

Susano v Hoppe

2015 NY Slip Op 30392(U)

March 12, 2015

Sup Ct, Queens County

Docket Number: 1437/13

Judge: Howard G. Lane

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This opinion is uncorrected and not selected for official publication.

122 AD2d 728 [1st Dept 1986], *affd*, 69 NY2d 701, 512 NYS2d 364 [1986]). When a defendant's motion is sufficient to raise the issue of whether a "serious injury" has been sustained, the burden shifts and it is then incumbent upon the plaintiff to produce prima facie evidence in admissible form to support the claim of serious injury (*Licari v. Elliot, supra; Lopez v. Senatore*, 65 NY2d 1017 [1985]).

In support of a claim that plaintiff has not sustained a serious injury, a defendant may rely either on the sworn statements of the defendant's examining physician or the unsworn reports of plaintiff's examining physician (*Pagano v. Kingsbury*, 182 AD2d 268 [2d Dept 1992]). Once the burden shifts, it is incumbent upon plaintiff, in opposition to defendant's motion, to submit proof of serious injury in "admissible form". Unsworn reports of plaintiff's examining doctor or chiropractor will not be sufficient to defeat a motion for summary judgment (*Grasso v. Angerami*, 79 NY2d 813 [1991]). Thus, a medical affirmation or affidavit which is based on a physician's personal examination and observations of plaintiff, is an acceptable method to provide a doctor's opinion regarding the existence and extent of a plaintiff's serious injury (*O'Sullivan v. Atrium Bus Co.*, 246 AD2d 418 [1st Dept 1998]). Unsworn MRI reports are not competent evidence unless both sides rely on those reports (*Gonzalez v. Vasquez*, 301 AD2d 438 [1st Dept 2003]; *Ayzen v. Melendez*, 749 NYS2d 445 [2d Dept 2002]). However, in order to be sufficient to establish a prima facie case of serious physical injury the affirmation or affidavit must contain medical findings, which are based on the physician's own examination, tests and observations and review of the record rather than manifesting only the plaintiff's subjective complaints. It must be noted that a chiropractor is not one of the persons authorized by the CPLR to provide a statement by affirmation, and thus, for a chiropractor, only an affidavit containing the requisite findings will suffice (see, CPLR 2106; *Pichardo v. Blum*, 267 AD2d 441 [2d Dept 1999]; *Feintuch v. Grella*, 209 AD2d 377 [2d Dept 2003]).

In any event, the findings, which must be submitted in a competent statement under oath (or affirmation, when permitted) must demonstrate that plaintiff sustained at least one of the categories of "serious injury" as enumerated in Insurance Law § 5102(d) (*Marquez v. New York City Transit Authority*, 259 AD2d 261 [1st Dept 1999]; *Tompkins v. Budnick*, 236 AD2d 708 [3d Dept 1997]; *Parker v. DeFontaine*, 231 AD2d 412 [1st Dept 1996]; *DiLeo v. Blumberg*, 250 AD2d 364 [1st Dept 1998]). For example, in *Parker, supra*, it was held that a medical affidavit, which demonstrated that the plaintiff's threshold motion limitations were

objectively measured and observed by the physician, was sufficient to establish that plaintiff has suffered a "serious injury" within the meaning of that term as set forth in Article 51 of the Insurance Law. In other words, "[a] physician's observation as to actual limitations qualifies as objective evidence since it is based on the physician's own examinations." Furthermore, in the absence of objective medical evidence in admissible form of serious injury, plaintiff's self-serving affidavit is insufficient to raise a triable issue of fact (*Fisher v. Williams*, 289 AD2d 288 [2d Dept 2001]).

Infant plaintiff alleges that he suffered serious personal injuries as a result of an accident which occurred on June 2, 2012. Defendant has failed to submit proof in admissible form in support of the motion for summary judgment for any category of serious injury, as he fails to address or present any medical evidence regarding plaintiff's injury alleged in his Verified Bill of Particulars of: permanent scarring of the left leg.

Defendant failed to satisfy his initial burden of demonstrating that plaintiff did not sustain a "serious injury." Thus, the burden thus did not shift to plaintiff to raise a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law (see, *Gaddy v. Eyler*, 79 NY2d 955 [1992]).

Accordingly, the branch of the motion seeking summary judgment on the grounds that plaintiff has not suffered a "serious injury" pursuant to Insurance Law § 5102(d) is denied.

The branch of the motion by defendant for an order pursuant to CPLR 3212 granting the defendant summary judgment against the plaintiff, Julio Susano, on liability is hereby denied.

This is an action for personal injuries allegedly sustained by infant plaintiff, Julio Susano when the motor vehicle operated by defendant came into contact with the pedestrian infant plaintiff, on July 2, 2012 when he was crossing the street on Perimeter Avenue near New York Avenue, Queens, New York.

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (*Andre v. Pomeroy*, 32 NY2d 361 [1974]; *Kwong On Bank, Ltd. v. Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]; *Crowley Milk Co. v. Klein*, 24 AD2d 920 [3d Dept 1965]). Even the color of a triable issue forecloses the remedy (*Newin Corp. v. Hartford Acc & Indem. Co.*, 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against

(*Bennicasa v. Garrubo*, 141 AD2d 636 [2d Dept 1988]; *Weiss v. Gaifield*, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (see, *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Pizzi by Pizzi v. Bradley's Div. of Stop & Shop, Inc.*, 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (*Gervasio v. DiNapoli*, 134 AD2d 235 [2d Dept 1987]). The role of the court on a motion for summary judgment is to determine if bona fide issues of fact exist, and not to resolve issues of credibility (*Knepka v. Tallman*, 278 AD2d 811 [4th Dept 2000]).

Defendant established a prima facie case that there are no triable issues of fact. In support of the motion, defendant presents, inter alia, the examination before trial transcript testimony of plaintiff himself, the examination before trial transcript of defendant himself, a copy of the Police Accident Report, and color photographs of the defendant's vehicle. Defendant demonstrated that the accident occurred when pedestrian infant plaintiff was running across the street to get a soccer ball and he ran into the side of defendant's car as it passed by. Defendant testified that he was driving well within the posted speed limit, and coming out from under a pedestrian overpass when plaintiff ran out from a blind spot next to the bridge at a high rate of speed and smashed into his car. Defendant established that plaintiff violated Vehicle and Traffic Law §§ 1151 and 1152-a in failing to yield to defendant's vehicle.

In opposition to the motion, plaintiff presents a triable issue of fact. In opposition, plaintiff presents, inter alia, the examination before trial transcript testimony of both plaintiff and defendant themselves. Plaintiff testified that he was walking immediately prior to the accident and that he observed defendant's vehicle prior to crossing and determined the vehicle to be a sufficient distance from where he was about to cross to be able to do so.

As there are conflicting versions of how the accident happened, there are triable issues of fact as to, inter alia, whether the defendant was negligent, whether any negligence on

the defendant's part was the proximate cause of the accident, and whether the plaintiff was comparatively negligent. As such, a trial is necessary and plaintiff's motion for summary judgment pursuant to CPLR 3212 is denied.

This constitutes the decision and order of the Court.

Dated: March 12, 2015

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Howard G. Lane, J.S.C.