

<b>Dettmering v Higgins</b>
2014 NY Slip Op 32317(U)
August 21, 2014
Sup Ct, Suffolk County
Docket Number: 10-40639
Judge: Jeffrey Arlen Spinner
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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 21 - SUFFOLK COUNTY**COPY****PRESENT:**Hon. JEFFREY ARLEN SPINNER  
Justice of the Supreme CourtMOTION DATE 1-16-14  
ADJ. DATE 7-9-14  
Mot. Seq. #002 - MD-----X  
HERBERT DETTMERING, as Executor of the  
Estate of CAROL DETTMERING and HERBERT  
DETTMERING, Individually,

Plaintiffs,

- against -

SARAH HIGGINS and JAMES HIGGINS,

Defendants.  
-----XMCANDREW, CONBOY & PRISCO, LLP  
Attorney for Plaintiffs  
1860 Walt Whitman Road, Suite 800  
Melville, New York 11747HELWIG, HENDERSON, RYAN & SPINOLA  
Attorney for Defendants  
One Old Country Road, Suite 428  
Carle Place, New York 11514

Upon the following papers numbered 1 to 31 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (002) 1 - 16; Notice of Cross Motion and supporting papers   ; Answering Affidavits and supporting papers 17-29; Replying Affidavits and supporting papers 30-31; Other   ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that motion (002) by the defendants, Sarah Higgins and James Higgins, pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that the plaintiff's decedent, Carol Dettmering, did not sustain a serious injury as defined by Insurance Law § 5102 (d), is denied.

In this negligence action, the plaintiff, Herbert Dettmering, seeks damages for the conscious pain and suffering and wrongful death of his wife, Carol Dettmering, and also asserts a derivative claim on his own behalf. Plaintiff's decedent was operating her motor vehicle on July 15, 2009, on Route 25 A, at or near its intersection with S. Jersey Avenue, in Setauket, New York, when her vehicle was struck on the passenger side by the vehicle operated by defendant Sarah Higgins and owned by defendant James Higgins. It is asserted that several days after the accident, the plaintiff began complaining of pain in her left knee. After unsuccessful physical therapy, the plaintiff's decedent underwent arthroscopic surgery to her left knee on or about January 28, 2011. On January 30, 2011, the plaintiff's decedent died. It is asserted that the cause of Carol Dettmering's death was pulmonary thromboemboli due to deep vein thromboses caused by limited mobility following arthroscopy for treatment of a blunt impact injury of her left knee sustained in the subject accident.

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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]). 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 (002), the defendants submitted, inter alia, an attorney's affirmation; copies of the summons and complaint; amended summons and amended complaint; answer; amended answer to amended complaint; plaintiff's verified bill of particulars; copy of the transcript of the examination before trial of Herbert Dettmering; certified medical records of Dr. Stuart Cheney, M.D., Dr. Fealy, and North Island Physical Therapy; certified copy of decedent's death certificate; copy of Letters Testamentary dated May 6, 2011; and the affirmation of David Zitner, M.D.

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 the verified bill of particulars, the plaintiff alleges that as a result of the subject accident, Carol Dettmering sustained a torn medial meniscus of the left knee, torn lateral meniscus of the left knee, left knee effusion, left knee arthroscopy, pulmonary thromboemboli due to deep vein thrombosis due to blunt impact injury to the left knee, limited mobility, lumbar sprain/strain, thoracic sprain/strain, lumbar subluxation, myalgia, thoracic subluxation, non-allopathic lesion of the lumbar spine, non-allopathic lesion of the thoracic spine, chondromalacia of the left patella, quad atrophy, enthesopathy of the hip, syncope, tachycardia, fear of impending death, and death.

Dr. Stuart Cherney set forth in his record of decedent’s visit of August 31, 2009, that she presented for evaluation of her left knee, having been involved in an automobile accident on July 15, 2009, and developed pain in her left knee several days following the accident. The pain continued to increase in severity, so he ordered an MRI of her left knee. Dr. Cherney’s note of September 1, 2009, indicates that the plaintiff’s decedent presented for evaluation of the left knee MRI. Dr. Cherney set forth in that office note that he reviewed the MRI which demonstrated effusion of the left knee, a narrowing with degenerative changes in the patellofemoral joint, a small cystic type effusion which appears to be stemming from the proximal tib fib joint just posterior to the joint. He continued that while the menisci and ligaments are intact, there is suggestion of at least a partial tear of the popliteus tendon. At subsequent office visits on September 21, 2009 and December 9, 2009, Dr. Cherney found there was mild diffuse swelling of decedent’s left knee, and minor crepitus of the patellofemoral joint during mid range of active flexion and extension. Physical therapy was prescribed for eight weeks due to findings consistent with chondromalacia patella and possible early arthritis. On March 3, 2010, Dr. Cherney noted the decedent developed right hip trochanteric bursitis which he opined appeared to be compensatory following her left knee injury. Thereafter, improvement of the right knee was noted by Dr. Cheney, however, on August 9, 2010, he noted that there was slight swelling of decedent’s left knee anteromedially, with mild patellofemoral crepitus at mid range. Physical therapy was to be completed, and steroid injection was discussed. The visit of October 4, 2010 revealed mild swelling over the pes bursa with corresponding tenderness, and tenderness over the medial and lateral joint line. Dr. Cheney reviewed treatment options with plaintiff’s decedent, consisting of injection, therapy, and arthroscopy.

Dr. Steven Kuchta issued a report concerning the MRI of September 1, 2009, which was reviewed by Dr. Cherney, as set forth above. Dr. Kuchta reported that a large knee effusion is present. He continued that there is mild distension of the popliteus tendon sheath by the effusion. Edema is present within the soft tissues about the knee, greatest posteromedially. He noted slight irregularity and heterogeneous signal of the articular cartilage of the patellofemoral compartment associated with

minimal marginal hypertrophic changes suggestive of degenerative osteoarthritis. He noted the subarticular cortex was smooth, and the menisci and collateral ligaments were intact.

Defendants also submitted the medical records of Dr. Stephen Fealy, of Hospital for Special Surgery, whose records include a copy of the MRI report of decedent's left knee dated November 29, 2010, by Dr. Mark Decker, wherein it is set forth that there is a subtle tear of the inner apex posterior horn-body junction of the medial meniscus, degenerative change with cartilage defects, patella alta with thickened plica, and joint effusion. Dr. Fealy's preliminary diagnoses were left knee medial meniscal tear, left knee lateral meniscal tear, left knee patellofemoral chondral lesion. On January 28, 2011, Dr. Fealy performed arthroscopic surgery on the decedent's left knee. His postoperative diagnoses were the same after the arthroscopy during which a large amount of bloody effusion was decompressed in the knee joint. He repaired a "complex tear, medial meniscus, with a piece flipped . . . over on itself backwards; this was reduced into the joint." He continued that there was a radial split in the A-B junction. His operative note also reveals that he found a complex tear of the lateral meniscus in Zone E-F, which was derided back to smooth circumferential fibers. Chondroplasty of the patellofemoral joint was done. There was a laminar fragment on the trochlear that was debrided back.

In addition to the foregoing, defendants also submitted the affirmation of David Zitner, a physician licensed to practice medicine in New York State who is board certified in orthopedic surgery. He set forth his education and training, and the records and materials which he reviewed in preparing his affirmation. Dr. Zitner set forth, in part, the course of treatment and findings by decedent's treating physicians following the car accident of July 15, 2009 (incorrectly set forth by Dr. Zitner as August 31, 2009). He stated that he reviewed the MRI study of September 1, 2009 by Dr. Kuchta, and that he found that the menisci and cruciate and collateral ligaments were intact. Dr. Zitner noted that Dr. Fealy saw the decedent on November 29, 2010, noting that the MRI was pretty unremarkable, however, he ordered a repeat MRI which was performed on November 30, 2010. That MRI, reported by Dr. Decker, noted a medial meniscal tear, with which Dr. Zitner agrees. It is Dr. Zitner's opinion that had the patient's left knee meniscal tear been caused by the automobile accident of August 31, 2009, it would have been present and visible on the September 1, 2009 MRI. Because it was not present at that time, Dr. Zitner believes that the tear was not caused by the accident, and thus surgery was not necessitated by any injury occurring from the accident.

It is determined that Dr. Zitner's opinion, that the menisci and cruciate ligaments were intact on the September 1, 2009 MRI, raises a factual issue with the opinion by decedent's treating physician, Dr. Cherny, who reviewed that same MRI, and interpreted it as demonstrating effusion of the left knee, a narrowing with degenerative changes in the patellofemoral joint, a small cystic type effusion which appears to be stemming from the proximal tib fib joint just posterior to the joint, and further mention that while the menisci and ligaments are intact, there is suggestion of at least a partial tear of the popliteus tendon. Dr. Zitner does not reconcile his opinion with these findings by Dr. Cheney, and does not address the significance of such findings, if any.

The plaintiff has opposed defendants' motion and has submitted, inter alia, the affirmation of A. Robert Tantleff, M.D., a physician licensed to practice medicine in New York State who is board certified in radiology. He set forth his education and training, as well as his work experience, and has submitted a curriculum vitae. He set forth the records and materials reviewed, including the MRI studies

of September 1, 2009 and November 30, 2010. Dr. Tantleff opined that Carol Dettmering sustained a left knee injury in the automobile accident of July 15, 2009, consisting of a tear of her medial meniscus and lateral meniscus, which is shown on the MRI of September 1, 2009.

Dr. Tantleff stated that he disagrees with the report of the initial MRI of September 1, 2009 as there are clearly tears of both the medial and lateral meniscus. He continued that he took individual slices, segregated them, and was able to print copies of those slices from his computer. He placed red arrows on the areas illustrating the tears above the medial and lateral meniscus. The tears shown on the films are consistent with the plaintiff's continual complaints of left knee pain, instability, difficulty in going up and down stairs, and in locking of the left knee, he stated. Dr. Tantleff continued that the tears visualized on the film of September 12, 2009 are consistent with the tears described in the operative report of Dr. Fealy from Hospital for Special Surgery on January 28, 2011, where he confirmed the complex tear of the medial meniscus and complex tear of the lateral meniscus. He stated that the surgery was a direct result of the injuries sustained in the accident. Dr. Tantleff stated that the death certificate and autopsy unrefutably establish that Ms. Dettmering died as a result of a thromboemboli due to lack of mobility following the arthroscopy.

The plaintiff has also submitted the affirmation of Stephen Fealy, M.D., who is licensed to practice medicine in New York State and who is board certified in orthopedic surgery. He set forth his education and training, and indicated that Carol Dettmering was his patient whom he saw at Hospital for Special Surgery on November 29, 2010. He set forth her medical history relating to the subject accident. Upon his physical examination of the decedent, he noted that she had mild patellofemoral crepitus and focal medial joint line tenderness. His impression was to rule out a medial meniscal tear of the left knee, and he recommended an MRI which was performed on November 30, 2010 and revealed a medial meniscal tear. Arthroscopic surgery was scheduled at Hospital for Special Surgery and performed on January 28, 2011. At the time of surgery, arthroscopy with partial medial and partial lateral meniscectomy and left knee chondroplasty was performed, and a complex tear of the medial meniscus was found along with a complex tear of the lateral meniscus. It is Dr. Fealy's opinion within a reasonable degree of medical certainty based on the history presented, his physical examination, and the MRI results, as well as his review of all the medical records, that Carol Dettmering sustained injury to her left knee in the automobile accident of July 15, 2009, which resulted in the arthroscopic surgery of January 28, 2011.

The plaintiff has additionally submitted the affirmation of Salvatore J. Corso, M.D., a physician licensed to practice medicine in New York State who is board certified in orthopedic surgery. He set forth his education and training, as well as his work experience. He set forth that he saw Carol Dettmering for the purpose of an independent orthopedic examination at the request of Allstate Insurance Company on three separate occasions, September 10, 2010, November 19, 2010, and January 14, 2011. He stated that he took a full history relating to her care and treatment arising from the accident, and that she had been having physical therapy two to three times a week on a regular basis for nine months prior to his seeing her. She denied any other accidents or orthopedic trauma. Dr. Corso noted that he reviewed the records of Dr. Cherney, her treating physician. He noted that upon examination, the left knee revealed a loss in range of motion in flexion and extension, as well as swelling and effusion, and positive patella grind test with tenderness to the patella. He recommended further physical therapy and opined that her pain and disability were causally related to the accident.

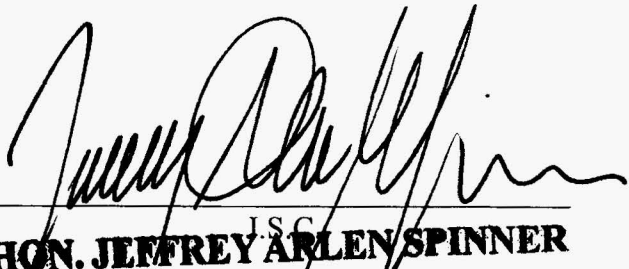
Dr. Corso continued that after the negative MRI of the knee, when he saw the decedent on November 19, 2010, he again found restrictions and loss of motion in flexion and extension of the left knee, swelling and effusion, and positive patella grind with tenderness in the patella area. His impression, based upon his examination, was pathology of the left knee, but because of the negative MRI report, his impression was that she had a left knee contusion which was resolving. He ordered additional physical therapy for the ongoing complaints causally related to the accident. He examined the decedent again on January 14, 2011 for an independent exam and again found limited range of motion of the left knee. He also found medial joint line tenderness and a positive McMurray's test indicative of ongoing damage to the menisci. It was his feeling that she should undergo left knee arthroscopic surgery followed by post-operative physical therapy for the injuries causally related to the accident.

Dr. Corso stated that when he reviewed the additional medical records and operative report from Hospital for Special Surgery of January 28, 2011, by Dr. Fealy, it confirmed findings of a complex tear to the medial meniscus and complex tear to the lateral meniscus. Dr. Corso continued that these findings were consistent with the decedent's complaints and his findings upon his three physical examinations of the decedent. He continued that he also reviewed the left knee MRI of September 1, 2009 and found a tear to the medial meniscus and the lateral meniscus consistent with the findings made by Dr. Fealy at the time of surgery. Upon review of the certificate of death of Ms. Dettmering, he noted the cause of death to be from pulmonary thromboemboli due to deep vein thrombosis due to limited mobility following the arthroscopy for the treatment of blunt impact injury of the left knee. The injury to the left knee, he stated, occurred on July 15, 2009 in the automobile accident. Thus, opined Dr. Corso, Ms. Dettmering's death was proximately caused by injuries she sustained in the accident of July 15, 2009.

It is noted that the movant's examining physicians did not examine the plaintiff during the statutory period of 180 days following the accident, thus rendering the defendant's physician's affirmation is 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 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 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]). Thus summary judgment is precluded in this category as well.

In view of the triable issues of fact set forth above, the defendants' motion for summary dismissal of the complaint is denied.

Dated:     AUG 21 2014    

  
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**HON. JEFFREY ARLEN SPINNER**  
J.S.C.

\_\_\_\_ FINAL DISPOSITION

  X   NON-FINAL DISPOSITION