Vilorio v Gonzalez
2014 NY Slip Op 32068(U)
July 29, 2014
Supreme Court, Suffolk County
Docket Number: 12-19683
Judge: Farneti
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[* 1]

SHORT FORM ORDER

INDEX No. 12-19683
CAL No. 13-02135MV

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

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 3-25-14 (#001)
MOTION DATE 3-27-14 (#002)
ADJ. DATE 5-1-14
Mot. Seq. # 001 - MD
002 - MD

JOSE VILORIO, a minor by his father and natural guardian, VINCENT VILORIO,

Plaintiffs,

- against -

BRENDA I. GONZALEZ and ANDREA ARAGON,

Defendants.

CANNON & ACOSTA, LLP
Attorney for Plaintiffs
1923 New York Avenue
Huntington Station, New York 11746

THOMAS M. BONA, P.C.
Attorney for Defendants
123 Main Street
White Plains, New York 10601

RICHARD T. LAU & ASSOCIATES
Attorney for
300 Jericho Quadrangle, P.O. Box 9040
Jericho, New York 11753

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)1-14; (002) 15- 23; Notice of Cross Motion and supporting papers _; Answering Affidavits and supporting papers 24-25; 26-28; Replying Affidavits and supporting papers 29-30; 31-32; 33-34; 35-36; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (seq. #001) by defendant, Andrea Aragon, pursuant to CPLR 3212, for summary judgment dismissing the complaint on the basis the plaintiff, Jose Vilorio, did not sustain a serious injury as defined by Insurance Law § 5102 (d), is denied; and it is further

ORDERED that motion (seq. #002) by defendant, Brenda I. Gonzalez, pursuant to CPLR 3212, for summary judgment dismissing the complaint on the basis the plaintiff, Jose Vilorio, did not sustain a serious injury as defined by Insurance Law § 5102 (d), is denied.

JH

Vincent Vilorio, on behalf of his minor son, Jose Vilorio, seeks damages for serious personal injuries sustained by Jose when the minor was involved in a motor vehicle accident on December 5, 2008, on Mastic Beach Road, at or near its intersection with Mastic Road, in Mastic Beach, New York. Jose Vilorio was a passenger in the vehicle operated by defendant Andrea Aragon when it was involved in a collision with the vehicle operated by defendant Brenda I. Gonzalez. A cause of action sounding in negligence has been pleaded by the plaintiff. Defendant Brenda I. Gonzalez has asserted a cross claim against co-defendant Andrea Aragon for judgment over against Aragon. Defendant Aragon has asserted a cross claim against co-defendant Brenda I. Gonzalez for judgment over, in whole or in part, against Gonzalez.

In motion (seq. #001), submitted by Andrea Aragon, and in motion (seq. #002), submitted by Brenda Gonzalez, the co-defendants seeks summary dismissal of the complaint and any cross claims asserted against each on the basis that the minor plaintiff did not sustain a serious injury as defined by Insurance Law § 5102 (d).

In support of application (seq. #001), defendant Aragon submitted, *inter alia*, an attorney's affirmation; copies of the summons and complaint, defendants' answers with cross claims, and plaintiff's verified bill of particulars; sworn report of Lee Kupersmith, M.D. dated July 9, 2013 concerning his independent orthopedic examination of plaintiff; and transcripts of Jose Vilorio, Vincent Vilorio, and Brenda Gonzalez's examinations before trial with proof of service pursuant to CPLR 3116, and the unsigned and uncertified transcript of Andrea Aragon.

In support of application (seq. #002), defendant Gonzales submitted, *inter alia*, an attorney's affirmation; copies of the summons and complaint, defendants' answers with cross claims, and plaintiff's verified bill of particulars; sworn report of Lee Kupersmith, M.D. dated July 9, 2013 concerning his independent orthopedic examination of plaintiff; and the transcript of the examination before trial of Jose Vilorio.

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 90 days during the 180 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 plaintiff's verified bills of particulars, the Jose Vilorio alleges that as a result of this accident, he sustained injuries consisting of L5-S1 disc bulge with neural foraminal stenosis; bilateral chondromalacia patella; thoracic nerve root injury; lumbar nerve root injury; lumbar myofascitis and spasm; lumbar radiculopathy; and knee derangement.

Based upon a review and careful consideration of the evidentiary submissions, it is determined that the defendants have not established *prima facie* entitlement to summary judgment dismissing the complaint on the issue 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 the report of Dr. Kupermsith concerning his findings with regard to his orthopedic examination of the plaintiff. Dr. Kupermsith has provided a copy of his curriculum vitae in which he set forth his education and training, and indicated that he is board eligible, but not board certified, and passed the ABOS Part I on July 19, 2002. Dr. Kupersmith indicated in his report that he reviewed, among other records and reports, the MRI studies of plaintiff's thoracic spine of January 19, 2009, lumbosacral spine dated January 19, 2009, right and left knees dated January 17, 2009, computerized range of motion testing, x-rays, and reports of independent examinations by Dr. Marks, Dr. Alan Zimmerman, and Dr. Sarasavani Jayaram, all of which have not been provided to this Court, raising 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]). Thus, the aforementioned studies, reports and records of plaintiff's treating medical doctors and other independent examinations reviewed by defendants' expert are not in evidence.

The plaintiff has pleaded that he suffered thoracic nerve root injury, lumbar nerve root injury, and lumbar radiculopathy, associated with the subject accident; however, no report from a neurologist has been submitted to rule out neurological injury relating to this accident, precluding summary judgment (*see* ***McFadden v Barry***, 63 AD3d 1120, 883 NYS2d 83 [2d Dept 2009]; ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]; ***Lawyer v Albany OK Cab Co.***, 142 AD2d 871, 530 NYS2d 904 [3d Dept 1988]; ***Faber v Gaugler***, 2011 NY Slip Op 32623U, 2011 NY Misc Lexis 4742 [Sup Ct, Suffolk County 2011]).

Dr. Kupersmith opined that the plaintiff's slight restriction in range of motion of his right and left knees (0-130 out of the normal 0-150 degrees) was subjective only. However, this opinion is conclusory, unsupported and raises credibility issues to be determined by the trier of fact(*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [1987]). Summary judgment is therefore precluded on this basis. Additionally, Dr. Kupersmith does not address plaintiff's claims of chondromalacia patella and does not rule out that the injuries claimed by plaintiff are causally related to the subject accident.

The defendants' expert offered no opinion as to whether the plaintiff was incapacitated from substantially performing the activities of daily living for a period of 90 days in the 180 days following the accident, and the plaintiff was not examined by the defendant's physicians 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]). Thus, defendants have not established that the plaintiff did not suffer a serious injury for this category of injury as well.

Jose Vilorio, then over the age of 18, testified on March 3, 2013, to the extent that in December 2008, he was involved an automobile accident while a passenger in a vehicle driven by his mother, Andrea Aragon. Since then, he graduated from high school and has been working as a sales associate at Nike and Journey stores. There are times that he works in the back of the store but cannot bring the shipment in, as he cannot lift the heavy boxes due to his injuries. He continued that he suffered injury to his back, neck, and knees at the time of the accident, and went to the emergency room at Stony Brook University Hospital, where he was treated and released. Thereafter, he went for physical therapy and chiropractic care about three times a week for about four months, then twice a week for about another four months, then once a week for three months. He experienced only slight improvement in the pain with the therapy. He also was seen by his medical doctors and had MRIs and trigger point injections into his back on about five occasions. He still experiences pain in both knees on a daily basis. He has pain in his back a couple days a week, and in his neck about two and a half weeks out of each month. He takes Tylenol for pain, and uses a cream on his knees. Prior to the accident he played soccer often, and now he cannot play soccer or basketball due to the pain. He can no longer rake leaves with his father. Walking up and down stairs hurts his knees, so he had to move his bedroom from upstairs to downstairs. He can't run and has to stop every couple of feet. Prior to the accident, he worked out at the gym about five times a week for about two to three hours each session, however, after the accident, he had to cancel his membership because he can do almost nothing there. In school, he was unable to participate in gym as he did prior to the accident due to

excruciating pain in his knees. He could not throw the dodge ball due to back pain. He tried not to miss any time from school.

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" 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***, 833 NYS2d 406, NY Slip Op 03885 [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 defendants' motions for summary dismissal of the complaint are denied.

Dated: July 29, 2014

Hon. Joseph Farneti
Acting Justice Supreme Court

_____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION