

Thomas v Gomez

2013 NY Slip Op 30181(U)

January 28, 2013

Supreme Court, Suffolk County

Docket Number: 09-39704

Judge: Arthur G. Pitts

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

P R E S E N T :

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 9-27-12
ADJ. DATE 12-13-12
Mot. Seq. # 002 - MD

COPY

-----X

KIM M. THOMAS,

Plaintiff,

- against -

MARIO UMANA GOMEZ,

Defendant.

-----X

JACOBSON & SCHWARTZ, LLP
Attorney for Plaintiff
99 Jericho Turnpike, Suite 200
Jericho, New York 11753

DAVID J. SOBEL, P.C.
Attorney for Defendant
811 West Jericho Turnpike, Suite 105W
Smithtown, New York 11787

Upon the following papers numbered 1 to 36 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (002) 1 - 25; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 26-34; Replying Affidavits and supporting papers 35-36; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (002) by the defendant, Mario Umana Gomez, pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that the plaintiff, Kim M. Thomas, did not sustain a serious injury as defined by Insurance Law § 5102 (d), is denied.

In this action, the plaintiff, Kim M. Thomas, seeks damages for personal injuries allegedly sustained on June 3, 2009 on August Road, at or near its intersection with Maybrook Road, in Babylon, New York, when her vehicle was struck by the vehicle owned and operated by defendant Mario Umana Gomez, after it failed to stop at a stop sign.

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 (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]). 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]). 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" CPLR3212 [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 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 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]).

On this motion for summary judgment on the issue of serious injury as defined by Insurance Law § 5102 (d), the initial burden is on the moving party to present evidence in competent form, showing that the plaintiff did not sustain a serious injury as a result of the accident (*see Rodriguez v Goldstein*, 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once that burden has been met, the opposing party must then, by competent proof, establish a *prima facie* case that such serious injury does exist (*see 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 [2d 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 [3d Dept 1990]).

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*).

In support of motion (001), defendant has submitted, inter alia, an attorney’s affirmation; copies of the summons and complaint, defendant’s answer, and plaintiff’s verified and first supplemental verified bills of particulars; the transcript of the examination of Kim Thomas, dated March 7, 2011; the report of Robert Michaels, M.D., dated March 13, 2011 concerning his independent orthopedic examination of the plaintiff; various uncertified copies of the plaintiff’s medical records, including Dr. Wang, Jonathan Ticker, M.D for left shoulder surgery on October 10, 2011; an uncertified copy of an MRI of the plaintiff’s left shoulder without contrast dated June 6, 2009 with comparison to the left shoulder MRI examinations from October 15, 2008 and January 26, 2008; and the unsworn report of Steven Simonsen, M.D. dated February 1, 2008.

By way of the bill of particulars, the plaintiff alleges that as a result of this accident, she sustained injuries consisting of sprain of the acromioclavicular joint with pain of the left shoulder; impingement and biceps tendonitis, left shoulder; exacerbation of the previous rotator cuff tendonitis; tears of the rotator cuff, impingement syndrome and joint arthritis; weakness and inability to lift with the left shoulder; sprain of the low back; exacerbation of prior low back injury; exacerbation of early RSD; surgery to repair the injury to left shoulder on November 13, 2009; partial disability since November 15, 2009; lidocaine injections to the left shoulder; continuing pain in the left shoulder with continuing need for physical therapy; minimal AC joint changes on the left; left acromioclavicular joint arthritis with impingement; partial rotator cuff tear; need for further surgery.

Based upon a review of defendant's evidentiary submissions, it is determined that the defendant has failed to establish prima facie entitlement to summary judgment dismissing the complaint on the basis that the plaintiff did not sustain a serious injury as defined by Insurance Law § 5102 (d) as to either category of injury.

Although, defendant's expert, Dr. Robert Michaels, has submitted his sworn report concerning his independent orthopedic examination of the plaintiff, he has not submitted a copy of his curriculum vitae or a basis to qualify as an expert in the matter. It is determined that even if Dr. Michaels demonstrated qualifications to offer expert opinion in this matter, there are factual issues raised in the moving papers which preclude summary judgment from being granted.

Dr. Michaels set forth in his report that the plaintiff had arthroscopic surgery on her left shoulder on November 13, 2009 for debridement of a rotator cuff tear and biceps tendon and labrum, tenotomy of the biceps tendon and rotator cuff, thermal repair of the posterior labrum and subacromial decompression. He stated that a second left shoulder surgery was performed in 2011, however, he does not indicate what the surgery was for, raising factual issues concerning whether the surgery was related to the subject accident.

Dr. Michaels stated that the MRI report of the plaintiff's left shoulder dated June 9, 2009, reported rotator cuff tendinitis with intrasubstance tear border on limited inferior surface involvement, which he opined in a conclusory manner, is essentially stable compared to the MRI report of October 2008. However, the plaintiff had prior surgery for this condition, thus there are factual issues concerning whether this is the same rotator cuff tear or a new rotator cuff tear associated with the subject accident. Additionally, limitations in the left shoulder range of motion values obtained by Dr. Michaels demonstrated deficits when compared to his normal range of motion values. It is noted that Dr. Michaels has not set forth the method employed to obtain the range of motion of the plaintiff's left shoulder, such as the goniometer, inclinometer or arthroidal protractor (*see Martin v Pietrzak*, 273 AD2d 361, 709 NYS2d 591 [2d Dept 2000]; *Vomero v Gronrours*, 19 Misc3d 1109A, 859 NYS2d 907 [Sup Ct, Nassau County 2008]), leaving it to this court to speculate as to how he determined such ranges of motions when examining the plaintiff and raising factual issues precluding summary judgement.

Dr. Michaels continued that he is unable to relate the shoulder surgery to the accident of June 9, 2009, but does not set forth the basis for this conclusory opinion. He added that it appears that the left shoulder sprain/contusion resolved, and the accident reported is causally related. However, he still has not

addressed the rotator cuff tear demonstrated on the MRI of June 9, 2009 when the plaintiff had prior surgery to correct the same. There are factual issues concerning whether this is a new rotator cuff tear. While he opined that there is no “significant exacerbation” of the left shoulder “condition” as a result of the subject accident, he does not set forth what he means by “significant exacerbation,” the amount of exacerbation, or the basis for such opinion.

The defendant submitted the unsworn letter of Dr. Steven Simonsen, dated October 15, 2009, wherein he set forth that following the subject accident, the plaintiff had a new finding of acromioclavicular pain in her left shoulder, as well as impingement and biceps tendinitis, and exacerbation of a rotator cuff tendinitis, biceps tear, and impingement with a first degree acromioclavicular sprain. The note from Dr. Wang indicates that the MRI of November 23, 2011 of the plaintiff’s left shoulder reveals left shoulder partial thickness rotator cuff tear with rotator cuff tendinopathy. The operative report of Dr. Ticker, dated October 17, 2011, for surgery on the plaintiff’s left shoulder on October 10, 2011 reveals a postoperative diagnosis of left acromioclavicular joint arthritis; recurrent impingement syndrome; shoulder pain; glenohumral joint arthritis; and partial subscapularis tear; debridement of the superior subscapularis with tearing noted; and adhesions to the rotator interval which were abraded and debrided. There was also arcomioplasty carried out with revision subacromial decompression and distal clavicle resection. Thus there are factual issues concerning the “recurrent impingement syndrome,” and the partial subscapularis tear in that the MRI report of January 26, 2008 does not identify a partial subscapularis tear; Dr. Michaels does not rule out that this injury was caused by the subject accident, only that there was no “significant exacerbation” of the left shoulder “condition” as a result of the subject accident. Nor does Dr. Michaels address the additional procedures performed by Dr. Ticker.

