derangement of the left knee; closed head trauma with loss of consciousness, dizziness, nausea and vomiting; anxiety; blurred vision; left ankle contusion; right forearm contusion; left hip contusion; and neck, back, shoulder and chest pain. She was confined to bed for about two weeks and was out of work for two months, then partially out of work from April 3, 2006 through July 29, 2006.

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 [1957]). The movant has the initial burden of proving entitlement to summary judgment (Winegrad v N.Y.U. Medical Center, 64 NY2d 351 [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 [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 [2nd Dept 1989]) 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 [2nd Dept 1981]). Summary judgment shall be granted only 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 [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 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."

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 [1982]).

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 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent

Daniels v Greenspon
Index No. 06-7453
Page No. 3

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 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (Licari v Elliott (supra)).

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 [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 [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 [1992]).

In support of this motion the defendants have submitted, inter alia, an attorney’s affirmation; a copy of the summons and complaint; defendant’s verified answer; a copy of the verified bill of particulars; a copy of a transcript of an examination before trial of Mercedes Daniels; a copy of the sworn report of Bruce P. Meinhard, M.D., orthopedist, dated July 25, 2007; and a copy of the sworn letter of Scott S. Coyne, M.D., radiologist, dated February 3, 2007, concerning his review of the MRI of the lumbosacral spine of March 9, 2006.

In opposing this motion, plaintiff has submitted, inter alia, an attorney’s affirmation; the affirmation Salvatore J. Corso, M.D.; and the affidavit of Mercedes Daniels.

Mercedes Daniels testified at her examination before trial that is employed at C&C Home Care Inc. as the account manager of the Visiting Nurse Service, and at Kennedy Realty as a real estate agent. She stated she was involved in an automobile accident on January 19, 2006 on Plainview Road, about fifty feet south of Old Country Road. She initially lost consciousness and was removed from the scene by ambulance and taken to Nassau University Medical Center where she was treated for complaints of injury to her head, neck, back, left ankle, left knee, left shoulder, chest, right forearm and right wrist. She stated she had MRI’s, CAT scan’s and sonograms and was told there may be a fracture in her neck for which she was hospitalized for three days until the fracture was ruled out. She had follow up care and treatment with a neurologist, an orthopedist who prescribed muscle relaxants for her back, with a chiropractor who adjusted and massaged her back, and with a physical therapist until her No-Fault benefits were discontinued. She wore an air cast on her left ankle for three to four months to help support the ankle and to help with the pain. She stated she has scarring as a result of the accident on her left ankle, and the right hand and forearm. She stated she had a prior injury to her middle back between 1999 and 2001 that was work related from lifting a heavy file and placing it on a top shelf. She had also been involved in a motor vehicle accident in 1995 but did not think she was injured. She had been receiving adjustments and massages to her mid back prior to the accident with the last treatment about two months prior. She described the pain she was experiencing in her back after this accident as being in a different place from the pain she previously experienced prior to the accident. She claims that as a result of this accident she can no longer jog, play basketball with her son, and cannot play handball or paddle ball anymore. She cannot go on a roller coaster with her children. She cannot sit for a long

period of time and is therefore limited going to the movies. She cannot do the normal things she used to, such as laundry.

Dr. Meinhard performed an independent orthopedic medical examination of plaintiff on July 25, 2007. He reviewed various diagnostic test results and medical records and opined that both a left knee MRI report and cervical MRI dated February 10, 2006 showed similarly normal findings. He states the lumbar MRI of March 10, 2006 indicated L2-3 and L3-4 bulging discs and L4-L5 and L5-S1 degenerative disc disease with disc dessication and posterior herniation. The thoracic MRI report of March 11, 2006 was normal. Upon physical examination he set forth that lumbar flexion was to thirty degrees at which time she experienced back pain. He described the normal lumbar flexion range of motion to be ninety degrees. He stated the supine straight leg raising test causes low back pain at 30 degrees on the left and 45 degrees on the right, but he does not set forth the normal range of motion value. He notes no abnormal findings upon examination of the cervical spine, left hip, both knees, shoulders, ankles and the forearms. His diagnosis was that of contusion right forearm, resolved; cervical strain, resolved, and exacerbation of cervical C4-5 and C5-6 degenerative disease; thoracic spine strain, resolved; lumbar strain, resolved, exacerbation of pre-existing degenerative disease superimposed on previous trauma; left hip contusion, resolved; left ankle contusion/sprain, resolved; and a contusion left shoulder, resolved. He further states that if the history is correct, the event of January 19, 2006 is the competent cause of the above diagnoses. He states she is not disabled, has mild symptom magnification and mild residuals of her pre-existing degenerative conditions of the cervical and lumbar spines which were temporarily exacerbated by the accident.

Dr. Coyne's letter of February 3, 2007 sets forth that her reviewed the lumbosacral spine MRI of March 9, 2006 and opined there were mild and age appropriate degenerative disc changes mainly at L4-5 and L5-S1, presenting with elements of disc dehydration, annular disc bulging and mildly diminished disc heights; no focal disc herniation at any level; no spinal stenosis or displacement of the cauda equina at any level. He stated that the mild degenerative disc changes are clearly chronic and longstanding, pre-existent and causally unrelated to the accident of January 19, 2006.

Based upon the foregoing, it is determined that defendants have failed to demonstrate prima facie entitlement to summary judgment as defendants' submissions have raised factual issues.

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 Rent a Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyer, 79 NY2d 955 [1992]). Here, defendants failed to satisfy the 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 [2nd Dept 2006]; see also, Walters v Papanastassiou, 31 AD3d 439 [2nd Dept 2006]).

Dr. Meinhard stated the cervical MRI dated February 10, 2006 showed normal findings and the lumbar MRI of March 10, 2006 indicated L2-3 and L3-4 bulging discs and L4-L5 and L5-S1 degenerative disc disease with disc dessication and posterior herniation which raises factual issues with the submission of Dr. Coyne wherein Dr. Coyne opined there were mild and age appropriate degenerative disc changes mainly at L4-5 and L5-S1, presenting with elements of disc dehydration, annular disc bulging and mildly diminished disc heights. Dr. Coyne does not address the bulging discs at L2-3 and L3-4, the posterior disc

herniations at L4-L5 and L5-S1, or exacerbation of cervical C4-5 and C5-6 degenerative disease set forth by Dr. Meinhard. Dr. Coyne sets forth that the mild degenerative disc changes are clearly chronic and longstanding, pre-existent and causally unrelated to the accident of January 19, 2006, however, he gives no basis upon which he rests this opinion.

Dr. Meinhard, upon physical examination of plaintiff, set forth that lumbar flexion was to thirty degrees at which time she experienced back pain. He described the normal lumbar flexion range of motion to be ninety degrees, thus indicating a significant limitation in lumbar flexion. He stated the supine straight leg raising test caused low back pain at 30 degrees on the left and 45 degrees on the right, but did not set forth the normal range of motion value. Here, the affirmed report of defendant's examining orthopedist is deficient in that he failed to provide the degrees of the normal range of motion in plaintiff's straight leg raising, thereby leaving the court to speculate as to what the normal is (see, Id; Manceri v Bowe, 19 AD3d 462 [2nd Dept 2005]).

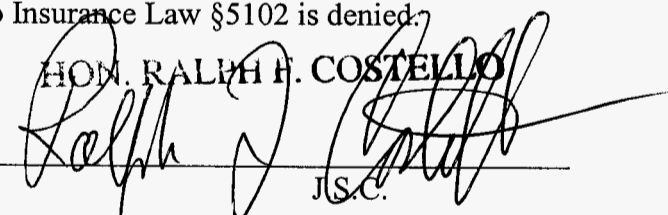
There are also factual issues concerning whether the plaintiff was unable to substantially perform all of the material acts which constituted her usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident (Blanchard v Wilcox, 283 AD2d 821 [3rd Dept 2001] in light of the amount of time she missed from work. 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 [2nd Dept 1996]).

Dr. Meinhard also states Ms. Daniels is not disabled, and that she has mild symptom magnification but does not state what mild symptom magnification is and causes the court to speculate as to whether this raises a credibility issue in addition to the factual issues raised.

Inasmuch as neither the orthopedic surgeon's affirmed report nor Dr. Coyne's letter 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 [2nd Dept 1998]). 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, Walker v Village of Ossining, 18 AD3d 867 [2nd Dept 2005]; Krayn v Torella, 40 AD3d 588 [2nd Dept 2007]), as 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.

Accordingly, motion (001) for summary judgment dismissing the complaint on the issue that plaintiff did not sustain a serious injury pursuant to Insurance Law §5102 is denied.

Dated: June 13, 2008

HON. RALPH F. COSTELLO

J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION