

<b>Brookman v Angarita</b>
2014 NY Slip Op 32112(U)
August 6, 2014
Sup Ct, Suffolk County
Docket Number: 12-21348
Judge: Joseph Farneti
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.



from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]; *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 the instant motion, the defendants submitted, *inter alia*, an attorney’s affirmation; copies of the summons and complaint, defendant’s answer, plaintiff’s verified bill of particulars; unsigned transcript of the examination before trial of the plaintiff; and the sworn report of Raghava R. Polavarapu, M.D. dated September 17, 2013 concerning his independent orthopedic examination of the plaintiff.

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” (*Rodriguez 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 his verified bills of particulars, the plaintiff alleges that as a result of this accident, he sustained injuries consisting of L3-4 disc herniation deforming the anterior margin of the thecal sac, left neural foramina extension abutting the left L3 nerve root; L4-5 disc herniation deforming the thecal sac with bilateral proximal neural foramina extension noted approaching the exiting nerve roots at both levels; L5-S1 disc herniation deforming the thecal sac with bilateral proximal neural foramina extension noted approaching the exiting nerve roots at both levels; lumbar disc derangement and/or displacement with impingement of the associated nerve roots; lumbar radiculopathy; lumbar neuropathy; lumbar sprain/strain; lumbar guarding; acute traumatic derangement of the lumbar paraspinal muscles and ligaments; permanent and significant loss of range of motion to the lumbar spine; functional deficit of the muscle strength of the lumbar spine; lateral epicondylitis of the right elbow; trauma based tendinitis of the right elbow; impingement syndrome of the right elbow; internal derangement of the right elbow; joint effusion of the right elbow; contusion of the right elbow; sprain/strain of the right elbow; temporary/significant loss of range of motion of the right elbow; acute traumatic derangement of the muscles and ligaments of the right elbow; and functional deficit of the muscle strength of the right elbow.

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 Raghava R. Polavarapu, M.D. concerning his findings upon examination of plaintiff, however, Dr. Polavarapu has not provided a copy of his curriculum vitae to qualify to render expert opinion in this matter. Dr. Polavarapu indicated the materials and medical records and reports he reviewed, including plaintiff’s right elbow and lumbar MRI reports, and NCS/EMG studies, however, copies of those records and reports have not been provided with the moving papers. The general rule in New York is that an expert cannot base an opinion on facts he did not observe and which are 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]). The right elbow and lumbar MRI studies, and NCS/EMG study, and the records of plaintiff’s treating medical doctors reviewed by

defendant's expert are not in evidence, raising factual issues as to their contents, precluding summary judgment.

It has not been established that the injuries alleged by the plaintiff are not causally related to the subject accident. Dr. Polavarapu opined that if the history provided is accurate and based upon the medical records provided, and his examination, there is a direct correlation between the low back and right elbow injuries and the accident of record. He does not rule out that plaintiff's multiple lumbar disc herniations and lumbar derangement, or elbow injuries are causally related to this accident, and he indicates that plaintiff only sustained lumbar spine sprain/strain/contusion, and right elbow sprain/contusion, and does not address the additional injuries alleged by the plaintiff.

The plaintiff has alleged in his bill of particulars that he suffered lumbar radiculopathy and lumbar neuropathy, however, no report from an examining 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]). This raises factual issues which preclude summary judgment.

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 *Delayhaye v Caledonia Limo & Car Service, Inc.*, 61 AD3d 814, 877 NYS2d 438 [2d Dept 2009]; *Uddin v Cooper*, 32 AD3d 270, 820 NYS2d 44 [1st Dept 2006]; *Toussaint v Claudio*, 23 AD3d 268, 803 NYS2d 564 [1st Dept 2005]). Thus, they have not established that the plaintiff did not suffer a serious injury for this category of injury as well.

The plaintiff testified that he is self-employed and since November or December 2011, owns a security company, Drew Brookman Protective Services, and provides bodyguard services for events. He was out of work from his company from about December 12, 2011 until April or May, 2012. He had no customers at the time of the accident. He provided the bodyguard and security work himself, but while he was out of work, he referred his work out to others. Four days after the accident, he sought medical care from Plaza Medical for complaints of pain in his lower back, left leg, and right elbow. Heat and stimulation was recommended to his back and elbow every day, three to four times a week, as frequently as he could. He initially attended treatment four to five times a week for a couple of months. He eventually decreased his visits to two to three times a week, and stopped about the time he returned to work in April or May following the accident. He had MRIs of his back and elbow and learned that he had two or three slipped discs in his back. In January 2013, he returned to Plaza Medical as he continued to experience numbness in his legs. He purchased an elastic brace for his back and uses it whenever his back stiffens, sometimes three to five times a month, and he wears it throughout the day while he is working. The plaintiff continued that since the accident, he is limited from running or weightlifting as the pain shoots up his back. He can no longer attend Planet Fitness as he did prior to the accident due to flare-ups in his back. He had a prior injury to his back from a car accident, but was

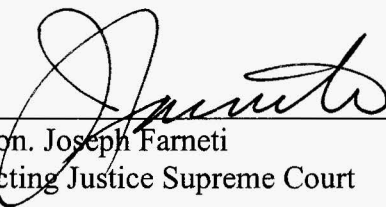
Brookman v Angarita  
Index No. 12-21348  
Page No. 5

unsure of the date. He believed that prior to the subject accident, he had no problem with his back for about ten plus years. He awakens from his sleep about four or five times a week due to back pain.

Inasmuch as the moving party has not established *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]).

Accordingly, this motion for summary dismissal of the complaint is denied.

Dated: August 6, 2014

  
\_\_\_\_\_  
Hon. Joseph Farneti  
Acting Justice Supreme Court

\_\_\_\_\_ FINAL DISPOSITION      X   NON-FINAL DISPOSITION