

Grillo v Farris

2008 NY Slip Op 31760(U)

June 3, 2008

Supreme Court, Suffolk County

Docket Number: 0034517/2006

Judge: Peter Fox Cohalan

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.

SUPREME COURT - STATE OF NEW YORK
 I.A.S. PART 24 - SUFFOLK COUNTY

P R E S E N T :

Hon. PETER FOX COHALAN
 Justice of the Supreme Court

MOTION DATE 2-29-08
 ADJ. DATE 4-30-08
 MNEMONIC: # 001 - MD

-----X			
JENNIFER GRILLO,	:	LITE & RUSSELL	
	:	Attorneys for Plaintiff	
Plaintiff,	:	212 Higbie Lane	
	:	West Islip, New York 11795	
- against -	:		
	:		
FRANKLYN A. FARRIS, as Public	:	RICHARD T. LAU & ASSOCIATES	
Administrator of the Estate of WILLIAM	:	Attorneys for Defendant	
SANGIRARDI,	:	P.O. Box 9040	
Defendant.	:	Jericho, New York 11753-9040	
-----X			

Upon the following papers numbered 1 to 21 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13; Notice of Cross-Motion and supporting papers ; Answering Affidavits and supporting papers 14-21; 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 the defendant Frank Farris as Public Administrator of the Estate of William Sangirardi pursuant to CPLR 3212 and Insurance Law §§ 5102(d) and 5104(a) for summary judgment because the plaintiff Jennifer Grillo has failed to meet the serious injury threshold limits, is denied.

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff when she was involved in a motor vehicle accident on August 1, 2004, on Indian Head Road, Town of Smithtown, County of Suffolk, State of New York. William Sangirardi, the owner/operator of the other vehicle involved in this accident, died on October 2, 2004. Letters of Administration were issued by the Surrogate's Court, County of Suffolk, to Franklyn A. Farris, appointing him as Public Administrator of the Estate of William J. Sangirardi, on November 17, 2006.

The plaintiff claims in her bill of particulars that as a result of the within accident she sustained straightening of the normal cervical lordosis; right sided herniated disc at L4-5 with partial involvement of the right neural foramen associated with downward disc extrusion; left sided herniated disc at L3-L4; numbness and bruising to the right wrist and bruising to the right hip. The plaintiff further claims she has sustained a permanent injury and significant limitation which prevented her from performing substantially all of the material acts which were usual and customary for a period in excess of ninety days during the first one hundred eighty

days following the accident. She also claims she was disabled for approximately two days immediately following the accident and has been partially disabled from the date of the accident.

The defendant now seeks summary judgment because the plaintiff's claimed injuries fail to meet the threshold imposed by Insurance Law §5102(d).

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" (*Rodriguez v Goldstein*, 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once the 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, the 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 the plaintiff’s limitations, with an objective basis, correlating the 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 [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, 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 the defendant has met the burden, the 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]).

In support of this motion, the defendant has submitted, inter alia, an attorney’s affirmation; copies of the pleadings and the plaintiff’s bill of particulars; a copy of an uncertified medical record from St. Catherine of Siena emergency department; unsworn letter of Alan M. Cohen, M.D. (hereinafter Cohen) an orthopedist, of Bay Shore Physical Medicine concerning his re-evaluation of the plaintiff on October 21, 2004; the sworn report dated October 11, 2007 of Michael J. Katz, M.D. (hereinafter Katz), orthopedist; the sworn report dated October 15, 2007, of Beatrice Engstrand, M.D. (hereinafter Engstrand), neurologist; sworn reports both dated September 25, 2007 of Melissa Sapan Cohn, M.D. (hereinafter Cohn), radiologist; and a copy of the transcript of the examination before trial of Jennifer Grillo.

The plaintiff testified at her examination before trial that on August 1, 2004, she was the operator of a motor vehicle involved in an accident and lost consciousness upon impact. She was removed from her vehicle with the Jaws-of-Life and remembered feeling pain in her right leg and right arm, and both hips. She was seen thereafter at St. Catherine of Siena Hospital emergency room and indicated that she also had pain in her head. After being treated, she was discharged with a splint on her right arm and was given crutches, which she stated she used for about a month following the accident. She thereafter followed up with Cohen, for treatment for pain in her back, legs, arms and head. She testified that every part of her body hurt. She attended physical therapy and chiropractic visits five days a week for about a year,

then with less frequency until 2007. After the accident she couldn't sleep, developed a fear of driving and could not drive for about three or four months, so she began seeing a psychologist or psychiatrist. She testified that she also followed up with a neurologist. She missed time from summer employment after the accident and returned to her job as head first grade teacher in September but did not miss any additional employment at the school. She stated as a result of the injuries sustained in this accident she cannot sit or stand too long, still experiences pain in her neck, back, right knee, and in her head once in a while, and still can't sleep. She also testified she used to be an avid runner and cannot run any longer, she cannot eat, and her self esteem is horrible because she cannot do any of the things she used to do. She stated she still feared driving and now would car pool to work.

Katz, in his sworn report dated October 11, 2007, states forth, inter alia, that he examined the plaintiff and that her history revealed she was under the outpatient care of Cohen and John Wallace, D.C., receiving physical therapy and chiropractic treatment three to five times per week for two years, as well as acupuncture and massage treatment and trigger point injections following the motor vehicle accident. Upon examination, he indicated that there was no tenderness or muscle spasm during the cervical spine and lumbar spine. He found full range of motion of the cervical and lumbar spines upon examination, and quantified his findings and compared them to normal range of motion in degrees. He stated the straight leg raising test was negative but did not indicate what test was performed and did not quantify his findings or compare the results to the normal, thus raising a factual issue in his report. Examination of the plaintiff's right and left wrists were indicated to be normal, with range of motion quantified in degrees and compared to the normal. He found the examination of the plaintiff's right and left hips to be normal and quantified his findings, comparing them to the normal ranges of motion. Katz's diagnosis was cervical strain resolved, lumbosacral strain resolved, right wrist contusion resolved and right hip contusion resolved. He stated that the treatment was consistent with the injuries sustained, and that these injuries were usually due to sudden impact. He further stated that the plaintiff showed no signs or symptoms of permanence relative to the musculoskeletal system and relative to the accident August 1, 2004. Katz did not address the results of the MRI or the plaintiff's claim of herniated discs as listed in her bill of particulars, thus raising further factual issues.

Engstrand, in her report of October 15, 2007, stated that she took a history and physical of the claimant and that the history revealed she had pain in her right arm, right hip, headaches, had difficulty sleeping as she had nightmares and that the plaintiff's mother died in a motor vehicle accident some years before. She further asserted that the plaintiff complained of feeling anxious and cried during the examination and that her current complaints were headaches, neck pain, low back pain and depression. During the physical examination, Engstrand examined the plaintiff's cervical spine and lumbar spine ranges of motion, quantified her findings and compared them to the normal ranges of motion. However, those quantified normal ranges of motion which Engstrand listed are different from the normal ranges of motion set forth by Katz in his report. Additionally, Engstrand found the plaintiff's straight leg raising to be 45 degrees but did not set forth the normal range of motion. Thus, factual issues have been raised in Engstrand's report as well.

Additionally, Engstrand conclusively stated that the pre-existing condition that

affected the plaintiff's recovery was the degenerative disc disease. However, no basis is indicated in her report for the etiology of the degenerative disc disease which she stated is pre-existing. Engstrand then stated that the pre-existing degenerative disc disease was partially caused by the accident. This, therefore, raises a factual issue.

There are additional factual issues in that the report of Cohn, dated September 25, 2007, stated that her review of the lumbar MRI of September 16, 2004 revealed a herniated disc at L3-L4 that effaces the ventral aspect of the thecal sac, and extruded disc material extending inferiorly behind the L4 vertebral body and slightly to the right of midline, the age of which is somewhat indeterminate based upon exclusively MRI criteria. Cohn further stated that it is difficult to accurately pinpoint the exact time of the occurrence.

These factual issues raised in the defendant's moving papers preclude summary judgment. The defendant failed to satisfy his burden of establishing, prima facie, that the plaintiff did not sustain a "serious injury" within the meaning of Insurance Law 5102 (d) (see, **Agathe v Tun Chen Wang**, 98 NY2d 345, 746 NYS2d 865 [2006]); see also, **Walters v Papanastassiou**, 31 AD3d 439, 819 NYS2d 48 [2d Dept 2006]) as the defendant's examining physicians either failed to provide specific range of motion measurements for the plaintiff or failed to compare those findings with normal ranges of motion (see, **Hypolite v International Logistics Management, Inc.**, 43 AD3d 461, 842 NYS2d 453 [2nd Dept 2007]; **Somers v Macpherson**, 40 AD3d 742, 836 NYS2d 620 [2nd Dept 2007]; **Browdame v Candura**, 25 AD3d 747, 807 NYS2d 658 [2nd Dept 2006]). By failing to compare the results that were reported to the normal range, or by failing to quantify their range of motion findings in degrees, the reports of the defendant's examining physicians leave it to this Court to speculate as to whether the ranges of motion reported are normal or abnormal (see, **Rodriguez v Schickler**, 229 AD2d 326, 645 NYS2d 31 [1st Dept 1996], *lv denied* 89 NY2d 810, 656 NYS2d 738 [1997]). In that the reports of the defendant's examining physicians do not exclude the possibility that the 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]). Disc herniation and limited range of motion based on objective findings may constitute evidence of serious injury (**Jankowsky v Smith**, 294 AD2d 540; 742 NYS2d 876 [2nd Dept 2002]). Here the defendant has submitted admissible evidence to demonstrate findings of herniated discs in the plaintiff's lumbar spine which may constitute evidence of serious injury based upon objective findings.

Since the defendant failed to establish entitlement to judgment as a matter of law, it is not necessary to consider whether the plaintiff's papers in opposition to the defendant's motion were sufficient to raise a triable issue of fact (see, **Agathe v Tun Chen Wang**, *supra*; **Walters v Papanastassiou**, *supra*).

Accordingly, the motion (001) by the defendant for dismissal of the complaint on the serious injury threshold is denied.

Dated: June 3, 2008



J.S.C.

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION