

Butler v Kim

2011 NY Slip Op 32524(U)

September 16, 2011

Sup Ct, Suffolk County

Docket Number: 08-29361

Judge: Jeffrey Arlen Spinner

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them on the basis that the plaintiff, Willien Butler, did not sustain a serious injury as defined by Insurance Law §5102 (d) is denied; and it is further

ORDERED that motion (009) by the defendant, Joanne Reddick, pursuant to CPLR 3212 for an order granting summary judgment dismissing the complaint as asserted against her on the basis that the plaintiff, Willien Butler, did not sustain a serious injury as defined by Insurance Law §5102 (d) is denied.

In this action, the plaintiff, Willien Butler, seeks damages for personal injuries allegedly sustained in a motor vehicle accident which occurred on January 11, 2008 on Route 25 on the exit ramp for County Road 97, Centereach, New York. The plaintiff was a passenger in a vehicle operated by Joanne Reddick, when it was involved in a collision with the co-defendants' vehicles. By stipulation dated March 11, 2009, the plaintiff withdrew those allegations premised upon gross negligence and recklessness, and for punitive damages as asserted against Chun K. Kim and KYC Dry Cleaners, Inc.

By way of her bill of particulars, the plaintiff, Willien Butler, alleges, that as a result of this accident she sustained injuries consisting of a scaphoid fracture; left DeQuervain's disease; subcuticular skin sutures; right hip contusion; and pain in the neck, left hand, and wrist.

In their respective motions, the defendants seek summary judgment dismissing the complaint on the basis that 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 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 [2d Dept 1981]).

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]).

In order to recover under the “permanent loss of use” category, a 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 plaintiff’s limitations, with an objective basis, correlating 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 defendant has met the burden, plaintiff must then, by competent proof, establish a prima facie case that such serious injury exists (*Gaddy v Eycler*, 79 NY2d 955, 582 NYS2d 990 [1992]).

In support of motion (007), Chun K. Kim and KYC Dry Cleaners, Inc., have submitted, inter alia, an attorney’s affirmation; copies of the pleadings, defendants’ answers, and plaintiff’s bill of particulars; a copy of the transcript of the examination before trial of the plaintiff dated January 25, 2010; and the sworn reports of Jay Nathanson, M.D. dated May 10, 2010 concerning his independent orthopedic examination of the plaintiff, and Melissa SapanCohn, M.D. dated April 24, 2010 concerning her review of the plaintiff’s MRI, CT and x-rays of the plaintiff’s left wrist.

In support of motion (008), Carl A. Taurisano and Kristina M. Taurisano have submitted, inter alia, an attorney’s affirmation; copies of the summons and complaint, defendants’ answer, and plaintiff bill of particulars; and the sworn report of Edward A. Toriello, M.D. dated March 16, 2010 concerning his independent orthopedic examination of the plaintiff.

In support of motion (009), Joanne Reddick has submitted, inter alia, an attorney’s affirmation; copies of the pleadings, defendants’ answers, and plaintiff’s bill of particulars; a copy of the transcript of the examination before trial of the plaintiff dated January 25, 2010; and the sworn reports of Jay Nathanson, M.D. dated May 10, 2010 concerning his independent orthopedic examination of the plaintiff, and Melissa SapanCohn, M.D. dated April 24, 2010 concerning her review of the plaintiff’s MRI, CT and x-rays of the plaintiff’s left wrist.

In opposing this motion, the plaintiff has submitted an attorney’s affirmation; the affidavit of Willien Butler; a copy of the MV 104 police accident report; plaintiff’s medical records from Peconic Bay Medical Center; the unsworn report of Brookhaven Orthopedic Associates by Itchak Schwartzbard, M.D., office records, radiology reports and operative reports.

Willien Butler testified to the extent that immediately following the accident, she felt stiffness in her left wrist and shoulder, as she had fallen over onto her left shoulder and hand with the impact. When she went to Peconic Bay Medical Center emergency department the following day, she had an x-ray taken of her left wrist. She testified that the physician told her that she had a fracture for which a cast was applied. She had no prior history of injury to that wrist, she stated, but was receiving disability and social security for a back injury which she previously sustained at work. She also had a prior neck injury as a result of a motor vehicle accident in 2005. After wearing the cast for an unspecified period of time, she started physical therapy as she felt a burning

sensation, "like glass" in her wrist, under the thumb area. She was treated with three cortisone injections into the wrist, then had surgery. Since the surgery, she has experienced weakness in her left wrist and has continuing, although less, burning sensation. Since the accident, she experiences difficulty with activities such as cooking, ironing, and putting on her shoes and socks.

JAY NATHANSON, M.D.

Dr. Jay Nathanson has set forth in his report, concerning his independent orthopedic examination of the plaintiff, that he reviewed the various pleadings, operative report of September 28, 2008, MRI report of the left wrist dated March 10, 2008, records from Brookhaven Memorial Hospital, progress notes, and CT scan of the left wrist dated January 22, 2008. Upon examining the plaintiff, he used a goniometer to determine the ranges of motion of the plaintiff's upper extremities at the shoulders, elbows, wrists, hands, hips, cervical spine and thoracolumbar spine, and compared his findings to the normal ranges of motion, and found no deficits. Additionally, he found no diminished grip, strength, or digital dexterity in the plaintiff's left hand and ascertained a normal range of motion of the left thumb. Dr. Nathanson's impression was that the plaintiff sustained a left wrist sprain which was resolved; status post left DeQuervain's release; cervical spine sprain resolved; and right hip sprain resolved. He states that the claimant was not employed at the time of the accident and has no disability as to activities of daily living. He does not opine as to whether the De Quervain's condition was causally related to the subject accident.

MELISSA SAPANCOHN, M.D.

Melissa SapanCohn, M.D. has set forth in her report that she reviewed the left wrist MRI, CT and x-rays of Willien Butler. She states that the left wrist CT scan, dated January 22, 2008, was of good quality and revealed diffuse osteopenia, with a small subchondral cyst noted along the anterior margin of the scaphoid bone. There was no evidence of acute fracture or dislocation. There were degenerative changes involving the intercarpal joints. Her impression was that of mild degenerative changes with narrowing of the intercarpal joints representing arthritis. She states that the subchondral cyst is likely degenerative in nature. There was no trauma related injury identified. She continues that the x-ray dated January 12, 2008 of the plaintiff's left hand revealed no acute fracture or dislocation. She adds that a lucency through the navicular bone appears to represent a nutrient vessel and not a fracture as the cortex is intact. This, she states, is a negative study. The left wrist x-ray, dated January 12, 2008, revealed a negative study with no fracture or dislocation identified, and the cortex was noted to be intact. The lucency was again noted extending through the scaphoid bone representing a nutrient blood vessel.

Dr. SapanCohn states that a left wrist x-ray, dated January 16, 2008, taken at Brookhaven Orthopedics, was a normal study, revealing no acute fracture or dislocations. With regard to the left wrist MRI, dated March 10, 2008, no acute fracture or dislocation was identified. There were degenerative changes noted involving the scaphoid, capitate, lunate and hamate bones with areas of fibrocystic degenerative changes. The scapholunate and lunotriquetral ligaments were intact. There was increased signal intensity with the triangular fibrocartilage complex consistent with degenerative tearing. An area of metallic artifact within the subcutaneous soft tissues of the palm was noted and was said to be of uncertain significance. The carpal tunnel and extensor tendons were within normal limits, and the flexor retinaculum was normal.

It is Dr. SapanCohn's opinion that there is no evidence of acute trauma related injury, and that the plaintiff has degenerative changes representing arthritis of the hand and involving the carpal bones and triangular fibrocartilage, as evidenced by the MRI. In her review of the medical data submitted to her, Dr.

SapanCohn states that Ms. Butler underwent surgery for DeQuervain's disease consisting of left first extensor compartment release. She continues that DeQuervain's disease consists of tendinitis involving the tendons along the thumb side of the wrist when the tendons either become irritated or swollen. The irritation causes the lining or synovium around the tendon to swell which changes the shape of the compartment. This, she states, results in difficulty in the tendons moving properly and can cause pain. She continues that DeQuervain's tendinitis may be caused by overuse and is frequently associated with pregnancy, or inflammation arthritides such as rheumatoid arthritis and is most common in middle aged women. Dr. SapanCohn states that DeQuervain's tendinitis is not a tendinitis associated with traumatic injury. She continues that since DeQuervain's disease is not a radiological diagnosis, but is instead diagnosed by clinical parameter, there is nothing on any of the submitted images which would be valuable to diagnose DeQuervain's disease.

EDWARD A. TORIELLO, M.D.

Edward A. Toriello, M.D. has set forth in his report that Ms. Butler is a 5'9", 355 pound woman who was fully cooperative with his examination, was well oriented and in no acute distress. He states he determined the ranges of motion during his examination of the plaintiff's cervical spine, right and left shoulder, right and left elbows, right and left wrists and hands, and lumbosacral spine, with the use of a goniometer, and that the plaintiff's values revealed no deficits when compared with the normal range of motion values. Dr. Toriello states he reviewed the hospital records from Peconic Bay Medical Center dated January 2008, and an operative report dated September 29, 2008 for a left first dorsal compartment release. He states the plaintiff reveals no evidence of disability from any orthopaedic injury sustained in the accident. His impression is that of a resolved cervical hyperextension injury, resolved left wrist sprain and resolved low back strain, causally related to the accident.

WILLIEN BUTLER

In her affidavit submitted in opposition to the defendants' motions, the plaintiff avers that she experienced pain and stiffness in her left wrist due to the accident and was informed that she had a fracture of her wrist when examined at Peconic Bay Medical Center. A soft cast was applied to her left wrist initially, and after seeing Dr. Schwartzbard, a hard cast was applied for approximately four to five weeks. She states that she has pain and burning and weakness in her left wrist, even following the surgery.

The January 15, 2008 Peconic Bay Medical Center radiology report of the plaintiff's left wrist/hand, by Dr. Perlmutter, submitted by the plaintiff, sets forth that no fractures or dislocations are demonstrated, and joint spaces have a normal radiographic appearance. No abnormal soft tissue calcifications are demonstrated. The impression was that of a normal study of the left wrist and hand.

ITCHAK SCHWARZBARD

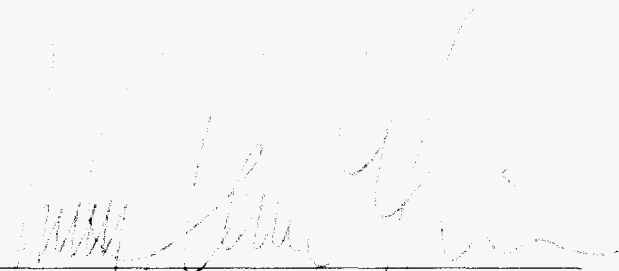
Dr. Itchak Schwarzbard, the plaintiff's treating orthopedist, has set forth in his unsworn report, dated October 25, 2010, that the plaintiff's x-rays of her right hip, right pelvis, left wrist, and left hand were negative. Upon his examination of the plaintiff, there was no focal swelling or deformity of the left wrist, however, there was point tenderness in the snuff box, and mild tenderness over the dorsal scaphoid. Three x-ray views of the left wrist revealed a slightly radiolucency within the scaphoid waist indicative of a possible fracture, with a degenerative cyst noted within the distal pole of the scaphoid. He also noted pre-existing scaphotrapezium arthrosis. A follow-up non-contrast CAT revealed no evidence of an acute fracture, but did reveal a large degenerative cyst in the distal scaphoid tubercle. He states he explained to Ms. Butler that she had a left wrist

contusion/sprain. Dr. Schwarzbard continues that the MRI of the left wrist, dated March 10, 2008, revealed diffuse degenerative changes in the carpus with increased T2 hyperintensity indicating tenosynovitis with a small first compartment cyst. He stated that he diagnosed her with traumatic left De Quervain's disease. It is Dr. Schwarzbard's opinion, with a reasonable degree of medical certainty, that there is a causal relationship between the motor vehicle accident and the left De Quervain's disease for tendonitis and right hip contusion.

Based upon the foregoing, it is determined that the moving defendants have not comported with CPLR 3212 in that they have not submitted, in support of their application, copies of the medical and radiological and diagnostic tests upon which the defendants' experts base their opinions (*see Friends of Animals v Associated Fur Mfrs., supra*; CPLR 4518 (c), *Westchester Medical Center v Progressive Casualty Insurance Company*, 51 AD3d 1014, 858 NYS2d 754 [2d Dept 2008]). Even if this court were to determine the motions without supporting evidentiary submissions, based upon the experts' opinions alone, it is determined that the plaintiff, whose expert report is not in admissible form as it is not sworn, raises factual issues which would preclude summary judgment, if considered. Dr. SapanCohn opines that DeQuervain's disease is not traumatic in origin, The plaintiff's treating physician, Dr. Schwarzbard, has opined that Ms. Butler sustained a traumatic DeQuervain's tendinitis causally related to the subject accident, for which the plaintiff had surgery, and has a resultant surgical scar.

Accordingly, motions (007), (008), and (009) are denied.

Dated: SEP 16 2011



J.S.C.
HON. JEFFREY ARLEN SPINNER

____ FINAL DISPOSITION X NON-FINAL DISPOSITION