Zambrano v Mendez
2013 NY Slip Op 32450(U)
October 3, 2013
Sup Ct, Suffolk County
Docket Number: 11-30920
Judge: Joseph Farneti

[* 1]

SHORT FORM ORDER

COPY INDEX No. 11-30920

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 7-19-13
ADJ. DATE 9-19-13
Mot. Seq. # 001 - MD

LUIS ZAMBRANO,	:	SURIS & ASSOCIATES, P.C.
	:	Attorney for Plaintiff
Plaintiff,	:	999 Walt Whitman Road, Suite 201
	:	Melville, New York 11747
- against -	:	
	:	RUSSO, APOZNANSKI & TAMBASCO
RAMON MENDEZ,	:	Attorney for Defendant
	:	875 Merrick Avenue
Defendant.	:	Westbury, New York 11590

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 1-10; Notice of Cross Motion and supporting papers _; Answering Affidavits and supporting papers 11-16; Replying Affidavits and supporting papers 17-18; Other _; it is,

ORDERED that this motion (seq. #001) by defendant, Ramon Mendez, pursuant to CPLR 3212, for an Order granting summary judgment dismissing the complaint on the basis that the plaintiff has failed to meet the serious injury threshold as defined by Insurance Law § 5102 (d), is denied.

In this negligence action, the plaintiff, Luis Zambrano, seeks damages for personal injuries which he alleges to have sustained in a motor vehicle accident that occurred on May 7, 2009, on Washington Avenue at its intersection with Ellery Street, Islip Town, Suffolk County, New York, when the defendant's vehicle and his vehicle 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]). 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]).

In support of this application, the defendant has submitted,[1] *inter alia*, an attorney's affirmation; copies of the pleadings; plaintiff's verified bill of particulars; the unsigned transcript of the examination before trial of Luis Zambrano dated March 28, 2012, with proof of service; expert disclosure; and the report of Joseph Y. Margulies, M.D. concerning his independent orthopedic examination of the plaintiff dated August 30, 2013.

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]).

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[1] The exhibits are untabbed and fail to comport with the rules of the Court. In the future, counsel is directed to properly tab exhibits rather than merely separating the pages with a sheet of paper, as it renders it difficult for the Court to match arguments to documents and to sort through the multitude of pages (*see* ***DelVecchio v Sciacca***, 2012 NY Slip Op 33088U [Sup Ct, Suffolk County]; ***Ro v Noah ModaMaya Sa De Cv, Inc.***, 2009 NY Slip Op 32598U [Sup Ct, New York County]; ***Youngewirth v Town of Ramapo Town Board***, 29 Misc3d 1221A, 918 NYS2d 401 [Sup Ct, Rockland County 2010]).

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 verified bill of particulars, the plaintiff alleges that as a result of this accident he sustained injuries consisting of posterior disc herniation with associated bony ridging at the C5-6 level favoring the left side; posterior disc herniation with bony ridging at the C6-7 level; posterior disc herniation at the C7-T1 level favoring the right side; posterior disc bulge at the C3-4 level; straightening of the curvature of the cervical spine with loss of the normal lordosis; painful and restricted ranges of motion of the cervical spine; posterior disc bulge at the L3-4 level encroaching upon the ventral aspect of the thecal sac and lateral recesses bilaterally; posterior disc bulge at the L4-5 level encroaching upon the ventral aspect of the thecal sac and lateral recesses bilaterally; posterior disc bulge at L5-S1 encroaching upon the anterior epidural fat and lateral recesses bilaterally; painful and restricted ranges of motion; bilateral upper extremity paresthesias and weakness; neck pain radiating to the shoulders bilaterally and to the left arm; partial thickness cuff tear of the shoulder with pain on external rotation and abduction of the left shoulder; need for future surgery; constant headaches; and intermittent dizziness; and psychological injuries consisting of nervousness, anxiety and tension.

Upon review and consideration of the defendant's evidentiary submissions, it is determined that the defendant has not established *prima facie* entitlement to summary judgment dismissing the complaint on the basis that Luis Zambrano did not sustain a serious injury as defined by Insurance Law § 5102 (d) as to either category of injury.

The defendant has failed to support this motion with the copies of the plaintiff's reports concerning the cervical and lumbar MRI studies of July 23, 2009, and the lumbar spine MRI of January 23, 2009, thus, this Court is left to speculate as to the contents of the MRI studies reviewed by Dr. Margulies who does not indicate that he also reviewed the films. Additionally, none of the other records and reports reviewed by Dr. Margulies in rendering his opinions have been provided to this Court. 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 expert testimony is limited to facts in evidence (*see* CPLR 4518; ***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]). Such records are not in evidence.

Dr. Margulies has not addressed the plaintiff's claims of a herniated/bulging lumbar discs and cervical discs, or opined as to whether or not they are causally related to the accident. Dr. Margulies has not set forth the method employed to measure the plaintiff's cervical and lumbar spine, ankle, knees, or shoulder ranges of motion, 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 [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. Thus, these factual issues preclude summary judgment.

Although Dr. Margulies noted that the plaintiff had a loss of consciousness associated with the accident, and although the plaintiff has pleaded that he suffers headaches and dizziness, as well as psychological problems also associated with the accident, a report from a neurologist or psychologist/ psychiatrist has not been submitted by defendant, leaving this Court to speculate as to these claimed injuries.

It is noted that the defendant's examining physician did not examine the plaintiff during the statutory period of 180 days following the accident, thus, rendering the defendant's physician's affidavit insufficient to demonstrate entitlement to summary judgment on the issue of whether the plaintiff was unable to substantially perform all of the material acts which constituted the usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident (***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]), and the expert 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]).

The plaintiff testified that due to the knee injury sustained in the accident, he still uses a knee brace due to the pain. His back and shoulders hurt a lot and he has pain in his left wrist. He gets headaches. He had physical therapy for eight months, two times a week, and also received acupuncture. His head hurts a lot. Sometimes he cannot go to work due to the pain. He has problems driving. He cannot pick up things at work. He stated, that the fact is, he has become crazy and does not want to drive the company truck any longer as it is too much responsibility, and he is not the same anymore. When he bends, he is stuck there. Defendant's expert did note that the plaintiff received acupuncture and massage therapy two to three times a week which stopped in 2010.

The factual issues raised in defendant's moving papers preclude summary judgment, as they failed to establish 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, 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]), as the burden has not shifted to the plaintiff. However, it

is noted that the plaintiff has submitted, *inter alia*, the sworn report of Dr. Harold Avella, who has set forth that the plaintiff has a mild to moderate residual and functional disabilities and permanent injuries, with guarded prognosis. He set forth the basis for such opinion.

Accordingly, this motion by the defendant for summary judgment dismissing the complaint on the basis that the plaintiff did not suffer a serious injury as defined by Insurance Law § 5102 (d) is denied.

Dated: October 3, 2013

Hon. Joseph Farneti
Acting Justice Supreme Court

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION