Parascandola v Castro

2012 NY Slip Op 30267(U)

January 4, 2012

Supreme Court, Suffolk County

Docket Number: 40626-08

Judge: Peter Fox Cohalan

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SHORT FORM ORDER

INDEX # 40626-08
RETURN DATE: **3-25-11**
MOT. SEQ. **#001**

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART XXIV - SUFFOLK COUNTY

PRESENT:
Hon. PETER FOX COHALAN

--x

JAMES PARASCANDOLA and THERESA PARASCANDOLA,

Plaintiffs,

-against-

EDMON CASTRO and YLUMINADA CASTRO,

Defendants.

--x

CALENDAR DATE: November 23, 2011
MNEMONIC: MD

PLTF'S/PET'S ATTORNEY:
The Latronica Law Firm, PC
64 Division Avenue
Levittown, New York 11756

DEFT'S/RESP ATTORNEY:
Russo, Apoznanski & Tambasco
875 Merrick Avenue
Westbury, New York 11590

Upon the following papers numbered 1 to 24 read on this motion for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1-12; Notice of Cross-Motion and supporting papers ______; Answering Affidavits and supporting papers 13-21; Replying Affidavits and supporting papers 22-24; Other ______; and after hearing counsel in support of and opposed to the motion it is,

ORDERED that this motion by the defendants, Edwin Castro and Yluminada Castro, for summary judgment and dismissal of the complaint of the plaintiffs, James Parascandola and Theresa Parascandola, pursuant to CPLR §3212 and Insurance Law §5102 and §5104 because the plaintiff, James Parascandola, has not sustained a "serious physical injury" as such term is defined in Insurance Law §5102(d) is denied in its entirety. Theresa Parascandola's action is derivative in nature and stands or falls on her husband's action and therefore that part of the motion to dismiss is denied also.

This action was instituted for personal injuries allegedly sustained by the plaintiff, James Parascandola, in a motor vehicle accident occurring on July 10, 2008 in the vicinity of the intersection of Nicolls Road and Furrows Road in Holtsville, Suffolk County on Long Island, New York. The plaintiff, in his deposition, testified that he was traveling eastbound on Furrows Road which he described as a two lane road with one lane in each direction and a wide safety zone of approximately eight (8) feet in the middle painted with yellow lines. The defendants' motor vehicle left the PAL sports complex on Furrows Road and the vehicle's driver made a right turn onto Furrows Road in front of the plaintiff's motor vehicle and thereafter the driver pulled the vehicle to the side of the road and attempted to make a U-turn in front of the plaintiff's motor vehicle precipitating the accident. The plaintiff claims that the driver of the defendants' motor vehicle gave no warning of the attempt to make an illegal U-turn in front of his vehicle. This lawsuit was thereafter commenced. The verified complaint in this action claims the accident happened on Furrows Road in the Town of Babylon, but the plaintiff's deposition testimony as well as his verified bill of particulars describes Furrows Road and the PAL sports complex on Furrows Road as being in Holtsville which is in the Town of Islip, not the Town of Babylon. The Court has not been provided with an amended complaint.

The defendants now move for summary judgment pursuant to CPLR §3212 dismissing the plaintiffs' complaint because the plaintiff has not sustained a "serious physical injury" as that term is defined in Insurance Law §5102(d). The plaintiffs oppose the motion arguing that the defendants have failed to establish entitlement to summary disposition as a matter of law and that the plaintiffs' submissions in opposition to the defendants' motion raise sufficient factual issues requiring a trial on the issue of serious physical injury.

For the reasons set forth herein, the defendants' motion for summary judgment and dismissal of plaintiffs' complaint is denied in its entirety.

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 produced, the burden then shifts to the opposing party who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form sufficient to require a trial of any issue of fact (***Joseph P. Day Realty Corp. v Aeroxon Prods.***, 148 AD2d 499, 538 NYS2d 843 [1979], ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).) and must assemble, lay bare and reveal his proof in order to establish that the assertions in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the Court to direct a judgment in favor of the movant as a matter of law (***Friends of Animals v Associated Fur Mfrs.,*** 46 NY2d 1065, 416 NYS2d 790 [1979]).

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 90 days during the 180 days immediately following the occurrence of the injury or impairment."

The term "significant," as it appears in Insurance Law §5102, 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]).

On a motion for summary judgment to dismiss a complaint for failure to state a prima facie case of serious injury as defined by Insurance Law § 5102(d), the initial burden is on the

defendant to "present evidence in competent form, showing that plaintiff has no cause of action" (***Rodriquez v Goldstein***,182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once the defendant has met the burden, the plaintiff must then, by competent proof, establish a prima facie case that such serious injury exists (***DeAngelo v Fidel Corp. Services, Inc.***, 171 AD2d 588, 567 NYS2d 454, 455 [1st Dept 1991]). Such proof, in order to be in competent or admissible form, shall consist of affidavits or affirmations (***Pagano v Kingsbury***, 182 AD2d 268, 587 NYS2d 692 [2nd Dept 1992]). The proof must be viewed in a light most favorable to the non-moving party. (***Cammarere v Villanova***,166 AD2d 760, 562 NYS2d 808, 810 [3rd Dept 1990]). The Court determines in the first instance whether a prima facie showing of serious injury has been established (*see*, ***Tipping-Cestari v Kilhenny***, 174 AD2d 663, 571 NYS2d 525 [2nd Dept 1991]).

In order to recover under the "permanent loss of use" category, the plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance***, 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*).

The plaintiffs, in their verified bill of particulars, dated November 3, 2009, claim, as to the plaintiff's right shoulder, a full thickness tear of the rotator cuff, retraction to the mid humeral head, a possible labral tear, restricted ranges of motion of the right shoulder and right shoulder pain and derangement with a prognosis recommending surgery. The plaintiff also claims that the injuries are permanent and were aggravated by the accident and alleges a total incapacitation from work of seven (7) days and a partial incapacitation from work continuing since the accident. In support of their motion, the defendants present the affirmed report of Paul Miller, MD (hereinafter Miller), an orthopedist. He conducted an examination of the plaintiff on March 1, 2010 (well over a year after the accident) and found no range of motion restrictions based upon "my expert clinical eye and judgment as a board certified orthopedic surgeon" and found no orthopedic disability and a "right shoulder sprain/strain - resolved."

The Court finds that the defendants have failed to establish prima facie entitlement to summary judgment on the issue of whether the plaintiff has sustained a serious injury as defined by Insurance Law §5102(d). Miller's report is deficient inasmuch as he has failed to state the objective tests used to test the plaintiff's range of motion as well as the standard of comparison for the normal ranges of motion employed, therefore leaving it to this Court to speculate as to which range of motion tests and values are correct. See, ***Manzi v. Lindenlaub***, 304 AD2d 802, 757 NYS2d 866 (2nd Dept. 2003); ***Minlionica v. Shababi***, 296 AD2d 569, 745 NYS2d 715 (2nd Dept. 2002). Further Miller has failed to address the full injuries alleged to have been sustained by plaintiff. *see*, ***Bentivegna v Stein***, 42 AD3d 555, 841 NYS2d 316 [2nd Dept 2007]; ***Staubitz v Yaser***, 41 AD3d 698, 839 NYS2d 113 [2nd Dept 2007]; ***Wade v Allied Bldg. Products Corp***, 41 AD3d 466, 837 NYS2d 302 [2nd Dept 2007]; ***Tchjevskaia v Chase***, 15 AD3d 389, 790 NYS2d 175 [2nd Dept 2005]).

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The plaintiff also has claimed both a total incapacitation for seven (7) days and a partial incapacitation in his employment and daily activities from the date of the accident resulting from the accident. Miller did not examine the plaintiff during the statutory period of one hundred eighty (180) days following the accident, thus rendering his expert opinion insufficient to demonstrate entitlement to summary judgment on the issue of whether the plaintiff was unable to substantially perform all of the material acts which constituted his usual and customary daily activities for a period in excess of ninety (90) days during the one hundred eighty (180) days immediately following the accident [***Brourman v. Gorokhovsky***, 89 AD3d 660, 931 NYS2d 890 (2nd Dept. 2011); ***Blanchard v. Wilcox***, 283 AD2d 821, 725 NYS2d 433 (3d Dept. 2001); see, ***Uddin v. Cooper***, 32 AD3d 270, 820 NYS2d 44 (1st Dept. 2006); ***Toussaint v. Claudio***, 23 AD3d 268, 803 NYS2d 564 (1st Dept. 2005)] and Miller, in any event, does not offer an opinion relative to that period of time as to the plaintiff.

The defendants have also submitted an affirmed report of Sheldon Feit, MD (hereinafter Feit), a radiologist, who upon review of the MRI found no evidence of a rotator cuff tear or fracture and diagnosed "a mild impingement on the supraspinatus muscle secondary to hypertrophic change at the acromioclavicular joint" which he claims is entirely degenerative. Further, Feit states that "no postraumatic changes are identified and there are no abnormalities causally related to the accident of July 10, 2008". However, this conclusory statement by Feit is based upon the reading of the MRI taken of the plaintiff eight (8) days after the accident and fails to detail the basis of Feit's opinion or the comparison to suggest the lack of abnormalities prior to the accident.

Finally, the defendants in support of the motion provide the unsigned deposition transcript of the plaintiff which is not in admissible form and is not considered on this motion for summary judgment, nor is the deposition accompanied by an affidavit pursuant to CPLR §3116 (*see*, ***Martinez v 123-16 Liberty Ave. Realty Corp.***, 47 AD3d 901, 850 NYS2d 201 [2nd Dept 2008]; ***McDonald v Maus,*** 38 AD3d 727, 832 NYS2d 291 [2nd Dept 2007]; ***Pina v Flik Intl. Corp.***, 25 AD3d 772, 808 NYS2d 752 [2nd Dept 2006].

The defendants have failed to satisfy the burden of establishing prima facie that the plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102 (d) (*see*, ***Agathe v Tun Chen Wang***, 98 NY2d 345, 746 NYS2d 865 [2006]); *see also*, ***Walters v Papanastassiou***, 31 AD3d 439, 819 NYS2d 48 [2nd Dept 2006]). Inasmuch as the moving party has failed to establish prima facie entitlement to judgment as a matter of law in the first instance, it is unnecessary to consider whether the opposing papers were sufficient to raise a triable issue of fact (*see*, ***Yong Deok Lee v Singh***, 56 AD3d 662, 867 NYS2d 339 [2nd Dept 2008]); ***Krayn v Torella,*** 833 NYS2d 406, NY Slip Op 03885 [2nd Dept 2007];***Walker v Village of Ossining***, 18 AD3d 867, 796 NYS2d 658 [2nd Dept 2005]) as the burden has not shifted.

Even assuming that the defendants have met their burden, the plaintiffs have presented the affirmation of Richard A. Ritter, MD, the plaintiff's treating physician, who conducted range of motion tests on the plaintiff and found "significant and permanent restriction of motion in his right shoulder" caused by this accident which affected his ability to lift heavy objects and also restricted his ability to participate in recreational activities. There is disagreement among the medical experts presented by the parties on the need for invasive right shoulder surgery.

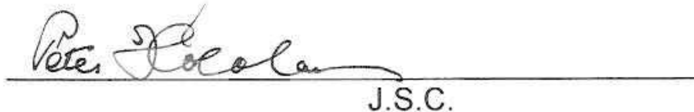
[* 5]

The Court's function on a motion for summary judgment is to consider all the facts in a light most favorable to the party opposing the motion, ***Thomas v. Drake***, 145 AD2d 687, 535 NYS2d 229 (3rd Dept. 1988) and to determine whether there are any material and triable issues of fact presented. The key is issue finding, not issue determination, and the Court should not attempt to determine questions of credibility. ***S.J. Capelin Assoc. v. Globe***, 34 NY2d 338, 357 NYS2d 478 (1974). In this case, weighing the differences and discrepancies between the medical reports and affidavits submitted by the parties on the questions of serious injury and the need for right shoulder surgery, questions of credibility between experts on behalf of plaintiffs and defendants are for the jury to determine. ***Moreno v. Chemtob***, 271 AD2d 585, 706 NYS2d 150 (2nd Dept. 2000); ***Vasilatos v. Chatertonon***, 135 AD2d 1073, 523 NYS2d 211 (3rd Dept. 1987).

Accordingly, the defendants' motion for summary judgment and dismissal of plaintiffs' action pursuant to CPLR §3212 because the plaintiff, James Parascandola, has failed to reach the threshold of a "serious physical injury" as defined in Insurance Law §5104 is denied in its entirety.

The foregoing constitutes the decision of the Court.

Dated: January 4, 2012



J.S.C.

HON. PETER FOX COHALAN