

**Bedus v Brook Trailer Serv., Inc.**

2012 NY Slip Op 31875(U)

July 9, 2012

Sup Ct, Suffolk County

Docket Number: 09-30869

Judge: W. Gerard Asher

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INDEX No. 09-30869  
CAL. No. 11-01522 MV

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 32 - SUFFOLK COUNTY

**PRESENT:**

Hon. W. GERARD ASHER  
Justice of the Supreme Court

MOTION DATE 12-08-11 (#004)  
MOTION DATE 12-21-11 (#005)  
ADJ. DATE: 3-20-12  
Mot. Seq. # 004 - MD  
# 005 - MD

-----X

AMANDA ZARRILLO BEDUS and CHRIS  
BEDUS,

Plaintiffs,

- against -

BROOK TRAILER SERVICE, INC., DAVID  
BLANCO and MITCHELL A. LORDITCH,

Defendants.

-----X

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Upon the following papers numbered 1 to 36 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; 13 - 22; Notice of Cross Motion and supporting papers    ; Answering Affidavits and supporting papers 23 - 32; Replying Affidavits and supporting papers 33 - 36; Other    ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that the motion (# 004) by defendants Brook Trailer Service, Inc. and David Blanco for an order granting summary judgment dismissing the complaint against them on the ground that plaintiff Amanda Bedus did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is denied; and it is further

**ORDERED** that the motion (# 005) by defendant Mitchell Lorditch for an order granting summary judgment dismissing the complaint against him on the ground that plaintiff Amanda Bedus did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is denied.

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This is an action to recover damages, personally and derivatively, for injuries allegedly sustained by plaintiff Amanda Bedus (“plaintiff”) on September 18, 2008 as a result of a motor vehicle accident which occurred in the eastbound lane of the Long Island Expressway at or near exit 58 in Islip, New York.

By their bill of particulars, plaintiffs allege that plaintiff sustained serious injuries as a result of the subject accident, including left shoulder adhesive capsulitis; left shoulder partial thickness rotator cuff tear; left shoulder subacromial bursitis; arthroscopy of the left shoulder; a bulging disc at C6-C7; left sided C7 radiculopathy; and lower back pain.

Defendants Brook Trailer Service, Inc. and David Blanco now move (# 004) for summary judgment in their favor dismissing the complaint against them on the ground that plaintiff has not sustained a “serious injury” as defined in Insurance Law § 5102 (d).

Insurance Law § 5102 (d) defines “serious injury” as “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.”

In order to recover under the “permanent loss of use” category, 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 a “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 (*see Perl v Meher*, 18 NY3d 208, 936 NYS2d 655 [2011]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]).

On a motion for summary judgment, the defendant has the initial burden of making a prima facie showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a “serious injury” within the meaning of Insurance Law § 5102 (d) (*see Gaddy v Eyer*, 79 NY2d 955, 582 NYS2d 990 [1992]; *Akhtar v Santos* 57 AD3d 593, 869 NYS2d 220 [2d Dept 2008]). The defendant may satisfy this burden by submitting the plaintiff’s own deposition testimony and the affirmed medical report of the defendant’s own examining physician (*see Moore v Edison*, 25 AD3d 672, 811 NYS2d 724 [2d Dept 2006]; *Faroze v Kamran* 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; *Boone v New York City Tr. Auth.*, 263 AD2d 463, 692 NYS2d 731 [2d Dept

1999]).

Here, defendants Brook Trailer Service, Inc. and David Blanco failed to meet 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 Reitz v Seagate Trucking, Inc.*, 71 AD3d 975, 898 NYS2d 173 [2d Dept 2010]). On July 27, 2010, approximately one year and ten months after the subject accident, the moving defendants’ examining orthopedist, Dr. Frank Oliveto, examined the plaintiff using certain orthopedic and neurological tests, including straight leg raising test. Dr. Oliveto found that all the test results were normal or negative. Dr. Oliveto performed range of motion testing on the plaintiff’s cervical and thoracolumbosacral spine, left shoulder and left ankle, and found that there were range of motion restrictions in the cervical spine and the left shoulder. With respect to the plaintiff’s cervical spine, Dr. Oliveto indicated that flexion was 30 degrees (45 degrees normal); extension was 20 degrees (45 degrees normal); right and left lateral flexion were 30 degrees (45 degrees normal); and right and left rotation were 60 degrees (80 degrees normal). Regarding the plaintiff’s left shoulder, he indicated that range of motion testing showed forward elevation to 90 degrees (normal 170 degrees) and abduction to 90 degrees (normal 170 degrees). Dr. Oliveto opined that there were subjective complaints of discomfort upon range of motion, and that there was no evidence of disability. Dr. Oliveto’s report is insufficient to sustain the moving defendants’ prima facie burden. In his report, except for the straight leg raising test, Dr. Oliveto did not set forth the objective testing he performed to support his conclusion that there was no evidence of disability (*see Vazquez v Basso*, 27 AD3d 728, 815 NYS2d 626 [2d Dept 2006]; *Kennedy v Brown*, 23 AD3d 625, 805 NYS2d 408 [2d Dept 2005]). Rather, Dr. Oliveto relied upon the subjective complaints of the plaintiff (*see Chiara v Dernago*, 70 AD3d 746, 894 NYS2d 129 [2d Dept 2010]; *Mannix v Lisi’s Towing Serv.*, 67 AD3d 977, 888 NYS2d 773 [2d Dept 2009]; *Vughan-Ware v Darey*, 2012 NY Slip Op 30643U; 2012 NY Misc Lexis 1202 [Sup Ct, Nassau County 2012]).

On July 27, 2010, the moving defendants’ examining neurologist, Dr. Maria DeJesus, examined the plaintiff using certain orthopedic and neurological tests including Phalen’s sign, Tinel’s sign, Patrick’s test, and Kernig’s test. Dr. DeJesus found that all the neurological and orthopedic test results were negative or normal. Nevertheless, Dr. DeJesus failed to perform any range of motion testing with respect to the plaintiff’s cervical spine and left shoulder, despite her claim, clearly set forth in the bill of particulars, that she allegedly sustained a bulging disc in her cervical spine and a rotator cuff tear in her left shoulder as a result of the subject accident (*see Isakov v Cooper*, 80 AD3d 662, 914 NYS2d 916 [2d Dept 2011]; *Sajid v Murzin*, 52 AD3d 493, 860 NYS2d 559 [2008]).

On March 4, 2010, the moving defendants’ radiologist, Dr. Audrey Eisenstadt, reviewed the MRI examination of the plaintiff’s cervical spine, performed on November 11, 2008. Dr. Eisenstadt concluded that there were no changes seen to the osseous, ligamentous, muscular, or intervertebral disc structures, and that there were no post-traumatic abnormalities identified. On August 1, 2010, Dr. Eisenstadt, reviewed the MRI examination of the plaintiff’s left shoulder, performed on February 5, 2009. Dr. Eisenstadt concluded that a low-lying acromion was seen with mild narrowing of the subacromial space noted, and that the plaintiff was born with this condition. Dr. Eisenstadt also concluded that no joint effusion or rotator cuff tear was seen. Dr. Eisenstadt’s two reports do not constitute competent medical evidence herein as the physician merely “reviewed” the MRI examination

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of the plaintiff's cervical spine and left shoulder (*see Patterson v Fives*, 2010 NY Slip Op 31232U, 2010 NY Misc Lexis 2330 [2010]). Dr. Eisenstadt's two MRI reports were not paired with her observations of the plaintiff during a physical examination (*see Perl v Meher, supra*).

Inasmuch as defendants Brook Trailer Service, Inc. and David Blanco did not meet their prima facie burden, it is unnecessary to consider whether plaintiffs' opposition papers were sufficient to raise a triable issue of fact (*see McMillian v Naparano*, 61 AD3d 943, 879 NYS2d 152 [2d Dept 2009]; *Yong Deok Lee v Singh*, 56 AD3d 662, 867 NYS2d 339 [2d Dept 2008]). In view of the foregoing, the motion (# 004) for summary judgment by defendants Brook Trailer Service, Inc. and David Blanco is denied.