It is noted in Dr. Simonsen’s letter of February 1, 2008 to Dr. Savino, the plaintiff’s referring physician, that his interpretation of the MRI of the January 26, 2008 of the plaintiff’s left shoulder reveals a partial thickness rotator cuff tear and significant biceps tendinitis, although the tendinitis is not mentioned in the report. Thus, there are factual issues concerning the interpretation of the January 26, 2008 MRI which have not been addressed by the defendant’s examining physician, Dr. Michaels.

Based upon the foregoing, the factual issues raised in the defendant’s moving papers, the defendant has not demonstrated prima facie entitlement to summary judgment dismissing the complaint on the basis that the plaintiff did not sustain a serious injury as defined by Insurance Law § 5102 (d) as to the first category of injury.

Defendant’s examining physician offers no opinion as to whether the plaintiff was incapacitated from substantially performing her activities of daily living for a period of ninety days in the 180 days following the accident, and he did not examine the plaintiff during that statutory period (*see Delayhaye v Caledonia Limo & Car Service, Inc.*, 61 AD3d 814, 877 NYS2d 438 [2d Dept 2009]; *Uddin v Cooper*, 32 AD3d 270, 820 NYS2d 44 [1st Dept 2006]; *Toussaint v Claudio*, 23 AD3d 268, 803 NYS2d 564 [1st Dept 2005]; *Blanchard v Wilcox*, 283 AD2d 821, 725 NYS2d 433 [3d Dept 2001]). The plaintiff testified that she has been receiving unemployment since May, 2009. After the subject accident, she felt pain in her left shoulder and arm, and her lower back for which she received treatment at Good Samaritan Hospital emergency department; Dr. Savino, her family doctor; Dr. Simonsen, her orthopedist; and Generations Physical therapy

where she continues to have physical therapy three times a week. On November 13, 2009, she had surgery to her left shoulder for a tear in the rotator cuff. Because she continued to have pain in her left shoulder after surgery, she was referred by Dr. Simonsen to Dr. Wang, a shoulder specialist, who recommended further surgery for the rotator cuff tear and to shave the clavicle bone after another shoulder MRI. He administered lidocaine injections into the plaintiff's left shoulder. Thereafter, she also saw Dr. Ticker and Dr. Dines.

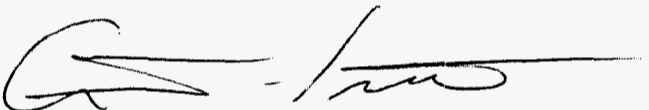
It is noted that on January 19, 2008, plaintiff had a prior accident wherein she sustained injury to her left shoulder for which Dr. Shalmi administered cortisone injections twice, causing some relief. She thereafter followed up treatment with Dr. Dewaal who prescribed physical therapy three times a week. She also experienced pain in her neck, some hypersensitivity but less pain in her left shoulder than she experienced after this accident, and she previously had more movement in her left arm. Following the accident of 2008, she was limited with mopping the kitchen floor, emptying the dishwasher, doing anything overhead, gardening, shoveling snow, lifting things, everyday cleaning activities, and driving, and she still has those same problems after this accident.

Based upon the foregoing, it is determined that the defendant has failed to demonstrate prima facie entitlement to summary judgment dismissing the complaint on the basis that the plaintiff did not sustain serious injury as defined by Insurance Law § 5102 (d) as to the second category of injury.

Inasmuch as the moving party has failed to establish prima facie entitlement to judgment as a matter of law in the first instance on the issue of "serious injury" within the meaning of Insurance Law § 5102 (d), it is unnecessary to consider whether the plaintiff's opposing papers were sufficient to raise a triable issue of fact (*see Yong Deok Lee v Singh*, 56 AD3d 662, 867 NYS2d 339 [2d Dept 2008]); *Krayn v Torella*, 40 AD3d 588, 833 NYS2d 406 [2d Dept 2007]; *Walker v Village of Ossining*, 18 AD3d 867, 796 NYS2d 658 [2d Dept 2005]).

In view of the foregoing, the defendant's motion for summary judgment dismissing the complaint is denied in its entirety.

Dated: January 28, 2013


 J.S.C.

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION