

Ryerson v Knuppel

2013 NY Slip Op 30981(U)

May 1, 2013

Sup Ct, Suffolk County

Docket Number: 11-9469

Judge: Peter H. Mayer

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 17 - SUFFOLK COUNTY**COPY****PRESENT:**Hon. PETER H. MAYER
Justice of the Supreme CourtMOTION DATE 10-30-12
ADJ. DATE 11-30-12
Mot. Seq. # 001 - MD

-----X		
KIMBERLY RYERSON,		GLYNN MERCEP and PURCELL, LLP
		Attorney for Plaintiff
	Plaintiff,	North Country Road
		Stony Brook, New York 11790-0712
- against -		
		BAKER, MCEVOY, MORRISSEY
		& MOSKOVITS, P.C.
DONALD KNUPPEL and STEAMY, INC.,		Attorney for Defendants
	Defendants.	330 West 34th Street, 7th Floor
		New York, New York 10001
-----X		

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendants dated September 25, 2012, and supporting papers 1-9 (including Memorandum of Law); (2) Affirmation in Opposition by the plaintiff, dated November 9, 2012, and supporting papers 10-11 untabbed; (3) Reply Affirmation by the defendant, dated December 12, 2012 and supporting papers 12-13; and 14-defendants' Mem. of Law; 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 (001) by the defendants, Donald Knuppel and Steamy, Inc., pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that the plaintiff, Kimberly Ryerson, did not sustain a serious injury as defined by Insurance Law § 5102 (d), is denied.

In this action, the plaintiff, Kimberly Ryerson, seeks damages for personal injuries allegedly sustained on January 10, 2010, on Columbia Street at or near its intersection with North County Road, in the Town of Brookhaven, New York, when the driver's side doors of the stopped Ryerson vehicle, and the left front end of the vehicle operated by Donald Knuppel and owned by Steamy, Inc., came into contact.

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 burden, 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, defendants' answer, and plaintiff's verified bill of particulars; the transcript of the plaintiff's examination before trial dated May 30, 2012; and the sworn reports of Roy Shannon, M.D. dated June 28, 2012 concerning his independent neurological examination of the plaintiff, and Mark Decker, M.D. dated September 27, 2011, concerning his independent radiological review of plaintiff's cervical and lumbar MRIs each dated April 30, 2010.

By way of the bill of particulars, the plaintiff alleges that as a result of this accident, the following injuries were sustained: concentric bulging of the disc and annular tears involving the C5-6 level; severe cervical spine and right upper extremity pain; cervical spine strain/sprain; cervicgia; cervical myalgia; right cervical radiculitis; cervical trigger points; lumbago; concentric bulging of the disc and annular tear at the L4-5 level; bilateral lumbar spasm, myofascitis and radiculopathy requiring paravertebral nerve blocks; lumbar myofascitis with radiculitis; myofascitis and myalgia in the lumbar region bilaterally with moderate limited range of motion; lumbar myalgia; right lumbar radiculitis; lumbar trigger points; lumbar spine sprain/strain; and progressive post-traumatic arthritis of the lumbar/cervical spines and increased vulnerability to insult and further trauma.

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.

Defendants' neurological expert, Dr. Roy Shannon, has submitted his sworn report concerning his independent neurological examination of the plaintiff, but 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. Shannon 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. Shannon set forth that at the time of the examination, no authenticated medical records were available for his review, and if such records are available at a later time, he would be pleased to review them and advise whether they alter his opinion, leaving this court to speculate as to Dr. Shannon's final opinion upon review of the records, and precluding summary judgment. 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]; *Marzullo 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]). The plaintiff testified that she had nerve conduction tests performed, but Dr. Shannon does not comment as to whether or not the plaintiff had radiculopathy and whether or not it was causally related to the accident.

Defendants' radiological expert, Dr. Decker, has submitted his sworn report concerning his radiological review of the MRIs of the plaintiff's cervical spine and lumbar spine each dated April 30, 2010, but has not submitted a copy of his curriculum vitae to qualify as an expert in this action. It is determined that even if Dr. Decker submitted a copy of his curriculum vitae, there are factual issues which preclude summary judgment with regard to his report and opinions. No copy of the original MRI reports by the plaintiff's treating radiologist has been provided to this court, leaving this court to speculate as to

whether the physicians agree in their interpretation of the films. Dr. Decker set forth that the bulging discs at C4-5, and loss of signal and height at C2-3 through C5-6 are all degenerative in nature and are not causally related to the accident. He continued that there is no herniation or fracture to suggest a traumatic injury, but he does not differentiate between a bulging disc and a herniated disc, and the lack of history of trauma in this then thirty-year old female. As to the lumbar MRI, Dr. Decker set forth that he found a broad based disc bulge at L5-S1 with facet arthropathy; broad bulge at L4-5 encroaching on the inferior foramina and facet arthropathy; and broad bulge at L3-4 encroaching on the inferior foramina and facet arthropathy; and broad bulge at L1-2 and L2-3 with facet arthropathy. Dr. Decker stated that these findings are long-standing and degenerative in nature and are not causally related to the subject accident. However, Dr. Decker's opinion is conclusory and unsupported. He does not set forth the duration of such "long-standing" findings or provide a basis for his unsupported and conclusory opinions, precluding summary judgment.

Although the plaintiff has pleaded that she sustained multiple bulging discs, no report from an independent orthopedist who has examined the plaintiff on behalf of the defendants has been submitted (*Browdame v Candura*, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]; *Rodriguez v Schickler*, 229 AD2d 326, 645 NYS2d 31 [1st Dept 1996], *lv denied* 89 NY2d 810, 656 NYS2d 738 [1997]), leaving this court to speculate as the additional injuries claimed by the plaintiff, and precluding summary judgment.

Based upon the paucity of the evidentiary submissions, and the factual issues raised in the defendants' moving paper, the defendants have 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.

Defendants' examining physicians offer no opinion as to whether the plaintiff was incapacitated from substantially performing the activities of daily living for a period of ninety days in the 180 days following the accident, and did not examine the plaintiff during that statutory period (*see Delayahaye 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 when her vehicle was struck by the defendants' taxi, she struck her head on the windshield of her car and her whole body jerked. She was bleeding from a small laceration to her head, and experienced pain in her shoulders, neck and back. She attended physical therapy for about four to five weeks, but she did not experience relief from the pain, and actually had more pain with physical therapy. She then continued to treat with a chiropractor, Dr. Patel, twice a week for about three months. Dr. Dinker, a neurologist, administered serial nerve block injections in March and May of 2010. She also had nerve testing done. She was working as a certified nursing assistant and lost about three weeks from work initially, and another week or week and a half when she received the nerve block injections. When she returned to work, her co-workers picked up the heavy work for her for a couple of months, until after the nerve block injections in May 2010. She now has trouble cleaning and mopping, and cannot sit for long as she develops numbness. The pain does not go away. Prior to this accident, she had no accidents or injuries to her back or neck.


Based upon the foregoing, it is determined that the defendants have 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) in the second category of injury.

Ryerson v Knuppel
Index No. 11-9469
Page No. 5

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 defendants' motion for summary judgment dismissing the complaint is denied in its entirety.

Dated: 5/1/13



PETER H. MAYER, J.S.C.