Defendant Mitchell Lorditch moves (# 005) for summary judgment in his favor dismissing the complaint against him on the ground that plaintiff has not sustained a "serious injury" as defined in Insurance Law § 5102 (d).

On September 30, 2010, approximately two years after the subject accident, the moving defendant's examining orthopedist, Dr. Isaac Cohen, examined plaintiff Amanda Bedus using certain orthopedic and neurological tests, including Spurling's test, Percussion test, straight leg raising test, Yergason's test, Neer's test, Hawkins' test, McMurray's test, Drawer sign, Apley's Compression test, and Sprint test. All the test results were negative. Dr. Cohen performed range of motion testing on plaintiff's cervical and lumbosacral spine, left shoulder, knees and left ankle using a goniometer. With respect to the plaintiff's cervical spine, Dr. Cohen indicated that flexion and extension were 50 degrees (normal 45-65 degrees); right and left lateral bending were to 45 degrees (normal 40-52 degrees); and right and left rotation were to 80 degrees (normal 63-93 degrees). With respect to the left shoulder, Dr. Cohen indicated that forward elevation was "possible to 160 degrees" (normal 162-172 degrees); abduction was "possible to about 175 degrees" (normal 177-191 degrees); adduction was to 30 degrees (normal up to 30 degrees); external rotation was to 100 degrees (normal 96-112 degrees); and internal rotation was "in the 65-degree range" (normal 64-74 degrees).

Here, defendant Lorditch failed to make a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) (*see Reitz v Seagate Trucking, Inc., supra*). Dr. Cohen's report is insufficient to sustain the moving defendant's prima facie burden. Dr. Cohen's comparative analysis of the plaintiff's range of motion to the purported normal range of motion for the particular body part that was being tested lacked "specificity" in that he did not compare the purported limitation to a "definitive" normal reading (*see Lee v M & M Auto Coach*, 2011 NY Slip Op 30667U, 2011 NY Misc Lexis 1131 [Sup Ct, Nassau County 2011]). Rather, Dr. Cohen compared the results to a purported normal range which varied at times up to 30 degrees, i.e. normal cervical rotation 63-93 degrees. Dr. Cohen referenced a spectrum of degrees that would qualify as a normal reading for a particular body part without indicating what other clinical components, unrelated to range of motion (i.e., age), may factor into the ultimate determination of where the normal should fall within that spectrum for that particular patient (*see id.*). Dr. Cohen's findings that a varying range of up to 30 degrees is normal effectively eliminates the possibility that a patient with a limited range of motion of the cervical or lumbar spine within that spectrum has no significant injury (*see id.*). In this regard, the lack of "specificity" in Dr. Cohen's report essentially creates an issue of fact with respect to determining

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whether plaintiff has a significant limitation of range of motion for a particular body part (*see id.*). Moreover, Dr. Cohen reported that internal rotation in the left shoulder was “in the 65-degree range,” rather than providing specific numerical results (*see Browdame v Candura*, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]). Furthermore, Dr. Cohen indicated that forward elevation in the left shoulder was “possible to 160 degrees” and abduction was “possible to about 175 degrees,” leaving it unclear as to what range the plaintiff actually demonstrated (*see, id.*).

Inasmuch as defendant Lorditch did not meet his prima facie burden, it is unnecessary to consider whether plaintiffs’ opposition papers were sufficient to raise a triable issue of fact (*see McMillian v Naparano, supra; Yong Deok Lee v Singh, supra*). In view of the foregoing, defendant Lorditch’s motion (# 005) for summary judgment is denied.

Dated: July 9, 2012

W. Gerard Ashe  
J.S.C.

           FINAL DISPOSITION      X   NON-FINAL DISPOSITION