

Barahona v Petillo

2013 NY Slip Op 30914(U)

April 22, 2013

Sup Ct, Suffolk County

Docket Number: 12-6224

Judge: Joseph C. Pastorella

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 34 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

Mot. Seq. # 002 - MD

-----X

JOSE SALOMON BARAHONA and MARIA MARQUEZ,

Plaintiffs,

- against -

WILLIAM D. PETILLO and MIDISLAND SYSTEMS CORP.,

Defendants.

-----X

CANNON & ACOSTA, LLP
Attorney for Plaintiffs
1923 New York Avenue
Huntington Station, New York 11746

BAKER, MCEVOY, MORRISSEY & MOSKOVITS, P.C.
Attorney for Defendants
1 Metro Tech Center
Brooklyn, New York 11201

Upon the following papers numbered 1 to 18 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (002) 1 - 11; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 12-16; Replying Affidavits and supporting papers 17-18; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (002) by the defendants, William D. Petillo and MidIsland Systems Corp., pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that the plaintiff, Jose Salomon Barahona, has not sustained a serious injury as defined by Insurance Law § 5102 (d) is denied.

This action arises out of a motor vehicle accident which occurred on November 15, 2010, while the plaintiff was operating his bicycle on Route 110 at the intersection with East 12th Street, Town of Huntington, New York. Maria Marquez, was a passenger on the bicycle operated by plaintiff Barahona. It is alleged that the bicycle which the plaintiffs were riding was struck by the defendants' vehicle operated by William D. Petillo. A claim on behalf of Maria Marquez asserts that she was caused to sustain serious injuries as a result of this accident. The defendants have set forth a counterclaim in their answer for judgment over against Barahona for injuries sustained by Maria Marquez.

Barahona v Petillo
Index No. 11-6224
Page No. 2

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 [1957]). The movant has the initial burden of proving entitlement to summary judgment (Winegrad v N.Y.U. Medical Center, 64 NY2d 851 [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 [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 [2nd 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).

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” (Rodriguez v Goldstein, 182 AD2d 396 [1st Dept 1992]). Once 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 [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 [2nd 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 [3rd Dept 1990]).

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 Inc., 96 NY2d 295 [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,

Barahona v Petillo
Index No. 11-6224
Page No. 3

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 [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, defendants' answer with counterclaim, and plaintiffs' verified bill of particulars; a copy of the transcript of the examination before trial of Jose Barahona dated March 5, 2012; and copies of the reports of the independent neurological examination of the plaintiff by Naunihal Sachdev Singh, M.D., the orthopedic examination of the plaintiff by Robert Israel M.D. each dated April 26, 2012; and the report by A. Robert Tantleff, M.D. dated December 7, 2011 concerning his review of the of the MRI of December 21, 2011 of Jose Barahona's lumbar spine.

Based upon a review of the evidentiary submissions provided by the moving defendants, it is determined that the defendants have failed to establish prima facie entitlement to summary judgment dismissing the complaint on the basis that Jose Barahona did not sustain a serious injury as defined by Insurance Law § 5102 (d) as to either category of injury.

By way of his bill of particulars, Barahona alleges that as a result of the subject accident he sustained injuries consisting of: a tear of the posterior horn of the lateral meniscus of the left knee requiring surgery; surgical debridement of the patellofemoral joint of the left knee; synovitis of the left knee requiring surgery; disc herniation at L5-S1 effacing the epidural fat; disc bulge at L4-5; multiple trigger point injections; lumbar radiculitis; and lumbar spine myofascitis.

Neither Dr. Israel, Dr. Singh, nor Dr. Tantleff have submitted copies of their respective curriculum vitae and have not otherwise demonstrated their qualifications as experts in this matter. The plaintiff's medical records and MRI report have not been provided and are not in evidence. 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 [2nd Dept 2011]; Marzuillo v Isom, 277 AD2d 362 [2nd Dept 2000]; Stringile v Rothman, 142 AD2d 637 [2nd Dept 1988]; O'Shea v Sarro, 106 AD2d 435 [2nd Dept 1984]; Hornbrook v Peak Resorts, Inc. 194 Misc2d 273 [Sup Ct, Tomkins County 2002]). Said records and MRI report are not in evidence.

Additionally, Dr. Singh and Dr. Israel both averred that their were no "legally authenticated" medical records available for review, and if such records become available, they would be reviewed to determine whether they have any affect on the current opinions proffered based upon examination only, thus leaving this court to speculate as to Dr. Singh's and Dr. Israel's final opinion upon review of those records and reports.

Additionally, upon examination of the plaintiff's lumbar spine, Dr. Singh failed to provide range of motion findings for left and right rotation. Dr. Singh's impression was that of lumbar spine sprain/strain, resolved. However, Dr. Singh, had failed to comment on the MRI results and correlate those findings with clinical examination. Dr. Singh failed to comment on the plaintiff's knee injuries and related surgeries claimed in the bill of particulars, and further failed to comment as to the plaintiff's lumbar radiculopathy, myofascitis, or disc herniations other than to set forth in a conclusory opinion that

Barahona v Petillo
Index No. 11-6224
Page No. 4

the neurological examination was negative, thus leading this court to speculate as to the plaintiff's radicular claims.

Dr. Israel set forth that upon examination, the plaintiff continues to have symptoms in his lower back and left knee, described as being better than at the time of injury. Whereas Dr. Singh found that the plaintiff's lumbar range of motion for flexion to be sixty degrees, and the normal range of motion for lumbar flexion as 60 degrees, Dr. Israel found lumbar flexion at seventy-five degrees, with the normal range of lumbar flexion at seventy-five degrees. This discrepancy in findings and normal lumbar flexion range of motion values raises factual issues. Relative to the injuries to the plaintiff's left knee and subsequent surgeries claimed in the plaintiff's bill of particulars, Dr. Israel does not address the issue of causation relating to the accident as to any of the injuries claimed by the plaintiff, thus raising further factual issues which preclude summary judgment.

Dr. Tantleff has not provided a copy of the original MRI report relating to the MRI of the plaintiff's lumbar spine, raising factual issue concerning whether or not the plaintiff's treating physician and Dr. Tantleff agree or disagree in their respective interpretations of the MRI films and findings. Dr. Tantleff opined that the findings on the MRI films required years and decades to develop as presented and are not the result of a single traumatic event. However, he does not give the basis for this conclusory opinion, especially in light of the plaintiff being 34 years of age, with no prior history of injury or symptoms relating to his back.

Additionally, the defendants' examining physicians do not opine on the serious injury category of 90/180 days following the accident thus, raising further factual issue.

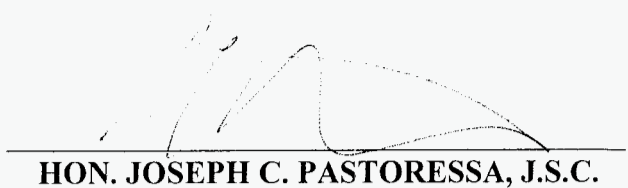
The reports of the examining physicians submitted in support of this motion do not exclude the possibility that the plaintiffs suffered serious injury within the meaning of Insurance Law §5102 under either category and do not establish that the plaintiffs' injuries were not causally related to this accident; therefore, the moving parties are not entitled to summary judgment (see, Peschanker v Loporto, 252 AD2d 485 [2nd Dept 1998]).

The defendants failed to satisfy the burden of establishing, prima facie, that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law 5102 (d) (see, Agathe v Tun Chen Wang, 98 NY2d 345 [2006]); see also, Walters v Papanastassiou, 31 AD3d 439 [2nd Dept 2006]). Inasmuch as the moving parties have failed to establish their 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 opposing papers were sufficient to raise a triable issue of fact (see, Yong Deok Lee v Singh, 56 AD3d 662 [2nd Dept 2008]); Krayn v Torella, 40 AD3d 588 [2nd Dept 2007]; Walker v Village of Ossining, 18 AD3d 867 [2nd Dept 2005]).

Accordingly, motions (002) by the defendants for dismissal of the complaint on the basis that the plaintiff, Jose Barahona has failed to meet the serious injury threshold as defined by Insurance Law § 5102 (d) is denied.

Barahona v Petillo
Index No. 11-6224
Page No. 5

Dated: April 22, 2013



A handwritten signature in black ink, appearing to read 'Joseph C. Pastorella', is written over a horizontal line.

HON. JOSEPH C. PASTORESSA, J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION