

Weik v Lorenz

2014 NY Slip Op 32711(U)

October 8, 2014

Sup Ct, Suffolk County

Docket Number: 11-15044

Judge: Joseph A. Santorelli

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 4-29-14 (#003)
MOTION DATE 7-29-14 (#004)
ADJ. DATE 8-26-14
Mot. Seq. # 003 - MD
Mot Seq. # 004 - MD

-----X

HENRY WEIK and MAUREEN WEIK

Plaintiff(s)

- against -

KENNETH LORENZ and ARLYNE LORENZ

Defendant(s).

-----X

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Upon the following papers numbered 1 to 27 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (003) 1-11; Notice of Cross Motion and supporting papers (004) 12-24; Answering/Replying Affidavits and supporting papers 25-27; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (003) by the defendants Kenneth Lorenz and Arlyne Lorenz pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that plaintiff, Henry Weik, failed to sustain a serious injury as defined by Insurance Law § 5102 (d) is denied; and it is further

ORDERED that cross motion (004) by the plaintiffs pursuant to CPLR 3212 for summary judgment in their favor on the issue of liability is denied as untimely.

In this negligence action, Henry Weik and Maureen Weik seek damages personally and derivatively for personal injuries alleged to have been sustained by Henry Weik, on November 24, 2010 at 4:55 p.m., on the Long Island Expressway East Service Road, at or near its intersection with Bagatelle Road, Huntington, New York, when the vehicle operated by Henry Weik was stopped, then struck by the vehicle operated by Kenneth Lorenz and owned by Arlyne Lorenz.

In support of motion (003), the defendants submitted, inter alia, an attorney's affirmation; copies of the pleadings; defendants' answer with demands; plaintiff's verified bill of particulars; plaintiff's deposition transcript; copy of a letter dated November 30, 2010 and signed by Dr. Paul Alongi; uncertified medical

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records; the sworn report of David Weisberg, M.D. dated October 10, 2013, concerning his independent orthopedic examination of plaintiff; and defendants' memorandum of law.

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 his verified bill of particulars, plaintiff alleges that as a result of the subject motor vehicle accident, he suffered the following injuries: grade 1 anterolisthesis of C3 or C4; C4-5 left paracentral disc bulge; C5-6 central right paracentral disc bulge; and C6-7 disc bulge; left shoulder rotator cuff and labral tear; impingement syndrome with chondromalacia, glenoid grade 2; synovitis; glenohumeral joint with subdeltoid bursitis; and left shoulder injury which required arthroscopic surgery consisting of arthroscopic labral repair, synovectomy, abrasion chondroplasty and debridement, glenoid, open rotator cuff repair, acromioplasty with distal clavicle resection, subdeltoid bursectomy, manipulation under anesthesia, and lysis of adhesions; and application of VPI cold therapy unit.

The multiple reports and medical records, including a sonogram, CT scan, and operative report concerning surgery on plaintiff's left shoulder reviewed by Dr. Weissberg have not been provided as required pursuant to CPLR 3212. 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 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 failure to submit such records and reports raises factual issues with regard to the impressions of plaintiff's treating physicians and findings set forth in the CT scan and relevant diagnostic testing.

Dr. Weissberg examined the plaintiff's cervical spine and obtained range of motion values, but failed to report a value for plaintiff's left and right lateral bending of the cervical spine, raising a factual issue concerning whether or not the plaintiff exhibited a deficit when the findings are compared to the normal range of motion value.

Dr. Weissberg set forth in a conclusory statement that upon reviewing the plaintiff's studies on his cervical spine done shortly after the accident, that the plaintiff had extensive and pre-existing degenerative disc disease of his cervical spine. However, this opinion is unsupported by the record or any admissible evidence. While Dr. Weissberg opined that the plaintiff had pre-existing degenerative disc disease, he does not set forth the findings which support this statement, and has failed to set forth the duration of such degenerative changes (*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]), precluding summary judgment. It is further noted that Dr. Weissberg, by way of his impression, set forth that the cervical studies revealed no acute disc herniation. This is contrary to his notation concerning plaintiff's cervical MRI study which he indicated revealed C3-7 degenerative changes, slight cord flattening, marked foraminal compression, and multilevel disc bulges. He does not rule out that these findings are causally related to the subject accident, thus raising factual issues concerning the actual findings on the reports.

While Dr. Weissberg stated plaintiff's history revealed that he had no prior injury to his neck, back or shoulder regions, he then stated that the plaintiff underwent arthroscopic rotator cuff repair with a mini open procedure to his left shoulder. He stated that it is clear that the claimant had pre-existing left shoulder problems and that any surgery done on the shoulder is more likely related to the pre-existing problems. However, it is determined that this opinion is conclusory and unsupported, as Weissberg did not set forth what those preexisting conditions were and the duration of the same, or the basis for his conclusory opinion, precluding summary judgment.

It is noted that the movants' examining physician did not examine the plaintiff during the statutory period of 180 days following the accident, thus rendering the physician's report 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 the plaintiff's 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]).

The plaintiff testified that he was disoriented and believed he lost consciousness at the time his stopped vehicle was struck by defendant's vehicle. He felt pain in his left shoulder and noted it was bruised following the accident. He felt pain radiating from his left shoulder into his left arm, and had difficulty moving it, as he could not raise his elbow above his shoulder. He also felt pain in his neck and back. He was treated and released after treatment received at the local hospital emergency room. He followed up with Dr. Perilla for the pain in his neck, back and shoulder, radiating down his left arm with numbness and tingling in his fingers on a fairly constant basis. She referred him to Dr. Alongi for treatment relating to the injuries sustained in the accident. He was prescribed pain medication and steroid patches for his neck and shoulder by Dr. Alongi. He underwent physical therapy twice a week for about eight weeks for his neck, back, and left shoulder, but felt the therapy was totally ineffective for his shoulder.

The plaintiff continued that he had MRIs of his neck and back. In mid to late March following the accident, he went to a shoulder surgeon for the pain, range of motion problems, and numbness and tingling he was experiencing down his arm into his hand. He was given a cortisone injection. An MRI was ordered and revealed a torn rotator cuff and a tear to the labrum. It was recommended that he have surgery for those injuries. He went for outpatient arthroscopic surgery, which left him with a "pretty good scar." He wore a sling for three weeks following the surgery, then had physical therapy three times a week for about seven months, then once a week for two months. He was out of work for about five days immediately following the accident, and then about seven weeks following the surgery on his shoulder.

He indicated that he went for acupuncture to his shoulders about a year before the accident as he injured both shoulders playing golf, but after three treatments, he had no pain. Prior to the accident, he played golf once a week in a league, but following the accident, he was unable to play golf until the spring of 2011.

The factual issues raised in the defendants' moving papers preclude summary judgment, thus, defendants 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, it is unnecessary to consider whether the opposing papers are 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 (003) for summary dismissal of the complaint on the basis that the plaintiff did not suffer a serious injury as defined by Insurance Law §5102 (d) is denied.

Turning to cross motion (004), wherein the plaintiffs seek summary judgment in their favor on the issue of liability, it is determined that the motion is untimely and is thus denied. The note of issue was filed in this action on December 19, 2013. Summary judgment motions were to be made within 120 days following the filing of the note of issue and certificate of readiness. The last day on which to serve such motion was April 17, 2014. Plaintiff did not cross move until July 18, 2014. Counsel for the plaintiffs

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proffers no excuse for the untimely submission of motion (003), and has not demonstrated good cause for the failure to timely serve said motion. "Good cause" in CPLR 3212 (a) requires a showing of good cause for the delay in making the motion-a satisfactory explanation for the untimeliness-rather than simply permitting meritorious, non-prejudicial filings, however tardy. No excuse at all, or a perfunctory excuse, cannot be "good cause" (see *Brill v City of New York*, 2 NY3d 648, 781 NYS2d 261 [2004]; *First Union Auto Finance, Inc.*, 16 AD3d 372, 791 NYS2d 596 [2d Dept 2005; *Tucci v Colella*, 26 Misc 3d 1234A, 907 NYS2d 441 [Sup Ct, Kings County 2010]). Based upon the failure of counsel to offer any excuse, good cause has not been demonstrated.

Accordingly, plaintiffs' motion (004) for summary judgment on the issue of liability is denied.

Dated: OCT 08 2014



HON. JOSEPH A. SANTORELLI
J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION