Destra v Magett

2011 NY Slip Op 30260(U)

January 25, 2011

Sup Ct, Suffolk County

Docket Number: 08-41317

Judge: Ralph T. Gazzillo

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[* 1]

SHORT FORM ORDER COPY

INDEX No. 08-41317
CAL. No. 10-00739

SUPREME COURT - STATE OF NEW YORK
IAS PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH T. GAZZILLO
Acting Justice of the Supreme Court

MOTION DATE: 8-26-10
ADJ. DATE 12-08-10
Mot. Seq. # 001 - MD

---X

JOSSELIN G. DESTRA and MARIE B. PIERRE,

Plaintiffs,

- against -

SADIE MAGETT and DANIEL MAGETT,

Defendants.

---X

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Upon the following papers numbered 1 to 9 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 4 ; Notice of Cross Motion and supporting papers ________; Answering Affidavits and supporting papers 5 - 7 ; Replying Affidavits and supporting papers 8 - 9 ; Other ______; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (001) by defendants for summary judgment dismissing the complaint is denied.

In this negligence action, plaintiff Josselin G. Destra seeks damages for injuries that he allegedly sustained in a motor vehicle accident on December 13, 2007 on Old Country Road in the Town of Huntington, New York. Plaintiff Marie B. Pierre alleges a derivative cause of action. Plaintiff alleges that defendant Sadie Magett lost control of a vehicle owned by defendant Daniel Magett and struck the plaintiffs' vehicle. By way of the bill of particulars, plaintiff alleges that he sustained the following injuries: left knee ligament tear, herniated disc at C3/4, C4/5, L4/5, cervical radiculopathy, headaches, and lumbar radiculopathy. He further alleges that his injuries are permanent.

[* 2]

Defendants now move for summary judgment on the ground that plaintiff Josselin G. Destra did not sustain a serious injury within the meaning of New York 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."

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 Corp.***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [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 (***Grossman v Wright***, 268 AD2d 79, 707 NYS2d 233 [2d Dept 2000]). Once defendant has met the burden, the burden shifts to plaintiff to demonstrate with competent proof that he sustained a serious injury within the meaning of the No-Fault Insurance Law (***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Staff v Yshua***, 59 AD3d 614, 874 NYS2d 180 [2d Dept 2009]). Such proof, in order to be in a competent or admissible form, shall consist of affidavits or affirmations (***Pagano v Kingsbury***, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]).

In support of their motion, defendants submit, *inter alia*, the pleadings, the bill of particulars, plaintiff's deposition testimony, unsworn reports by Samuel Mayerfield, M.D., Suja Johnkutty, M.D., and a sworn report by Michael J. Katz, M.D. Plaintiff testified that after being treated and released from Huntington Hospital on the date of the accident, he went to a chiropractor and a physical therapist. He received treatment for approximately 5 months until the no fault benefits expired. He stated that the therapy helped to relieve his pain. His last visit to a medical provider was May, 2008. As a result of the accident, he is unable to climb steps, lift heavy objects, dance, clean the house, garden, or cut the grass at his home. He missed approximately one week from his work as a school bus driver. He stated that he was involved in a prior accident in 2006 and injured his back and neck, but not his knees. He received treatment for approximately two months and the symptoms resolved. He has not had a subsequent accident after the instant accident.

The MRI reports by Dr. Mayerfield relate to the prior accident in 2006. An MRI of the cervical spine, dated November 10, 2006 reveals herniated discs at C3/4, C4/5 and C5/6. An MRI of the lumbar spine, dated November 7, 2006 reveals herniated discs at L3/4 and L4/5, and a bulging disc at L2/3. An

EMG performed by Dr. Johnkutty on December 6, 2006 reveals a mild S1 radiculopathy on the left.

Dr. Katz avers that he performed an independent orthopedic examination on December 8, 2009. He measured the range of motion in the cervical spine, lumbar spine and left knee and found no limitations as compared to normal ranges. He performed objective tests which were negative. He found no signs and symptoms of permanence. He opined that plaintiff was not disabled and was capable of all pre-loss activities.

Defendants met their prima facie burden of showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (*see*, ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 352, 746 NYS2d 865 [2002]). Defendants' examining doctors set forth, in their affirmed medical reports, that plaintiff had full range of motion in his cervical and lumbar spine based on objective range of motion tests, wherein the numerical findings were compared to what is normal. In addition, defendants submitted plaintiff's deposition testimony showing that he resumed his duties at work (***Layne v Drouillard***, 65 AD3d 1197, 885 NYS2d 540 [2d Dept 2009]). The burden of proof shifts to plaintiffs to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (*see*, ***Gaddy v Eyler***, *supra*).

In opposition, plaintiffs submit, *inter alia*, the sworn reports by John Himmelfarb, M.D., Miguel Vargas, M.D., Patrick J. Hannan, D.C., Joseph Perez, M.D., and Harshad C. Bhatt, M.D. Dr. Himmelfarb conducted MRI studies of plaintiff's left knee, cervical spine and lumbar spine. The left knee MRI, performed on January 21, 2008, reveals a partial tear of the posterior cruciate ligament with effusion. The cervical spine MRI, performed on February 3, 2008, reveals herniated discs at C3/4, C4/5 and C5/6, and disc bulges at C6/7 through T2/3 levels. The lumbar spine MRI, performed on February 11, 2008, reveals a herniated disc at L4/5 and a bulging disc at L3/4. Dr. Vargas performed motor and sensory nerve conduction studies on January 28, 2008 which reveal evidence of C5/6 and C6/7 radiculopathy on the left.

Dr. Hannan avers that he initially saw plaintiff on December 14, 2007. He measured plaintiff's range of motion in the cervical and lumbar spines and noted limitations in movement as compared to normal ranges. He also performed objective tests which were positive. He began chiropractic care to include soft tissue manipulation, manual traction, passive range of motion therapy, and chiropractic adjustments. He treated plaintiff regularly until November, 2008.

Dr. Perez avers that he initially saw plaintiff on December 26, 2007. He also noted decreased range of motion in the cervical and lumbar spines with spasms on palpation and limited range of motion in the left knee. He ordered physical therapy. He causally related plaintiff's symptoms to the accident of December 13, 2007. Dr. Perez also saw plaintiff on January 16, 2008, March 31, 2008, and May 20, 2008. Dr. Perez performed a final examination on August 4, 2010. He opined that plaintiff continued to experience limited range of motion in the cervical and lumbar spines and left knee as compared to normal ranges. He stated that plaintiff has a permanent disability.

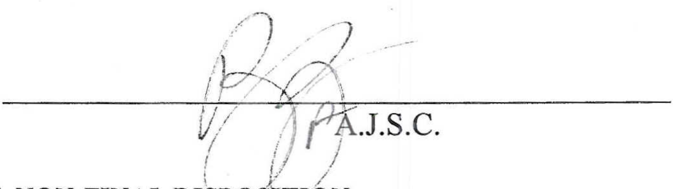
Dr. Bhatt avers that he performed an orthopedic examination on March 18, 2008. He measured the range of motion in the right and left knees and noted limitations in movement in the left knee,

crepitus, and swelling. He diagnosed plaintiff as having sustained a knee joint effusion, internal derangement and torn posterior cruciate ligament in the left knee. He advised plaintiff to wear a knee brace, to participate in physical therapy, and to undergo arthroscopic surgery of the left knee. He opines that plaintiff is totally disabled and that the injury to the left knee is causally related to the subject accident.

With these submissions, plaintiffs have met their burden of raising an issue of fact as to whether plaintiff Destra sustained a serious injury (***Curry v Velez***, 243 AD2d 442, 663 NYS2d 63 [2d Dept 1997]; ***Lincoln v Johnson***, 225 AD2d 593, 639 NYS2d 124 [2d Dept 1996]; ***Friedman v U-Haul Truck Rental***, 216 AD2d 266, 627 NYS2d 765 [2d Dept 1995]; ***Baker v Zelem***, 202 AD2d 617, 609 NYS2d 330 [2d Dept 1994]). Given that issues of fact with respect to at least one aspect of the statutory definition of the term "serious injury" have been raised, it is not necessary to determine whether a prima facie showing of "serious injury" has been made with respect to other aspects of the statutory definition as well (*see*, ***O'Neill v O'Neill***, 261 AD2d 459, 690 NYS2d 277 [2d Dept 1999]).

Accordingly, defendants' motion for summary judgment is denied.

Dated: 1/25/11



A.J.S.C.

__FINAL DISPOSITION __X__ NON-FINAL DISPOSITION