

Hamer v Browen

2008 NY Slip Op 32939(U)

October 23, 2008

Supreme Court, New York County

Docket Number: 109173/06

Judge: Paul Wooten

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN
Justice

PART 22

JAMAR HAMER, JR., an infant under the age of 14 years, by his father and Natural Guardian, JAMAR HAMER, and JAMAR HAMER, individually,
Plaintiffs,

- v -

NATHANIEL BROWEN, SHERMICA PRICE and SPYRIDON HALIKIAS,
Defendants.

INDEX NO. 109173/06

MOTION DATE _____

MOTION SEQ. NO. 004

MOTION CAL. NO. 40

The following papers, numbered 1 to _____ were read on this motion to/for summary judgment.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits (Memo) _____

Replying Affidavits (Reply Memo) _____

Cross-Motion: Yes No

FILED
PAPERS NUMBERED
OCT 28 2008
COUNTY CLERK'S OFFICE
NEW YORK

In this personal injury action, infant plaintiff Jamar Hamer, Jr. sustained injuries as a result of a motor vehicle accident that occurred on January 28, 2005 on First Avenue near its intersection with 117th Street, New York, New York.

The action was commenced on June 30, 2006, discovery was completed and a note of Issue filed. Defendants Nathaniel Browen and Shermica Price move for summary judgment pursuant to CPLR § 3212 dismissing the complaint and any cross claims and counterclaims against them. Defendant Spyridon Halikias also cross-moves for summary judgment, on the same ground raised by the other defendants and adopts the same arguments made by them.

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The defendants assert that the complaint should be dismissed on the ground that the infant plaintiff's injuries do not constitute "serious injury" pursuant to section 5102 of the Insurance Law. Section 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.

It is indisputable that six of the nine categories of serious physical injuries discussed by Insurance Law 5102 (d) are not applicable herein as there is no allegation of death, dismemberment, significant disfigurement, fracture, or loss of a fetus or a permanent loss of use of a body organ, member, function, or system. Therefore, the court must determine if the injuries asserted by plaintiff constitute: (1) 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 90 days during the 180 days immediately following the occurrence of the injury or impairment; (2) a significant limitation of use of a body function or system; (3) a permanent consequential limitation of use of a body function or system.

The plaintiffs' bill of particulars alleges that he sustained the following injuries: L4/5 and L5/S1 posterior disc herniations extending to narrow the foramina. There is abutment of the existing left L4 root. At L5/S1 there is an impression of the existing L5 roots; L1/2, L2/3 and L2/4 posterior disc bulges; C2/3, C3/4 and C4/5 posterior disc bulges with ventral CSF impression at these levels; posteriosuperior nasopharyngeal adenoidal hyperplasia; diminished size involving the C3, C4 and C5 vertebral bodies, as well as the intervening C4/5 disc; and possible posterior fusion of the disc at C4/5.

SUMMARY JUDGEMENT STANDARD

It is well settled that the "legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to serious injuries." (*Toure v. Avis Rent-A-Car Sys., Inc.*, 98 N.Y.2d 345, 350 [2002] quoting *Dufel v. Greene*, 84 N.Y.2d 795, 798 [1995]) The issue of whether a claimed injury falls within the statutory definition of "serious injury" is a question of law for the courts which may decide the issue on a motion for summary judgment. (*Perez v. Rodriguez*, 25 A.D.3d 506, 507 [1st Dept 2006]).

The proponent of a motion for summary judgment is required to make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*JMD Holding Corp. v Congress Fin. Corp.*, 795 NY2d 502 [2005]; *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Medical Center*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006]; *Thomas v Holzberg*, 751 NY2d 433, 434 [1st Dept 2002]; *Silverman v. Perlbiner*, 762 NY2d 386 [1st Dept 2003]). The failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Medical Center, supra*). The motion must be supported "by affidavit...from a person having knowledge of the facts, by a copy of the pleadings and by other available proof . . ." (CPLR § 3212 [b]). A conclusory affidavit, expressions of hope, unsubstantiated allegations or an affidavit by an individual without personal knowledge of the facts does not establish the proponent's *prima facie* burden (*Winegrad v New York Univ. Medical Center, supra*). A party may also demonstrate a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman v City of New York, supra*; *Prudential Securities Inc. v Rovello*, 692 NYS2d 67 [1st Dept 1999]). Where the proponent of the motion has made a *prima facie* showing, the burden then shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a triable issue of fact (*Vermette*

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v *Kenworth Truck Co.*, 68 NY2d 714 [1986]; *Zuckerman v City of New York*, *supra*; *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Forrest v Jewish Guild for the Blind*, 765 NY2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in to sufficiently establish the existence of a "serious injury," which mandate's resolution by trial. If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978].

DISCUSSION

In order to weed out frivolous claims, and limit recovery to significant injuries (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345 [2002]), the No-Fault Law precludes recovery for pain and suffering, and other non-economic loss, between covered persons, unless the plaintiff pleads and proves a "serious injury" (Insurance Law § 5104 [a]). The burden of proof on the threshold issue of whether a serious injury has been sustained is on the plaintiff (CPLR § 3016 [g], 3043 [a] [6]). However, on a defendant's' motion for summary judgment, the motion papers must establish a prima case through evidence in admissible form that the plaintiff's injuries are not serious within the meaning of Insurance Law § 5102 (d) (*Baez v Rahamatali*, 6 NY3d 868 [2006]).

In support of the motion, the defendants submit the affirmed medical report of Dr. R.C. Krishna, a neurologist and Dr. S. W. Bleifer, an orthopedist, both who examined the infant plaintiff on July 10, 2007, after the note of issue was filed Dr. Krishna diagnosed the infant plaintiff as having resolved cervical and lumbar strains with no neurological disability. Dr. Bleifer diagnosed the infant plaintiff as having a resolved head concussion, a resolved post traumatic cervical strain and a resolved post lumbosacral strain, with no orthopedic disability.

The defendants also submit deposition testimony of Shermica Price, who is the infant plaintiff's mother. She testified that the infant plaintiff was confined to bed for two weeks after

the accident. The defendants state that this is an insufficient duration for a person with serious injuries. The defendants contend that the reports from their specialists and the deposition testimony specialists indicate that the infant plaintiff has currently recovered from his injuries and is not suffering from serious injuries pursuant to the statute.

Based on the foregoing, defendants have submitted evidence in legally admissible form to meet their *prima facie* burden, entitling them to summary judgment and a finding that plaintiffs have not sustained a "serious injury" within the meaning of Insurance Law § 5102 [d] (See, *Gaddy v Eyer*, 79 NY2d 955, 956-957 [1992]; *Shinn v Catanzaro*, 1AD3d 195, 197 [1st Dept 2003]; *Lowe v Bennett*, 511 NYS2d 603 [1st Dept 1986], *Affd*, 69 NY2d 700 [1 Dept 1986]; *Pagano v Kingsbury*, 587 NYS2d 692 [2d Dept 1992]). Thus, the burden now shifts to plaintiffs to demonstrate evidentiary proof in admissible form to warrant the showing that a material question of fact exists to defeat defendants' motion. (See *Zuckerman v City of New York*, *supra*; *Forrest v Jewish Guild for the Blind*, *supra*; *Oquendo v New York City Transit Authority*, 246 AD2d 635 [2d Dept 1998].

In opposition, the plaintiffs profer the following; uncertified January 28, 2005, emergency room hospital records of the plaintiff from Mt. Sinai Hospital, the affirmed medical reports of plaintiffs examinations by Dr. David H. Delman, physician on February 2, March 9, April 12, and May 24, 2005; the uncertified and unaffirmed medical notes by Delman; and the unaffirmed and uncertified MRI reports of Dr. Robert Diamond, Radiologist from March 2005. Plaintiffs assert that defendants have failed to meet the burden of showing that plaintiff has not sustained an serious injury pursuant to the Insurance Law and there is an issue of fact as to the nature of the infant plaintiff's injuries. They allege that a significant limitation of the use of a body function or system does not require proof of permanence and that the infant plaintiff sustained a cervical spine strain. They point out that Dr. Diamond's 2005 unaffirmed MRI report of infant plaintiff's lumbar spine indicates a posterior disc bulge and a posterior disc herniation.

The infant plaintiff's proof is insufficient. The Courts have unanimously held that a party may not use an unsworn medical report prepared by the parties' own physician on a motion for summary judgment (See *Grasso v Angerami*, 79 NY2d 813 [1991]; *Offman v Singh*, 813 NY2d 56 [1 Dept 2006]) Moreover, CPLR § 2106 ["requires a physician's statement be affirmed to be true under the penalties of perjury"]. Hence, Dr. Diamonds 2005 MRI reports and Dr. Delman's, unaffirmed handwritten notes, fail this requirement, are inadmissible and cannot be considered on this motion.

In addition, plaintiff's proof fails because *Toure*, *supra*, holds that a bulging disc alone is not a "serious injury". See *Navedo v Jaime*, 32 AD3d 788 (1st Dept 2006), sprains, radiculopathy and herniated and bulging discs are not "serious injuries" without a showing of permanent disability resulting therefrom); (also see *Forte v Vaccaro*, 175 AD2d 153 (2d Dept 1991), restriction of motion by itself is not a "serious injury").

Plaintiffs have also failed to provide any evidence that, as a result of the alleged accident, they were unable to perform all of their normal and customary activities for at least ninety days out of the one hundred eighty days subsequent to the injury. Plaintiffs, in their responses to the Bill of Particulars, merely state, in a conclusory fashion, that they were unable to perform their normal functions for the statutorily specified period. Conclusory statements tailored to meet the statutory definitions, standing alone, are insufficient to defeat a motion for summary judgment. See *Bent v Jackson*, 15 AD3d 46 [1st Dept 2005].

The court also notes that six years elapsed since plaintiffs were treated, and they offer no explanation for the gap in treatment. Although this gap is not dispositive, plaintiffs should have offered some explanation why treatment was not pursued. *Pommells v Perez*, 4 NY3d 566, 574 [2005].

Plaintiffs have not provided more recent medical evidence which would indicate the nature and extent of the infant plaintiff's present medical condition. The records they submit are several years old. Therefore, they have not satisfied the requirement of competent medical

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evidence under the statute. See *Young v Russell*, 19 AD3d 688 (2d Dept 2005). Their claim shall be dismissed.

Accordingly, it is

ORDERED that defendants Nathaniel Browen's and Shermica Price's motion for summary judgment is granted and the complaint and cross claims are dismissed with costs and disbursements to these defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

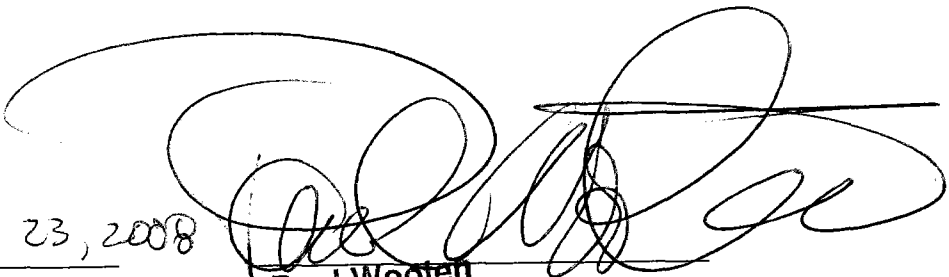
ORDERED that defendant Spyridon Halikiaas' cross motion for summary judgment is granted and the complaint and cross claims are dismissed with costs and disbursements to this defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

Enter:

Dated:

October 23, 2008

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Paul Wooten

J.S.C. Paul Wooten J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

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