Barreau v Anselmo
2013 NY Slip Op 32925(U)
November 4, 2013
Sup Ct, Suffolk County
Docket Number: 12-10732
Judge: Jerry Garguilo

[* 1]

SHORT FORM ORDER

INDEX No. 12-10732
CAL No. 13-01256MV

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 47 - SUFFOLK COUNTY

PRESENT:

Hon. JERRY GARGUILO
Justice of the Supreme Court

MOTION DATE 6-26-13
ADJ. DATE 8-28-13
Mot. Seq. # 002 - MD

OSCAR BARREAU,

Plaintiff,

- against -

CHRISTINA ANSELMO,

Defendant.

CANNON & ACOSTA, LLP
Attorney for Plaintiff
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Huntington Station, New York 11746

DESENA & SWEENEY, ESQS.
Attorney for Defendant
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Upon the following papers numbered 1 to 20 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 11-17; Replying Affidavits and supporting papers 18-20; Other _; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (002) by the defendant, Christina Anselmo, pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that the plaintiff, Oscar Barreau, did not sustain a serious injury as defined by Insurance Law § 5102 (d), is denied.

In this negligence action, the plaintiff, Oscar Barreau, seeks damages for personal injuries alleged to have been sustained on December 14, 2010, on Whitney Road at or near its intersection with Bristol Drive, in the Town of Oyster Bay, New York, when his vehicle and the plaintiff's 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 motion, the defendant submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, answer, and plaintiff's verified bill of particulars; the sworn report of Michael J. Katz, M.D. dated May 7, 2013 concerning his independent orthopedic examination of the plaintiff; sworn report of David A. Fisher, M.D. dated April 29, 2013 concerning his independent radiologic review of the plaintiff's x-rays of the lumbar spine dated December 14, 2010, MRI of the plaintiff's lumbar spine dated February 4, 2011, x-rays of the cervical spine dated December 14, 2010, and MRI of the cervical spine dated February 4, 2011; and the transcript of the plaintiff's examination before trial dated July 6, 2012.

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*).

By way of the verified bill of particulars, the plaintiff alleges to have sustained the following injuries in the subject accident: recurring headaches and dizziness resulting from head injury; cervical herniation at C3-4, C4-5, C5-6, and C5-6; lumbar herniation at L5-S1; 50% limitation of lumbar range of motion and 25% limitation of cervical range of motion; lumbar disc bulges at L1-2 through L4-5; cervical, lumbar, and thoracic subluxation; straightening of the normal cervical lordosis.

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

Dr. Katz has not set forth his education or training and work experience to qualify as an expert and has not submitted a copy of his curriculum vitae with the moving papers, however a copy of his curriculum vitae was submitted in defendant's reply papers. Although Dr. Katz set forth the materials and medical records and reports which he reviewed, and upon which he bases his opinions in part, said copies of the records, EMG/NCV reports, and the MRI and the x-ray reports of the studies of plaintiff's cervical spine and lumbar spine, taken following this subject accident and following the accident of 2003, have not been provided. 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* ***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]). Here, the aforementioned records and reports are not in evidence, leaving this court speculate as to the contents of those reports and whether or not there are any differences in the plaintiff's conditions following the second accident.

Dr. Katz, in a conclusory and unsupported statement, opined that it is significant that there was a prior accident in 2003 with injury to the plaintiff's neck and back. He continued that the MRI reports of the cervical spine and the lumbar spine indicate changes which are degenerative in nature. However, he does not indicate which changes are degenerative in nature, and which changes he is referring to, thus raising factual issues which preclude summary judgment

Dr. Fisher set forth in his report concerning his review of the x-rays and MRI studies of the plaintiff's neck and back, obtained after this accident, that these studies revealed degenerative changes. While he notes that the lumbar MRI manifests disc dehydration, disc space narrowing and hypertrophy of the end plates and facets, with accompanying mild annular bulges at multiple levels, he does not indicate which levels are involved. He does not discuss the findings from the 2003 lumbar MRI to compare and demonstrate that there have been no changes or to state the differences, if any, upon comparison. He stated no herniations are seen. Again, with respect to the cervical MRI following the subject accident, Dr. Fisher found no herniations but stated that it reveals degenerative changes. However, by not submitting the actual lumbar and cervical MRI reports for 2003 and 2011, and by failing to make a comparison between the 2003 and 2011 studies. factual issues are raised, precluding summary judgment.

While the plaintiff has pleaded that he sustained a herniated disc at L5-S1, the report of Dr. Himelfarb dated February 7, 2011, submitted in plaintiff's opposing papers, interprets the lumbar MRI spine as posterior disc bulge at the L5-S1 level, with lesser disc bulges at the L1-2 through L4-5 levels. It is also noted that the plaintiff has pleaded that he sustained cervical herniation at C3-4, C4-5 and C5-6, however, the MRI report by Dr. Himelfarb dated February 7, 2011 reveals central posterior disc bulges at C2-3, central posterior disc herniation at the C3-4 level, posterior disc bulge associated with bony ridging at the C4-5 level, posterior to right posterolateral disc herniation at the C5-6 level, and posterior disc bulges at the C6-7 and C7-T1 levels. It is further noted that plaintiff has submitted the affirmed report of Alvin Stein M.D. dated July 31, 2013 wherein cervical and lumbar ranges of motion have been obtained by computerized range of motion testing which findings reveal deficits when comparing the findings to normal range of motion values. Thus, plaintiff's opposition raises further factual issues to preclude summary judgment.

It is noted that the plaintiff has also compared the signature of Dr. Katz placed on his supporting IME report to that of a hand inscribed signature of Dr. Katz in an affirmation dated October 8, 2012 concerning an action pending under Index No. 10-4490, in Supreme Court, Kings County. The plaintiff objects to Dr. Katz's report submitted in support of the instant motion, stating that Dr. Katz's signature has been electronically signed. The plaintiff cites to ***Eill v Mork (sic) Morck***, 2022 NY slip 51996 (October 19, 2012), noting that the Appellate Division fails to recognize stamped or electronically signed signatures.

CPLR 2106 governs the use of facsimile signatures on affirmations. In ***Eill v Morck***, supra, it was determined that Dr. Katz's affirmation contained an electronically signed signature. While deemed admissible by the Appellate Division, First Department, such electronic signature is not deemed admissible by the Appellate Division, Second Department, citing to ***Vista Surgical Supplies, Inc. v Travelers Ins. Co.***, 50 AD3d 778. 860 NYS2d 532 [2d Dept 2008]. In ***Vista Surgical Supplies, Inc. v Travelers Ins. Co.***, *supra*, the court found medical reports to be inadmissible since they contained computerized, affixed, or stamped facsimiles of the physician's signature, which failed to comport with CPLR 2106 since such signatures were not subscribed or affirmed, and the reports merely contained facsimiles of the physician's signature without any indication as to who placed them on the reports, or any indicia that the facsimiles were properly authorized. The court noted that prior to the decision in ***Vista Surgical Supplies, Inc. v Travelers Ins. Co.***, *supra*, no appellate court considered the effectiveness of a facsimile signature of any sort on an affirmation, verified pleading, or similar legal document. Subsequent to ***Vista Surgical Supplies, Inc. v Travelers Ins. Co.***, *supra*, Appellate Term Second Department ruled inadmissible "affirmed" medical reports with stamped or electronic facsimile signatures where the record did not demonstrate that the signature was placed on the report by the doctor or at the doctor's direction (*see* ***Rogy Med., P.C. v Mercury Cas. Co.***, 23 Misc3d 132 [A], 885 NYS2d 713, 2009 NY Slip Op 50732[U] [App Term, 2d Dept 2009]). ***Sweeney v Springs***, 2012 NY Slip Op 30415 [U] [Sup Ct, Nassau County 2012], held that affirmed medical reports submitted on serious injury motions were inadmissible. In the instant action, it cannot be determined whether or not Dr. Katz' signature has been electronically signed, and his report does not indicate that it has been. However, in that the defendant has not demonstrated prima facie entitlement to summary judgment, and defendant's counsel does not address this issue in his reply, whether Dr. Katz's signature was signed electronically or not is not dispositive.

It is noted that the movant's examining physician did not examine the plaintiff during the statutory period of 180 days following the accident, thus rendering their 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 their 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]). Thus, summary judgment is precluded to the moving parties with regard to this category of injury as well.

The plaintiff testified to the extent that when this accident occurred, he hit his head on the back of his seat and had pain in his head. His neck and back jerked, and he had pain in his neck and back after the accident. He was seen in the emergency room at Syosset Hospital and released. He started the therapy the day after the accident, every day for one month. One month after the accident he had an MRI. He testified that in 2003, he had a prior car accident wherein he hurt his back and obtained an MRI of his back. He also went for therapy for his neck and back after the 2003 accident. He was involved in another car accident in 2007 and stated there "was no shock to my body." The plaintiff testified that he works as a machine operator in a factory, and after this accident, holds the same position as he did prior to the subject accident. He missed one week of work after this accident as he was getting massages. For about three months after the accident, he did light work at his job. He then stated that he goes to work but now does easy work, and when he comes home, he doesn't really to anything. When asked, as a result of this accident, if anything has changed in his life in terms of what he is able to do, he responded, "No, I don't try to do anything any way. I come home from work and relax with my wife and kids.

The factual issues raised in the defendant's moving papers preclude summary judgment and the defendant has have 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 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 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) for summary judgment on the basis that the plaintiff did not suffer a serious injury as defined by Insurance Law §5102 (d) is denied.

Dated: 11/4/13

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION