

Prada v Baumgarten

2013 NY Slip Op 32866(U)

October 28, 2013

Sup Ct, Suffolk County

Docket Number: 11-9619

Judge: Denise F. Molia

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INDEX No. 11-9619

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Acting Justice of the Supreme Court

MOTION DATE 8-2-13
ADJ. DATE 10-4-13
Mot. Seq. # 002 - MD

-----X
STEPHEN PRADA,

Plaintiff,

- against -

ALAN BAUMGARTEN,

Defendant.
-----X

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Upon the following papers numbered 1 to 16 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (002) 1-10; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 11-14; Replying Affidavits and supporting papers 15-16; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (001) by the defendant, Alan Baumgarten, pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that the plaintiff 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 May 11, 2010, on the eastbound Long Island Expressway, in Nassau County, New York, when the vehicle operated by the defendant Alan Baumgarten came into contact with the vehicle operated by plaintiff Stephen Prada. The plaintiff alleges that as a result of this accident he sustained a serious injury as defined by Insurance Law § 5102 (d).

The defendant seeks 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

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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 defendant has submitted, inter alia, an attorney's affirmation; a copy of the summons and complaint, defendant's answer, and plaintiff's verified and supplemental verified bills of particulars; a copy of the unsigned and certified transcript of the plaintiff's examination before trial dated January 24, 2012 with proof of service; and the signed reports of Dr. Michael J. Katz dated April 30, 2013 concerning the independent orthopedic examination of the plaintiff, and Dr. Mark J. Zuckerman dated April 15, 2013 concerning the independent neurological examination of the plaintiff.

By way of the plaintiff's verified bills of particular, he alleges that as a result of this accident, the following injuries were sustained: C5-6 posteriolithesis of C5 and C6 with central narrowing; cervical sprain/strain; cervical derangement; permanent consequential limitation of the cervical spine; loss of range of motion of the cervical spine; L4-L5 posterior central disc protrusion; L5-S1 moderate diffuse disc herniation asymmetric to the left posterior left paracentral disc extrusion; narrowing of the lumbar left foramin and S1 left exiting nerve displacement; L1-L4 disc protrusion with annular fissure; T12-L1 disc protrusion with annular fissure; lumbar derangement; lumbar sprain/strain; permanent consequential limitation of the lumbar spine; significant limitation of the lumbar spine; loss of range of motion of the lumbar spine; aggravation and/or exacerbation of underlying/pre-existing herniated discs at L4-L5 and L5-S1, which were asymptomatic and in quiescent condition; and aggravation and/or exacerbation of pre-existing migraine headaches which were asymptomatic and in a quiescent condition requiring plaintiff to be placed on a regimen of medications.

Based upon careful review and consideration of the evidentiary submissions, it is determined that the defendant has not established 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) under both categories of injury.

The moving papers contain Dr. Katz's and Dr. Zuckerman's reports of their respective independent examinations of the plaintiff, wherein they have set forth the various medical records, and MRI reports reviewed by them. Referenced were plaintiff's lumbar spine MRI of January 13, 2011, and a prior lumbar MRI report dated December 7, 2009. However, these reports and records have not been submitted with the moving papers, leaving this court to speculate as to the contents of those records and tests, and whether there was an interval change between the two lumbar MRIs. The examining physicians do not comment on the findings. This raises factual issues which preclude 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]; *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]). Those reports, records, and diagnostic studies reviewed by Dr. Katz and Dr. Zuckerman are not in evidence.

Disc herniation and limited range of motion based on objective findings may constitute evidence of serious injury (*Jankowsky v Smith*, 294 AD2d 540, 742 NYS2d 876 [2d Dept 2002]). Both Dr. Katz and Dr. Zuckerman have performed range of motion testing on plaintiff's lumbar spine and cervical spine. It is noted that Dr. Katz has set forth the normal range of motion for cervical flexion as 50 degrees, extension 60 degrees, lateral flexion at 45 degrees, and rotation at 80 degrees. Dr. Zuckerman has set forth that normal

cervical flexion is 40 degrees, and extension at 40 degrees. Thus, the varying range of motion findings set forth for cervical flexion have been compared to differing normal range of motion values, creating factual issues concerning which range of motion values are normal and the degree of limitation, if any.

It is additionally noted that Dr. Zuckerman has set forth the normal range of motion values for the lumbar spine in a range of values. Comparing range of motion findings to normal range of motion values set forth in a spectrum, leaves it to this court to speculate under what conditions the ranges would be applied (*see Spencer v Golden Eagle, Inc.*, 82 AD3d 589, 920 NYS2d 24 [1st Dept 2011]; *Lee v M & M Auto Coach, Ltd.*, 2011 NY Slip Op 30667U, 2011 NY Misc Lexis 1131 [Sup Ct, Nassau County 2011]). When a normal reading for range of motion testing is provided in terms of a spectrum or range of numbers rather than one definitive number, the actual extent of the limitation is unknown (*see Sainnoval v Sallick*, 78 AD3d 922, 923, 911 NYS2d 429 [2d Dept 2010]; *Lee v M & M Auto Coach, Ltd.*, *supra*; *Hypolite v International Logistics Management, 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]; *Rodriguez v Schickler*, 229 AD2d 326, 645 NYS2d 31 [1st Dept 1996], *lv denied* 89 NY2d 810, 656 NYS2d 738 [1997]). Thus, Dr. Zuckerman's report raises further factual issues which preclude summary judgment.

Neither Dr. Katz nor Dr. Zuckerman have offered an opinion that plaintiff's lumbar herniation is unchanged or not causally related to the subject accident. Although the plaintiff testified that he underwent a cervical MRI, neither of defendant's experts have stated that they reviewed such MRI, leaving this court to speculate if their opinions concerning the plaintiff's alleged neck injury would be affected upon reviewing plaintiff's cervical MRI.

The defendant's experts offered 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 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]), precluding summary judgment at to this category of injury.

The plaintiff testified that he is executive vice president of merchandising at Kravet, Inc., where he has worked for fifteen years, and which requires traveling in the United States and to Canada, Paris and London. He first sought medical care and treatment the day following the accident at Plainview Hospital emergency department where he presented for pain in his neck and back, and a migraine headache which started after the accident. He had a prior history of migraine headaches once or twice a year, and last took medication for the headaches six months before. At Plainview Hospital, x-rays of his neck and back were taken, and he was given a prescription for Flexeril, and a soft collar for his neck. He used the soft collar for a couple days, but slept with it for six months. He then saw his primary physician, Dr. Hartman, for the migraine headaches and because his neck was still hurting. He started physical therapy one week after the accident and continued for six to eight weeks, once a week. He underwent MRIs of his neck and back and started treating with Dr. Benitar, whom he still sees. Dr. Benitar prescribed muscle relaxants and anti-inflammatory medication and referred him to Dr. Snyder for injections into his neck, which he had on four occasions. He then went to physical therapy in Bethpage several times a week for about three months with

Dr. Mazza. The plaintiff also started exercises prescribed for him, and he continues to do these exercises on a daily basis as directed. He also uses electro-stimulation to his neck. The plaintiff testified that he attended the pain clinic in Massachusetts and received epidural injections into his lower back at L-5 on two occasions. The plaintiff also testified that two years prior to the accident, he experienced some pain in his back but had no prior injury. He had received two injections into his back prior to the accident about six months and a year before, and had undergone some physical therapy for his lower back. He stated that an MRI showed a bulging disc at L4-5 at that time.

The plaintiff testified that everyday he experiences pain, aching, burning and radiating in his neck on both sides into his right shoulder. The pain can last all day. He experiences mid and lower achy back pain mostly in the morning for about an hour. After this accident, he began experiencing migraine headaches for two weeks, then twice a week for several months. The migraines consist of a massive headache, with flashing over his left eye. Since the accident, he cannot do heavy yard work, or heavy lifting over twenty pounds. He had to hire someone to do fall and spring clean up and to spread mulch in the yard.

The factual issues raised in defendant’s moving papers preclude summary judgment. The defendant 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, 746 NYS2d 865 [2006]); *see also Walters v Papanastassiou*, 31 AD3d 439, 819 NYS2d 48 [2d Dept 2006]). Inasmuch as the moving party 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.

Accordingly, the defendant’s motion (002), for summary judgment dismissing the complaint is denied.

Dated: 10-28-13

Hon. Denise F. Molia

A.J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION