

**Walker v Wilson**

2014 NY Slip Op 30686(U)

March 11, 2014

Supreme Court, Suffolk County

Docket Number: 11-37154

Judge: Jerry Garguilo

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SHORT FORM ORDER

INDEX No. 11-37154  
CAL No. 13-0115MV

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

**PRESENT:**

Hon. JERRY GARGUILO  
Justice of the Supreme Court

MOTION DATE 9-18-13  
ADJ. DATE 1-29-14  
Mot. Seq. # 001 - MD  
              # 002 - MD

-----X

DEVANTE WALKER,

Plaintiff,

- against -

TONYA WILSON and STEVEN NAVAS,

Defendants.

-----X

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Upon the following papers numbered 1 to 29 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (001) 1-13; (002) 14-17 and untabbed exhibits; Notice of Cross Motion and supporting papers    ; Answering Affidavits and supporting papers 18-23; Replying Affidavits and supporting papers 25-26; 27-28; Other 29; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that motion (001) by defendant Steven Navas, pursuant to CPLR 3212 for summary judgment dismissing the complaint and any cross claims asserted against him on the basis that the plaintiff did not sustain a serious injury as defined by Insurance Law § 5102 (d) is denied; and it is further

**ORDERED** that motion (002) by defendant Tony Wilson, pursuant to CPLR 3212 for summary judgment dismissing the complaint and any cross claims asserted against him on the basis that the plaintiff did not sustain a serious injury as defined by Insurance Law § 5102 (d) is denied.

In this action premised upon the alleged negligence of the defendants, Steven Navas and Tonya Wilson, the then sixteen year old plaintiff, Devante Walker, asserts that on July 20, 2009, he was a passenger in the vehicle operated by defendant Wilson when it came into contact with the vehicle operated

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by defendant Navas, at or near the intersection of Oakwood Road and North Street, in Huntington, New York. Walker asserts that as a result of this accident, he sustained serious injuries 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 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 motion (001), defendant Navas submitted, inter alia, an attorney’s affirmation; copies of the summons and complaint; his answer with cross claim against defendant Wilson for judgment over against her in whole or in part based upon her culpable conduct, and plaintiff’s verified bill of particulars; copy of the note of issue and certificate of readiness indicating they were filed on June 20, 2013; the transcripts of the examinations before trial of plaintiff dated August 8, 2012 which is unsigned but certified and not objected to by plaintiff; uncertified copy of a police field report which constitutes hearsay and is inadmissible (*see Lacagnino v Gonzalez*, 306 AD2d 250, 760 NYS2d 533 [2d Dept 2003]; *Hegy v Collier*, 262 AD2d 606, 692 NYS2d 463 [2d Dept 1999]); uncertified Huntington Hospital record; electronically signed cervical spine MRI report and lumbar spine report each dated September 15, 2009; unauthenticated letter dated March 29, 2010 from Dr. Sarita Duchatelier to Dr. Blando; and the reports each dated December 20, 2012, by Isaac Cohen, M.D. concerning his independent orthopedic evaluation of the plaintiff, and Edward M. Weiland, M.D. concerning his independent neurological examination of the plaintiff.

In support of motion (002), defendant Wilson has submitted, inter alia, an attorney’s affirmation; copies of the summons and complaint; answer served by defendant Navas with cross claim against defendant Wilson for judgment over against her in whole or in part based upon her culpable conduct, and plaintiff’s verified bill of particulars; the transcripts of the examination before trial of plaintiff dated August 8, 2012 which is unsigned but certified and not objected to by plaintiff; uncertified copy of an police field report which this court notes constitutes hearsay and is inadmissible (*see Lacagnino v Gonzalez, supra; Hegy v Collier, supra*); uncertified Huntington Hospital record; electronically signed cervical spine MRI report and lumbar spine report each dated September 15, 2009; unauthenticated letter dated March 29, 2010 from Dr. Sarita Duchatelier to Dr. Blando; and the reports each dated December 20, 2012, by Isaac Cohen, M.D. concerning his independent orthopedic evaluation of the plaintiff, Edward M. Weiland, M.D. concerning his independent neurological examination of the plaintiff, and the reports by Stephen Lastig, M.D. dated July 18, 2013, concerning his independent radiological review of the plaintiff’s cervical and

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lumbar MRIs of September 15, 2009. Defendant Wilson has not submitted a copy of her answer as required pursuant to CPLR 3212.

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]).

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 his verified bill of particulars, the plaintiff alleges that as a result of the subject accident, injuries consisting of the following have been sustained: subligamentous disc herniations and radial annular tears at C2-3, C3-4, and C5-6; posterior disc bulges which impress the thecal sac at C4-5, C6-7, and T1-2 encroaching into the neural foramen bilaterally; T11-12 and L1-2 and L5-S1 posterior disc bulges impressing on the thecal sac; L5-L5-S1 grade I spondylolisteses; post-traumatic secondary tension headaches; cervical spine IVD with upper extremity radiculitis; lumbar spine disc syndrome with lower extremity radiculitis; permanent restriction in cervical range of motion; and limited straight leg raise.

Upon review of the defendant’s evidentiary submissions, it is determined as a matter of law that even if all the requisite pleadings were provided, that the defendants have not established prima facie entitlement to summary judgment pursuant to either category of injury defined by Insurance Law § 5102 (d).

It is noted that none of defendant’s expert physicians, Dr. Cohen, Dr. Lastig, and Dr. Weiland, have submitted copies of their respective curriculum vitae or otherwise established themselves as experts to give testimony in this matter.

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Dr. Cohen stated that he determined plaintiff's range of motion evaluations with the use of a goniometer and/or bubble inclinometer, and visual observation, but leaves this court to speculate as to which methods were employed for the various evaluations performed, creating factual issues in his report. Dr. Cohen stated that he reviewed the objective workup performed which demonstrated some bulging discs and some mild degenerative changes of a pre-existent nature that were not post-traumatic. However, his opinion is non-specific, vague, and conclusory with no bases for his opinion set forth. Upon review of the objective workup, namely the MRI of plaintiff's lumbar spine, Dr. Cohen concluded that there were no focal disc herniations or annular bulges identified. This opinion by Dr. Cohen conflicts with the cervical and lumbar MRI reports submitted as evidentiary proof by the moving defendants.

Dr. Lastig notes no focal disc herniations upon review of the plaintiff's cervical spine MRI, but does note annular bulges at C3-4, and C5-6 which mildly impress upon the ventral subarachnoid space without evidence of cord impingement. This opinion conflicts with the MRI reports submitted as evidentiary proof by the defendants, thus raising factual issue. Dr. Lastig opines in a conclusory and unsupported opinion that his findings in reviewing the MRI films are not related to the accident as they are degenerative in nature. He does not opine, however, to the duration of those findings, or the cause of the same, precluding summary judgment (*Estella v Geico Insurance Company*, 102 AD3d 730, 959 NYS2d 210 [2d Dept 2013]; *Partlow v Meehan*, 155 AD2d 647, 548 NYS2d 239 [2d Dept 1989]). Dr. Lastig does not give any opinion or discuss the cervical and lumbar MRI reports relative to the thoracic spine findings, including peripheral disc bulges encroaching into the neural foramen bilaterally at T1-2; and T11-12, and L1-2 and L5-S1 posterior disc bulges impressing upon the thecal sac. While Dr. Lastig opines there is an unremarkable MRI study of the lumbar spine, he does not comment upon the aforementioned findings by the plaintiff's examining physician in the very films which Dr. Lastig reviewed. These factual issues preclude summary judgment.

Dr. Weiland noted in his report that the plaintiff complained of neck pain radiating to the shoulders and lower back pain radiating into the buttocks. He continued that the plaintiff underwent physical therapy and chiropractic spine care for several months at a frequency of three to four times per week, and still undergoes periodic chiropractic spine manipulation treatments on an as needed basis. While Dr. Weiland stated that the plaintiff denied any radicular symptoms at the time, he does not set forth those symptoms to which he made inquiry of the plaintiff.

It is further noted that the defendants' examining physicians did not examine the plaintiff during the statutory period of 180 days following the accident, thus rendering the defendants' physician's affidavits 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 his 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]). Additionally, the experts offer 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]), precluding summary judgment.

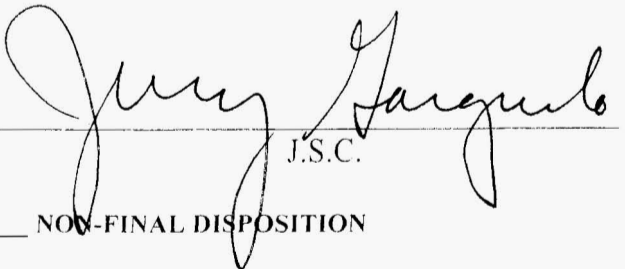
Devante Walker testified to the extent that at the time of the accident he was in high school and worked as a counselor with St. John's Day Camp, where he was going when the accident occurred. His

head hit the backrest in front of him as a result of the impact. He stayed out of work for two days. When he returned to work, he did not do activities with the children due to the pain in his neck and back. On the date of the accident, he went to Huntington Hospital for the pain in his neck and back. He thereafter received treatment from Dr. Kotsovolos, a chiropractor, for the pain in his neck and back, two to three times a week, and continuing as of the date of his deposition. He underwent MRI studies of his neck and back within about three months of the accident. His was also seen by his pediatrician, Dr. Blando, by a general practitioner, Dr. Llanos, and had an evaluation by a neurologist, Dr. Duchatelier who prescribed Naproxin and Neurontin for the pain.

Walker continued that he is now attending college, but plays no sports. He goes to the gym but is limited due to the pain in his back and neck, and usually just does curls with his hands, biceps, and does an "abs" workout." He testified that he was having pain while giving testimony from sitting in the chair. His neck is stiff and he has sharp pains when he wakes up in the morning, making it a process for him to get out of bed. It continues with a dull pounding throughout the day. He gets shooting pains if he lifts a little too much around the house. He tries not to make too many sharp turns with his neck to look around. Walker testified that he can no longer play basketball. When he works out, he can no longer squat the 250 pounds he did prior to the accident; or do leg presses or curls of 200 pounds as he did previously; or bench presses of about 150 pounds as he did prior to the accident. He cannot run any longer and usually ran one mile twice a week. He can now only run one-half mile four times a month instead of eight times. Walker testified that he had no prior injuries to his neck or back, and no subsequent injuries. He receives unemployment benefits each week, and has no other source of income except student loans for living expenses while in school.

Based upon the foregoing, the defendants have failed to demonstrate entitlement to summary judgment on 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 parties have 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, motions (001) and (002) by defendants Navas and Wilson for summary judgment dismissing the complaint on the basis that the plaintiff did not suffer serious injury as defined by Insurance Law §5102 (d) is denied.

Dated: 3/11/14  
  
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J.S.C.  
 FINAL DISPOSITION  NON-FINAL DISPOSITION