

Dorio v County of Suffolk

2010 NY Slip Op 33480(U)

December 16, 2010

Sup Ct, Suffolk County

Docket Number: 2995/2003

Judge: William B. Rebolini

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Short Form Order

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SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Joseph Dorio,

Plaintiff,

-against-

The County of Suffolk, The Suffolk County
Transportation Division, Joseph Parise,
Matthew Dower and D.L. Peterson Trust,

Defendants.

Clerk of the CourtMotion Sequence No.: 006; MDMotion Date: 7/22/10Submitted: 10/20/10Index No.: 2995/2003Attorney for Plaintiff:Daniel Henthorne, Esq.
7 Railroad Avenue
Patchogue, New York 11772Attorney for Defendants The County of
Suffolk, The Suffolk County
Transportation Division, Joseph Parise:Kral,, Clerkin, Redmond, Ryan
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Mineola, New York 11501Attorney for Defendants Matthew
Dower and D.L. Peterson Trust:Cullen & Dykman, LLP
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Upon the following papers numbered 1 to 14 read on this motion for summary judgment:
Notice of Motion and supporting papers, 1 - 4; Answering Affidavits and supporting papers, 5 - 7,
8 - 10; Replying Affidavits and supporting papers, 11 - 12; 13 -14.

Dorio v. County of Suffolk, et al.

Index No.: 2995/2003

Page No. 2

In this negligence action, plaintiff alleges that he sustained serious personal injuries in a motor vehicle accident on November 14, 2001 while he was a passenger on a bus (the County bus) owned by the Suffolk County Transportation Division and operated by the defendant Joseph Parise (the County defendants). The complaint alleges that the County bus was struck by a van owned by the defendant D.L. Peterson Trust and operated by the defendant Matthew Dower (the Peterson defendants) at the intersection of Route 112 and Woodside Avenue, in the Town of Brookhaven, New York.

In the bill of particulars, the plaintiff alleges that he sustained the following injuries: post traumatic headaches, post traumatic acute exacerbation of cervical radiculopathy with spasm, posttraumatic acute exacerbation of lumbar radiculopathy with spasm, posttraumatic acute exacerbation of thoracic strain, partial tear of the supraspinatous tendon of the right shoulder, cervical, thoracic and lumbar myofascial derangement and exacerbation of Grade III-IV separation of the right shoulder with AC deformity. In addition, it is alleged that the plaintiff was confined to his bed for approximately three days and home from the date of the accident to the present. The plaintiff further alleges that he was totally and partially disabled from the date of the accident to the present.

In the supplemental bill of particulars, the plaintiff alleges, *inter alia*, that as a result of the accident, he developed a Grade I spondylolisthesis at L4/5 and stenosis of L4/5 and L3/4. He underwent a lumbar decompression and fusion at L3/4 and L4/5 and multiple epidural steroid injections of the lumbar spine. In addition, the plaintiff alleges that he sustained chronic pain syndrome, neuropathic pain syndrome and postlaminectomy fusion syndrome. He allegedly now suffers a permanent restriction of range of motion of the cervical, thoracic and lumbar spine. He also underwent an arthrotomy of the right shoulder with acromioplasty, repair of the rotator cuff and arthrotomy of the acromioclavicular joint excision of the clavicle.

The Peterson defendants now move for summary judgment dismissing the complaint insofar as asserted against them on the ground that the plaintiff did not sustain a serious injury pursuant to Insurance Law §5102 (d).

Under Insurance Law §5102(d), "serious 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."

Dorio v. County of Suffolk, et al.

Index No.: 2995/2003

Page No. 3

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 (see, Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395 [1957]). The movant has the initial burden of proving entitlement to summary judgment (see, Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851 [1985]). A defendant can establish that the plaintiff's injuries are not serious within the meaning of Insurance Law §5102(d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim (see, Grossman v. Wright, 268 AD2d 79 [2nd Dept., 2000]). Once defendant has met this initial burden, the burden shifts to the plaintiff to demonstrate with competent proof that he sustained a serious injury within the meaning of the No-Fault Insurance Law (see, Pommells v. Perez, 4 NY3d 566 [2005]; Gaddy v. Eyler, 79 NY2d 955 [1992]; Staff v. Yshua, 59 AD3d 614 [2nd Dept., 2009]). Such proof, in order to be in a competent or admissible form, shall consist of affidavits or affirmations (see, Pagano v. Kingsbury, 182 AD2d 268 [2nd Dept., 1992]).

In support of the motion, the Peterson defendants submit, *inter alia*, the pleadings, the bill of particulars, the supplemental bill of particulars, the plaintiff's deposition testimony, an MRI of the lumbar spine by Thomas J. Dowling, M.D. dated August 1, 2001, unsworn reports by Jimmy U. Lim, M.D. and Anjani Sinha, M.D. and sworn reports by Noah S. Finkel, M.D. and Howard B. Reiser, M.D.

At his deposition, the plaintiff testified that he injured his right shoulder, neck and back in a work-related fall on February 7, 2001. As a result of the fall, he sustained injuries to his right shoulder, right hip, neck and low back. He did not injure his left knee or lower extremities. He received physical therapy from that time to the present. He stated that he continued to experience right shoulder, neck, low back pains, and numbness in the right arm, both legs and feet from the work related injury. On November 14, 2001, the date of the instant accident, he was returning from his doctor's office by bus when the second injury occurred. As a result of the bus driver suddenly braking prior to impact, he slid off his seat and grabbed a bar with his right hand, landed on his left knee and was thrown forward and backward. He thereafter felt more severe pain in the neck, back and right shoulder than before the accident. He boarded a second bus and was transported to his chiropractor's office, where he was evaluated and treated. He stated that he did not reinjure the neck, back and right shoulder after the accident on November 14, 2001. The plaintiff stated that there were no tests performed on his left knee after the accident.

The plaintiff stated that as a result of the work-related accident, he underwent right shoulder surgery. He stated that he had not had any tests performed of his neck from the time of the work-related accident up to the time before the subject accident and no tests were performed

Dorio v. County of Suffolk, et al.

Index No.: 2995/2003

Page No. 4

on the neck after the subject accident. He continues to feel numbness in the right shoulder, pains in the left knee and severe pain in the low back to the legs at the present time. At a second deposition, plaintiff testified that he underwent low back surgery on November 4, 2004. He stated that the surgery helped relieve approximately 30% of the daily pain and numbness in the lower extremities. He obtained prescriptions for pain. He stated that he entered a psychiatric rehabilitation center for excessive pain medication use and anxiety attacks. At the present time as a result of the accident, he is unable to obtain gainful employment and engage in sexual relations.

The MRI of the lumbar spine, dated August 1, 2001, reveals a transitional lower intervertebral disc is present at S1/2, disc herniations at L3/4 and L5/S1 with foraminal narrowing at L3/4, L4/5 and L5/S1 and a disc bulge at S1/2. Dr. Lim avers in a report dated April 25, 2001, that the plaintiff has been disabled since his work-related injury. In his report, dated October 25, 2001, Dr. Lim notes that although an MRI of the right shoulder was requested, the plaintiff did not receive an authorization from Workers' Compensation for the study. An MRI, performed on March 15, 2002, revealed a torn rotator cuff of the right shoulder with marked hypertrophy of the acromioclavicular joint with separation of the AC joint. Dr. Sinha avers that he performed an orthopedic examination on February 5, 2003, and noted marked loss of mobility of the right shoulder, which he states was causally related to the accident on February 7, 2001. Despite enormous amounts of physical therapy, the plaintiff's condition had not changed. Dr. Sinha performed right shoulder surgery on February 11, 2003.

Dr. Finkel avers that he performed an independent orthopedic examination on November 23, 2009. Upon examination, he noted limitations of motion in the cervical and lumbar spines, as compared to normal ranges, thereby creating an issue of fact (see, Trunk v. Spross, 306 AD2d 463, [2nd Dept., 2003]). He also examined the right shoulder and stated that the plaintiff had excellent strength with all rotator cuff and scapulothoracic muscular testing with no evidence of atrophy. However, he failed to set forth the objective tests he performed or measure the range of motion to support his opinion (see, Zavala v. DeSantis, 1 AD3d 354, 355 [2nd Dept., 2003]; Black v. Robinson, 305 AD2d 438 [2nd Dept., 2003]; Gamberg v. Romeo, 289 AD2d 525 [2nd Dept., 2001]; Junco v. Ranzi, 288 AD2d 440 [2nd Dept., 2001]). In addition, Dr. Reiser, who also performed an independent neurological examination on November 23, 2009, failed to measure the range of motion in the cervical, thoracic and lumbar spine, or in the right shoulder.

Defendants failed to demonstrate a *prima facie* entitlement to judgment as a matter of law with evidence that the injuries at issue were attributable to the prior accident or pre-existing conditions and were not exacerbated by the subject accident with regard to the allegations by the plaintiff (see, Cebularz v. Diorio, 32 AD3d 975 [2nd Dept., 2006]). Under these circumstances, it is unnecessary to consider the sufficiency of the plaintiff's opposition papers (see, Coscia v.

Dorio v. County of Suffolk, et al.

Index No.: 2995/2003


Page No. 5

938 Trading Corp., 283 AD2d 538 [2nd Dept., 2001]; Chaplin v. Taylor, 273 AD2d 188 [2nd Dept., 2000]; Mariaca-Olmos v. Mizrhy, 226 AD2d 437 [2nd Dept., 1996]).

Accordingly, it is

ORDERED that the motion by defendants Matthew Dower and D.L. Peterson Trust for summary judgment dismissing the complaint insofar as asserted against them is denied.

Dated: December 16, 2010



HON. WILLIAM B. REBOLINI, J.S.C.

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION