

**Flythe v Wine**

2010 NY Slip Op 33661(U)

December 30, 2010

Supreme Court, Suffolk County

Docket Number: 36107-08

Judge: Thomas F. Whelan

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 33 - SUFFOLK COUNTY

**PRESENT:**

Hon. THOMAS F. WHELAN  
Justice of the Supreme Court

MOTION DATE 11/29/10  
ADJ. DATES 12/3/10  
Mot. Seq. # 003 - MG; ~~CDISP~~

|                              |   |                                |  |
|------------------------------|---|--------------------------------|--|
| -----X                       |   |                                |  |
| JOHN M. FLYTHE,              | : | CARL A. MALTESE, ESQ.          |  |
|                              | : | Atty. For Plaintiff            |  |
| Plaintiff,                   | : | 1050 W. Jericho Tnpk.          |  |
|                              | : | Smithtown, NY 11787            |  |
| -against-                    | : |                                |  |
|                              | : | BAKER, McEVOY, MORRISSEY ET AL |  |
| MICHAEL WINE and SOUTHAMPTON | : | Attys. For Defendants          |  |
| MANAGEMENT, INC.,            | : | 330 W. 34 <sup>th</sup> St.    |  |
|                              | : | New York, NY 10001             |  |
| Defendants.                  | : |                                |  |
| -----X                       |   |                                |  |

Upon the following papers numbered 1 to 6 read on this motion by the plaintiff to vacate his default in opposing the motion (#002) for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1 - 3; Notice of Cross Motion and supporting papers \_\_\_\_\_; Answering Affidavits and supporting papers 4-6; Replying Affidavits and supporting papers \_\_\_\_\_; Other \_\_\_\_\_; (~~and after hearing counsel in support of and in opposition to the motion~~) it is,

**ORDERED** that this motion (#003) by the plaintiff for an order relieving him of his default in opposing the defendants' prior motion for summary judgment is granted as the parties believed they had secured an adjournment of such motion pursuant to a stipulation that was not received by the court (*see* CPLR 5015[a][1]; *Hospital for Joint Diseases v Dollar Rent-A-Car*, 25 AD3d 534, 806 NYS2d 437 [2d Dept 2006]); and it is further

**ORDERED** that the July 13, 2010 order of this court, which granted the defendants' motion (#002) for summary judgment upon the plaintiff's default is hereby vacated and upon review of the original motions papers (#1-3), the opposing papers attached to the motion papers submitted by the plaintiff on this motion (#4-5), and the reply papers attached to conditional, partial opposing papers submitted by the defendants on this motion (#6-7), the defendants' motion for summary judgment dismissing the plaintiff's complaint pursuant to CPLR 3212 is granted, for the reasons stated below.

*Handwritten:* CR 1-5-11

This action arises out of a motor vehicle accident that occurred on February 14, 2008. After leaving the scene, the plaintiff was driven to a local hospital. He was treated in the emergency room for pain in his neck, back and knees and released. By his amplified pleadings, the plaintiff claims to have sustained injuries to both knees, and to his back and neck. One or more of these injuries are alleged to constitute a serious injury in four of the several categories of serious injury listed in § 5106(d) of the Insurance Law. By the instant motion, the defendants seek summary judgment dismissing the plaintiff's complaint on the grounds that none of the injuries claimed to have been sustained in the subject accident constitutes a serious injury as that term is defined in the Insurance Law.

The record reflects that following his discharge from the emergency room on February 14, 2008, the plaintiff made an appointment with an orthopedist (Finkel), to whom emergency room personnel referred the plaintiff. An MRI of the plaintiff's right knee was conducted on June 4, 2008. Among other abnormalities, a meniscus tear of the right knee was noted and surgery on the right knee to repair the tear was performed by orthopedic surgeon, Dr. Healy, on October 31, 2008. In November of 2008, the plaintiff received physical therapy treatments to the right knee for approximately two months, which were halted by developing pain in the plaintiff's left knee. An MRI of the left knee was performed on April 16, 2009 which revealed arthritic and other degenerative changes. Complaints of pain in the left knee were treated primarily with injections of steroids over a period of several months.

The plaintiff's separate complaints of back and neck pain were the subject of an MRI of the cervical spine conducted in April of 2008. Chiropractic and physical therapy treatments began shortly thereafter and continued for approximately two to three months. At his deposition in January of 2010, the plaintiff testified that his principal complaint was pain in his left knee and that he had no plans for further treatments except with respect to his left knee.

The record reflects that the plaintiff was unemployed at the time of the accident and that his customary trade was employment in the construction industry where he worked principally as a ceramic tiler. The plaintiff testified that he was confined to his home for approximately three weeks following the accident and similarly confined for two weeks following the October 31, 2008 orthoscopic surgery on his right knee. The record further reflects that the plaintiff returned to work in January of 2010 as a construction manager.

In support of their motion, the defendants rely upon the reports of their retained radiologist who, in November of 2009, reviewed the MRI films taken of the plaintiff's cervical spine, right knee and left knee. Therein, the defendants' radiologist attributed all noted changes and/or abnormalities to arthritic degeneration and other pre-existing conditions, except for the tear in the meniscus in the plaintiff's right knee, which was surgically repaired in October of 2009 by Dr. Healy. Nevertheless, the defendants' examining neurologist and orthopedist, both of whom conducted physical examinations of the plaintiff in March of 2010, found that the plaintiff's injuries had resolved and that he was suffering from no disabilities, limitations or residual effects of any of the injuries sustained in the accident.

In opposing the motion, the plaintiff relies principally on radiological reports of the radiologist who performed the MRIs of his right and left knees. The plaintiff also relies upon the reports of Dr. Healy, the orthopedist who treated the plaintiff's right and left knees and the examination report of Dr.

Bernhang, who physically examined the plaintiff on June 23, 2010. Dr. Healy, who neither examined nor treated the plaintiff prior to October 9, 2008, found that the plaintiff likely sustained in the subject accident the meniscus tear and traumatic arthritis to his right knee, for which no future treatments were prescribed. Dr. Healy suggested that the plaintiff's complaints to his left knee were consistent with "post traumatic" arthritis for which "ongoing management" is required.

Noted in Dr. Bernhang's report was a separation of the right shoulder which was stated to be unrelated to the subject accident and some limitations in the ranges of motion in that shoulder. Also noted were minor (5%) limitations of motion in cervical flexion and lateral flexion, none of which were attributed to injuries sustained in the accident. All other ranges of motion were reported within normal limits. Dr. Bernhang further reported that the sprains and strains of the cervical and lumbar spines sustained in the accident were resolved without residuals and that the meniscus tear of the right knee that was surgically repaired requires no further treatment. Dr. Bernhang also reported that the plaintiff suffers from an arthritic right knee condition, for which, physiotherapy was recommended.

Upon the court's review of the record adduced on this motion and for the reasons set forth below, the defendants' motion for summary judgment dismissing the plaintiff's complaint for want of serious injury as that term is defined in §5102(d) of the Insurance Law is granted.

It is well established that the court must determine in the first instance whether a prima facie showing of serious injury as defined in § 5102(d) of the Insurance Law has been established (*see Tipping-Cestari v Kilhenny*, 174 AD2d 663, 571 NYS2d 525 [2d Dept 1991]). On a motion for summary judgment for dismissal the plaintiff's complaint pursuant to § 5102(d) of the Insurance Law, the initial burden is on the defendant to present evidence, in competent form, showing that no injury constituting a serious injury was sustained by the plaintiff in the subject accident (*see Forlong v Faulton*, 29 AD3d 856, 814 NYS2d 50 [2d Dept 2006]). Once that showing is made, the burden shifts to the plaintiff to demonstrate, by equally competent medical proof, that a genuine question of fact exists on the threshold issue of serious injury (*see Feng Jin v Reilly*, 296 AD2d 373, 745 NYS2d 435 [2d Dept 2002]; *Grossman v Wright*, 268 AD2d 79, 707 NYS2d 233 [2d Dept 2000]).

To support a claim that the plaintiff sustained a permanent loss of use of a body organ, member function or system under §5102(d) (vi) of the Insurance Law, the loss must total (*see Oberly v Bangs Ambulance*, 96 NY2d 295, 727 NYS2d 378 [2001]). Claims of serious injuries under the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories of serious injury require the plaintiff to demonstrate the existence of a causally related injury resulting in a qualified statutory limitation measured contemporaneous with the accident and at a recent medical examination by either of the following: (1) objective evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration; or (2) 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 (*see Insurance Law § 5102(d) (vii & viii)*; *Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d 345, 746 NYS2d 865 [2000]; *Perl v Meher*, 74 AD3d 930, 902 NYS2d 632 [2d Dept 2010]; *Nesci v Romanelli*, 74 AD3d 765, 902 NYS2d 172 [2d Dept 2010]; *Jack v Acapulco Car Service, Inc.*, 72 AD3d 646, 897 NYS2d 648 [2d Dept 2010]; *Mejia v DeRose*, 35 AD3d 407, 825 NYS2d 722 [2d Dept 2006]). A claim of serious

injury under Insurance Law §5102(d) (ix) requires proof that the plaintiff sustained a medically determined non-permanent injury which prevented him or her from performing all or substantially all of his or her customary daily activities for 90 out of the 180 days immediately following the accident (see *Taylor v Flaherty*, 65 AD3d 1328, 887 NYS2d 144 [2d Dept 2009]). The failure to establish a causal relationship between the claimed injuries and the subject accident is fatal to any claim for recovery under §5102(d) of the Insurance Law (see *Scotto v Ah Ram Suh*, 50 AD3d 1012, 857 NYS2d 185 [2d Dept 2008]; *Vishnevsky v Glassberg*, 29 AD3d, 680, 815 NYS2d 152 [2006]; *McCauley v Ross*, 298 Ad2d 506, 748 NYS2d 409 [2002]; *Bucci v Kempinski*, 273 Ad2d 333, 709 NYS2d 595 [2000]).

Here, the moving papers established, prima facie, that none of the injuries sustained in the subject accident constitutes a serious injury as that term is defined in § 5102(d) of the Insurance Law. The defendants' proof, including the plaintiff's own deposition testimony, established, prima facie, that no serious injury of the type contemplated by Insurance law § 5102(d)(vi) (total loss of use) or (ix) (impairment for 90/180 days) was sustained by the plaintiff in the subject accident.

The records relied upon the defendants also demonstrated the absence a causally related injury to the plaintiff's neck, back and knees resulting in limitations that were objectively measured contemporaneous with the accident and in recent medical examinations. Although the meniscus tear of the right knee was noted by the defendant's retained radiologist as potentially having been caused by the accident, the record is devoid of any contemporary measurement of restrictions and limitations in the right knee. Moreover, none of the recent physical examinations conducted by the physicians, whose examination reports were submitted on this motion, revealed any significant deviations from the normal limits of motion ranges or other residual limitations in the plaintiff's right knee. The defendants' proof thus established, prima facie, that the right knee injury constitutes neither a permanent consequential limitation of use of a body organ or member or significant limitation of use of a body function or system set forth in subparagraphs vii and vii of § 5102(d) of the Insurance Law. The proof adduced was also sufficient to establish the absence of any casually related injury and measured limitation contemporaneous with the accident to the plaintiff's left knee, back and/or neck. This proof, coupled with the findings of the examining physicians who, in recent physical exams, observed no abnormalities, restrictions or limitations in the plaintiff's neck back and left knee, was sufficient to establish the absence of a serious injury to these parts of the body under the permanent consequential limitation of use of a body organ or member or significant limitation of use of a body function or system categories of serious injury.

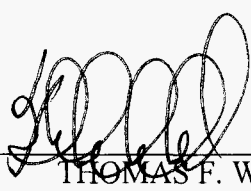
It was thus incumbent upon the plaintiff to adduce medical proof sufficient to demonstrate that a question of fact exists with respect to the serious injury threshold. A review of the plaintiff's submissions reveals, however, that no such question of fact was raised.

No proof of any total loss of use of any of a body organ, member function or system was adduced (see *Candia v Omonia Cab Corp.*, 6 AD3d 641, 775 NYS2d 546 [2d Dept 2004]). Nor was there any proof to support the plaintiff's pleaded claim of a medically determined injury that prevented him from performing all or substantially all of his customary activities for 90 out of 180 days immediately following the accident (see *Krauer v Hines*, 55 AD3d 881, 866 NYS2d 340 [2d Dept

2008]). Finally, the plaintiff's claims of a permanent consequential limitation of use of a body organ or member and/or a significant limitation of use of a body function or system are unsupported by the medical reports of both Dr. Healy and Dr. Bernhang and the other proof relied upon by the plaintiff (see *Ressek v Morreale*, 74 AD3d 1043, 903 NYS2d 120 [2d Dept 2010]; *Nieves v Michael*, 73 AD3d 716, 901 NYS2d 100 [2d dept 2010]; *Raleigh v Ram*, 60 AD3d 747, 874 NYS2d 258 [2d Dept 2009]).

In view of the foregoing, the defendants' motion (#002) for summary judgment dismissing the plaintiff's complaint for lack of a serious injury as that term is defined in § 5102(d) of the Insurance Law is granted. The plaintiff's complaint is thus dismissed.

DATED: 12/30/10

  
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THOMAS F. WHELAN, J.S.C.