Taylor v Doe
2013 NY Slip Op 30424(U)
February 19, 2013
Supreme Court, Suffolk County
Docket Number: 10-42227
Judge: Peter H. Mayer
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[* 1]

SHORT FORM ORDER

INDEX No. 10-42227
CAL No. 12-00532MV

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 6-14-12
ADJ. DATE 11-29-12
Mot. Seq. # 002 - MD

CAMERON TAYLOR,
Plaintiff,

- against -

"JOHN DOE", a fictitious name of the bus driver, SUFFOLK TRANSPORTATION SERVICE, INC., SUFFOLK BUS CORP., COUNTY OF SUFFOLK, SUFFOLK COUNTY TRANSIT and SUFFOLK TRANSIT,
Defendants.

CELLINO & BARNES, P.C.
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MULHOLLAND, MINION, DUFFY DAVEY, MCNIFF & BEYRER
Attorney for Defendants
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Williston Park, New York 11596

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendant, dated May 16, 2012 , and supporting papers 1-13; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that motion (002) by the defendants, "John Doe", Suffolk Transportation Service, Inc., Suffolk Bus Corp., County of Suffolk, Suffolk County Transit, and Suffolk Transit, pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that the plaintiff, Cameron Taylor, has not sustained a serious injury as defined by Insurance Law § 5102 (d), is denied.

This action arises out of an automobile accident which occurred on September 4, 2009, on Suffolk Avenue along Suffolk Transit Route S41, in Brentwood, New York, while the plaintiff, Cameron Taylor, was a passenger seated on the defendants' bus # 41, operated by defendant, John Doe, who was employed by defendants. When the bus allegedly braked suddenly, the plaintiff's body flew from the seat upon which he was sitting. He grabbed a pole with his left hand to stop from falling. The bus skidded and came to a sudden stop. The plaintiff alleges that as a result of this accident, he sustained a serious injury as defined by Insurance Law § 5102 (d).

The defendants seek summary judgment dismissing the complaint on the basis that the plaintiff did not sustain a serious injury as defined 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 ***(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]). 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 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 a motion for summary judgment to dismiss a complaint for failure to set forth 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 [2d Dept 1992]). The proof must be viewed in a light most favorable to the non-moving party, here the plaintiff (***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 this motion, the defendants have submitted, inter alia, an attorney's affirmation; a copy of the summons and complaint, and plaintiff's verified bills of particulars; a copy of the unsigned but certified transcript of the plaintiff's examination before trial dated September 23, 2010; the signed and certified transcript of the 50-h hearing of Cameron Taylor; the signed but uncertified transcript of the examination before trial of John Oliver (John Doe) which is not in admissible form as it has not been certified as accurate pursuant to CPLR 3116; and the signed reports of Eric Roth, M.D. dated December 8, 2009 concerning his independent PM&R and acupuncture medical evaluation, Maria Audrie DeJesus, M.D. dated February 2, 2010 concerning the independent neurology examination of the plaintiff, and Isaac Cohen, M.D. dated October 27, 2011 concerning his independent medical evaluation. The defendants have failed to provide this court with a copy of their respective answers, as required pursuant to CPLR 3212.

By way of the bills of particulars, the plaintiff alleges that as a result of this accident, the following injuries were sustained: post-traumatic cervical spine sprain/strain; cervical myofascial pain; cervical radiculopathy; cervical facet syndrome; cervicalgia; cervical trigger point injections; cervical epidural steroid injections; cervical dorsal median branch blocks; muscle spasms of the cervicothoracic paravertebral muscles, bilaterally; cervical stiffness; severe pain at the base of the neck radiating to the occipital area and towards the frontal side, lift shoulder, and upper left arm; snapping sensation at the base of the neck upon movement; neck pain exacerbated with moving the neck side to side; pain across the bilateral shoulders radiating to the neck; post-traumatic left shoulder sprain/strain; left shoulder rotator cuff impingement; reduced range of motion of the left shoulder; suprascapular nerve block; post-traumatic thoracic sprain/strain; mid-back pain with spasms; post-traumatic lumbosacral sprain/strain; lumbar radiculopathy; myofascial pain syndrome; lumbar trigger point injections; lumbar dorsal median branch blocks; muscle spasms of the lumbosacral paravertebral muscles, worse on the left side; severe lower back pain radiating into the right hip; difficulty bending; post-traumatic occipital tension; antalgic gait; left arm paresthesias.

Based upon a review of the evidentiary submissions, it is determined that even if the defendants had submitted proof in admissible form, they have not established prima facie entitlement to summary judgment dismissing the complaint on the issue that the plaintiff did not sustain a serious injury as defined by Insurance Law §5102 (d) under both categories of injury.

None of defendants' experts, Dr. Roth, Dr. DeJesus, nor Dr. Cohen, have submitted copies of their respective curriculum vitae to qualify as experts in this matter. None of the medical records, reports, and reports of x-ray studies have been submitted with the moving papers, as identified in the experts' respective reports, or as testified to by the plaintiff with respect to EMG studies, MRA and ultrasound testing, and CT Scans. The general rule in New York is that an expert cannot base an opinion on facts he did not observe and which were not in evidence, and that the expert testimony is limited to facts in evidence (*see* ***Allen v***

Uh, 82 AD3d 1025, 919 NYS2d 179 [2d Dept 2011]; ***Marzuillo v Isom,*** 277 AD2d 362, 716 NYS2d 98 [2d Dept 2000]; ***Stringile v Rothman***, 142 AD2d 637, 530 NYS2d 838 [2d Dept 1988]; ***O'Shea v Sarro***, 106 AD2d 435, 482 NYS2d 529 [2d Dept 1984]; ***Hornbrook v Peak Resorts,*** Inc. 194 Misc2d 273, 754 NYS2d 132 [Sup Ct, Tomkins County 2002]). Thus, the court is left to speculate as to the contents of the reports and results of the various tests and studies performed on the plaintiff.

Dr. Roth indicated that the plaintiff had CT scans of his head, neck and back, but according to his report, he has not reviewed such studies, leaving this court to speculate as to whether or not his opinion would be affected upon reviewing the results of such reports and films. Although Dr. Roth indicated that he performed range of motion findings on the plaintiff's cervical, thoracic, and lumbar spine, right and left shoulder, right and left hip, he has not indicated the objective method employed to determine such range of motion findings, such as the goniometer, inclinometer or arthroidal protractor (*see* ***Martin v Pietrzak***, 273 AD2d 361, 709 NYS2d 591 [2d Dept 2000]; ***Vomero v Gronrous***, 19 Misc3d 1109A, 859 NYS2d 907 [Supreme Court, Nassau County 2008]), leaving it to this court to speculate as to how he determined such ranges of motions when examining the plaintiff. It is additionally noted that Dr. Roth does not comment upon the plaintiff's claims of radiculopathy or myofascitis, although he conducted a neurological evaluation, nor does he address plaintiff's treatment with steroid epidural injections and treatment with acupuncture, and does not rule out that the plaintiff's claimed injuries and treatment are causally related to the accident, precluding summary judgment with regard to his report. Additionally, he does not address the paresthesia in the plaintiff's arm and the results of the EMG study. Thus, factual issues preclude summary judgment based upon Dr. Roth's report.

Dr. Cohen indicated that the plaintiff denied any prior contributory history of traumatic injury or medical problems. Due to a bullet wound to his face, the plaintiff was unable to have MRI studies conducted. Dr. Cohen set forth those records and reports which he reviewed, and indicated that the CT studies of the plaintiff's lumbar spine reveal disc bulges throughout L3-4 to L5-S1, associated with degenerative changes; NCV studies of both upper extremities were consistent with carpal tunnel syndrome; and CT study of the cervical spine revealed disc bulges throughout C3-4 and C4-5. While Dr. Cohen opined that the degenerative changes reported are of a chronic nature, however, he does not quantify the duration of those bulging discs and duration of the degenerative changes, and set forth a conclusory opinion that none of his findings are related to the accident, and that those findings have no clinical significance. There are factual issues in that the plaintiff's testimony revealed no prior injuries to his neck, back, and shoulders, and his symptoms relative to his neck, back, and shoulder, and headaches had an onset after the accident, and not prior thereto. Dr. Isaac does not address the necessity or indications for the plaintiff's epidural steroid injections and acupuncture, and does not indicate that this treatment is not causally related to the injuries sustained in the occurrence. Although he indicated that the plaintiff suffered soft tissue damage, he does not indicate what is meant by the same, and whether herniated or bulging discs are considered soft tissue.

Dr. DeJesus set forth her range of motion findings upon examination of the plaintiff's lumbar and cervical spines, but has not indicated the objective method employed, as set forth above, to determine such range of motion findings, precluding summary judgment. Dr. DeJesus opined that after taking a complete history, performing a physical examination, and reviewing the records provided, that it is apparent that the injuries sustained and the reported accident are causally related. However, she does not specify whether the injuries claimed in the plaintiff's bill of particulars are the injuries she refers to as "sustained" in the

accident. In light of the fact that Dr. Cohen identified multiple cervical and lumbar bulging discs, there are factual issues concerning which injuries are causally related to the accident, precluding summary judgment. As a neurologist, Dr. DeJesus has not commented upon the plaintiff's claim of headaches, paresthesia in his arm, and the need for acupuncture and epidural steroid injections into the cervical and lumbar spine, leaving this court to speculate as to their relationship to injuries caused by this accident. Additionally, although the plaintiff has claimed cervical and lumbar radicular injury, Dr. DeJesus does not specifically address this condition and does not rule out that radicular injuries are not causally related to the accident. She does not address the acupuncture or cervical and epidural injections, and does not rule out that such treatment was not causally related to those bulging discs or cervical or lumbar radiculopathy, creating further factual issues precluding summary judgment.

It is noted that many of the normal range of motion findings to which Dr. Roth, Dr. DeJesus, and Dr. Cohen compared their findings upon examination, differ, leaving this court to speculate as to which doctor is applying the correct normal range of motion for the cervical, thoracic, and lumbar spines, and raising further factual issue which precludes summary judgment.

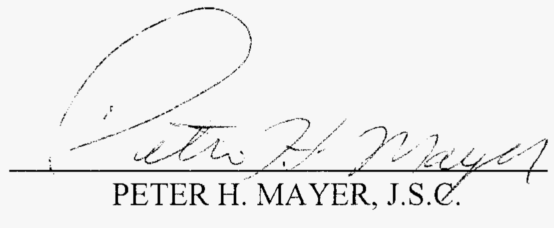
The defendants' experts have offered no opinion as to whether the plaintiff was incapacitated from substantially performing his activities of daily living for a period of ninety days in the 180 days following the accident, and they did not examine the plaintiff during that statutory period (*see* ***Blanchard 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]; ***Delayhaye v Caledonia Limo & Car Service, Inc.***, 61 AD3d 814, 877 NYS2d 438 [2d Dept 2009]). The plaintiff testified that since the accident, he can no longer lift much due to pain, and has difficulty lifting his daughter as he cannot pick her up. He used to read a lot and no longer has concentration sufficient to do so. He used to cook a lot but is now limited as he cannot mix ingredients. He is not in the work program at the V.A. because he cannot do much. They had him answering the phone, but that got to be too much as he cannot sit for any length of time. He left his job with C.W.Y. as he could no longer assemble the lenses. He had to leave Hunter Business School as he could not sit all day, and experienced pain in his neck and had headaches. Being on the computer causes problems in his neck. Just raising his hands causes strain in his neck. He has had multiple epidural steroid injections to his neck and back at Suffolk Surgery Center, and received acupuncture. He started physical therapy two weeks after the occurrence, and has been attending three times a week since. Prior to this accident, he never received any treatment for his back, neck or shoulders, and had no prior injuries to the areas claimed in this action. He continues to have pain in his neck, back, and shoulders, and experiences headaches, every day, every minute. Thus, there are factual issues precluding summary judgment as to this category of injury.

Based upon the foregoing, the defendants have failed to establish that the plaintiff did not sustain a serious injury under either category set forth in Insurance Law § 5102 (d).

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) as to either category of injury, the burden has not shifted to the plaintiff to raise a triable issue of fact to preclude summary judgment (*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]).

Accordingly, the defendants' motion (002), for summary judgment dismissing the complaint is denied.

Dated: 2/15/13



PETER H. MAYER, J.S.C.