Torres v Sprague
2013 NY Slip Op 31215(U)
June 9, 2013
Sup Ct, Suffolk County
Docket Number: 10-31353
Judge: Ralph T. Gazzillo
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SHORT FORM ORDER

INDEX No. 10-31353
CAL No. 12-01866MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH T. GAZZILLO
Acting Justice of the Supreme Court

MOTION DATE 3-20-13 (#001)
MOTION DATE 3-21-13 (#002)
ADJ. DATE 5-9-13
Mot. Seq. # 001 - MD
002 - MD

FERNANDO TORRES,

Plaintiff,

- against -

WAYNE SPRAGUE, SUSAN H. SPRAGUE, OTILIA VILLATORO and VICTOR CALDERO,

Defendants.

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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 (001)1 -10; (002) 11-16; Notice of Cross Motion and supporting papers _; Answering Affidavits and supporting papers 17-25; 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 (001) by defendants, Wayne Sprague and Susan H. Sprague, pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that the plaintiff, Fernando Torres, did not sustain a serious injury as defined by Insurance Law § 5102 (d) is denied; and it is further

ORDERED that motion (002) by defendants, Otilia Villatoro and Victor Calderon, for summary judgment dismissing the complaint on the basis that the plaintiff, Fernando Torres, did not sustain a serious injury as defined by Insurance Law § 5102 (d), has been rendered academic by withdrawal of the motion by stipulation dated May 7, 2012, and is denied as moot.

This negligence action arises out of an automobile accident wherein the plaintiff, Fernando Torres, alleges to have sustained serious injury on February 9, 2010, on Spur Drive South, at or near the intersection with Commack Road, in the Town of Islip, New York. The plaintiff was a passenger in the vehicle operated by Victor Calderon and owned by Otilia Villatoro when it became involved in a collision with the vehicle operated by Susan Sprague and owned by Wayne Sprague.

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]).

In support of motion (001), defendants have submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, their answer with cross claim for judgment over and contribution/indemnification from co-defendants Villatoro and Caldero; plaintiff's bill of particulars; a discharge summary for plaintiff's admission to North Shore University Hospital at Southside; an uncertified copy of a wage loss calculation worksheet by State Farm; a copy of plaintiff's deposition transcript dated August 10, 2011 in admissible form; and the report of Isaac Cohen, M.D. dated December 29, 2011 concerning his independent orthopedic examination of the plaintiff.

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* ***Rodriquez 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*).

By way of the bill of particulars, the plaintiff alleges that as a result of this accident, he sustained injuries consisting of a disc bulge at C5-6; cervical segmental dysfunction; cervical disc derangement; cervical radiculopathy; disc bulge at L5-S1 into the epidural fat; lumbar segmental dysfunction; lumbar disc derangement; thoracic segmental dysfunction; left ankle sprain; concussion; and left shoulder AC impingement. Plaintiff has set forth that he was hospitalized from February 9, 2010 to February 10, 2010 at Southside Hospital, confined to home and disabled through July 1, 2010 and remains partially disabled to date.

In reviewing the evidentiary submissions, it is determined that the moving defendants have failed to demonstrate prima facie entitlement to summary judgment dismissing the complaint. None of the medical records and MRI reports, CT reports, and x-ray reports which Dr. Cohen reviewed and based his opinions on in part, have been submitted by the defendants in support of this motion as required pursuant to ***Friends of Animals v Associated Fur Mfrs***., *supra*. Expert testimony is limited to facts in evidence (*see also* ***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]), and these medical records and reports are not in evidence. Notably, Dr. Cohen indicated that he reviewed "extensive medical records, scans and multi-disciplinary consultations, which have not been submitted. Thus, this court is left to speculate as to the contents and findings in those records and reports.

Dr. Cohen examined the plaintiff and stated that he is a twenty one year old full-time student who offers complaints of pain everywhere, including the neck, back, knees, shoulders, arms, ankles, and headaches. Upon physical examination, Dr. Cohen obtained cervical ranges of motion and compared them to the normal ranges of motion values. Although he examined the plaintiff's upper extremities, and stated that ranges of motion of the upper extremities, including both elbows and wrists, are within normal range, he did not set forth the range of motion values which he obtained, and he did not compare

his findings to the normal range of motion values for these body parts, raising factual issue as to his findings and precluding summary judgment. Upon examining the plaintiff's left knee, he found flexion to be 145 degrees compared to the normal value of 130 up to 150 degrees, leaving this court to speculate as to whether or not a deficit in flexion was determined, and what the normal range of motion value is. When the normal range of motion is set forth within a range or spectrum, it leaves it to the court to speculate as to the actual normal ranges of motion without variations, and under which conditions such variations would be applicable (*see* ***Hypolite v International Logistics Mgt., Inc.***, 43 AD3d 461, 842 NYS2d 453 [2d Dept 2007]; ***Somers v Macpherson***, 40 AD3d 742, 836 NYS2d 620 [2d Dept 2007]; ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]; ***Manceri v Bowe***, 19 AD3d 462, 798 NYS2d 441 [2d Dept 2005]; *see also* ***Rodriguez v Schickler***, 229 AD2d 326, 645 NYS2d 31 [1st Dept 1996], *lv denied* 89 NY2d 810, 656 NYS2d 738 [1997]), precluding summary judgment.

Dr. Cohen indicated that the MRI examination of the plaintiff's left shoulder was interpreted as demonstrating impingement of the acromioclavicular joint. He continued that on a clinical basis, no indication exists of any pathology involving the shoulder, and independent evaluation of those films is warranted. However, no such independent radiology evaluation has been submitted, thus raising factual issues with regard to this injury and radiology evaluation. Dr. Cohen offers no opinion with regard to plaintiff's claim of bulging cervical and lumbar discs and does not rule out that such injuries are causally related to the subject accident.

Although the plaintiff has pleaded that he suffered a concussion and cervical radiculopathy, no report concerning an independent neurological evaluation has been submitted by the defendants (*see* ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]), thus, raising factual issues concerning whether these conditions have been ruled out.

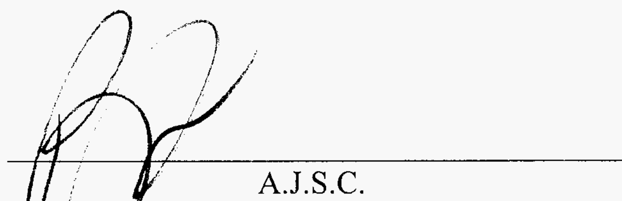
Defendants' examining physician offers no opinion as to whether the plaintiff was incapacitated from substantially performing the usual activities of daily living for a period of ninety days in the 180 days following the accident, and he did not examine the plaintiff during that statutory period (*see* ***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]). He offers no opinion with regard to this category of serious injury (*see* ***Delayhaye v Caledonia Limo & Car Service, Inc.***, 61 AD3d 814, 877 NYS2d 438 [2d Dept 2009]), raising factual issues concerning whether the plaintiff sustained a serious injury with regard to this category of injury. The plaintiff testified that following the accident, he had to stop working at his job with the Eyewear Company due to the pain in his back, head, neck, shoulder, and ankle. He remained in bed for about three to four weeks. He received physical therapy for four months, three times a week. Since the accident, he cannot sit for long periods of time, and he cannot run due to pain in his left ankle. Prior to the accident, he ran for about one to two hours, every day.

Based upon a review of defendants' evidentiary submissions in support of this motion, it is determined that the defendants have 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 defined in Insurance Law § 5102 (d) (*see* ***Agathe v Tun Chen Wang***, 98 NY2d 345, 746 NYS2d 865 [2006]); *see also* ***Walters v Papanastassiou***,

31 AD3d 439, 819 NYS2d 48 [2d Dept 2006]). 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", 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, 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, motion (001) by defendants Wayne Sprague and Susan Sprague for summary judgment dismissing the complaint is denied.

Dated: 6/4/13



A.J.S.C.

_____ FINAL DISPOSITION **__X__ NON-FINAL DISPOSITION**