

Lucrelli v Sardis

2015 NY Slip Op 31624(U)

August 18, 2015

Supreme Court, Suffolk County

Docket Number: 11-24784

Judge: Joseph A. Santorelli

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PUBLISH

ORIGINAL

SHORT FORM ORDER

INDEX No. 11-24784
CAL. No. _____

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

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 10/1/14 & 10/9/14
SUBMIT DATE 8/6/15
Mot. Seq. # 04 - MG
Mot. Seq. # 05 - MG

-----X
VINCENT LUCARELLI and CHRISTINE LUCARELLI,

Plaintiffs,

-against-

JUSTIN M. SARDIS and JEFFREY I. SARDIS,

Defendants.
-----X

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Upon the following papers numbered 1 to 47 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (#04) 1 - 15 & (#05) 25 - 45; ~~Notice of Cross Motion and supporting papers;~~ Answering Affidavits and supporting papers (#04) 16 - 21 & (#05) 46 - 62; Replying Affidavits and supporting papers (#04) 22 - 24 & (#05) 63 - 74; ~~Other~~; (and after hearing counsel in support and opposed to the motion) it is,

The plaintiff, Vincent Lucarelli, moves, in motion delineated as motion # 04, for an order granting summary judgment dismissing the counterclaim on the basis that the plaintiff did not breach any duty owed to the plaintiffs and was not negligent as a matter of law. Defendants oppose that motion in all respects.

The defendants move, in motion delineated as motion # 05, for an order granting summary judgment dismissing the complaint solely as against plaintiff Vincent Lucarelli on the ground that he did not sustain a "serious injury" within the meaning of N.Y. Insurance Law § 5102(d). Plaintiffs oppose that motion in all respects.

Plaintiffs commenced this action to recover damages for personal injuries allegedly sustained in a motor vehicle accident that occurred on Wolf Hill Road near its intersection with Crandon Street, in the Town of Huntington, New York at 8:50 pm on September 16, 2010. The accident allegedly happened when a vehicle driven by defendant, Justin M. Sardis, was descending a hill at an S-curve and crossed the double yellow line hitting the plaintiff's vehicle head-on. Defendant, Justin M. Sardis, allegedly became distracted just prior to the accident because of either a fallen GPS device or because

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he was looking at his speedometer. In the bill of particulars, plaintiff, Vincent Lucarelli, alleges he suffered injury to left knee with surgery, pain tenderness and restriction of movement of the left knee, chronic sprain of left knee, cortisone injections to left knee, MRI left knee, left shoulder injury with future surgery recommended, pain tenderness and restriction of movement of the left shoulder, AC joint arthropathy with deformity upon the supraspinatus muscle tendon complex, glen humeral joint effusion and synovitis, torn labrum, MRI left shoulder and shoulder impingement syndrome as a result of the accident. Defendants counterclaim alleges that if plaintiff Christine Lucarelli sustained injury, then any damages were brought about by "the affirmative wrong doing, fault, negligence, recklessness or failure of due care of the plaintiff, Vincent Lucarelli" and if Christine Lucarelli were to be awarded damages then a "separate determination should be made as to the proportion of relative responsibility and culpable conduct of the plaintiff, Vincent Lucarelli."

Plaintiff's Motion to Dismiss Counterclaim

Plaintiff, Vincent Lucarelli, moves for an order granting summary judgment and dismissing the counterclaim because he did not breach a duty owed to the plaintiffs and was not negligent as a matter of law. Plaintiff alleges that he was traveling westbound within the speed limit ascending the hill on Wolf Hill Road, while defendant was traveling eastbound and accelerating down the hill. Plaintiff alleges that he was traveling completely within the confines of his lane and that defendant crossed the double yellow line into oncoming traffic, striking the plaintiff's vehicle in the westbound lane. Defendant, Justin M. Sardis, testified at his deposition that "his vehicle left the boundaries of his eastbound lane, crossed the double yellow line and went into the westbound lane." He further states that "I was distracted by looking at the speedometer." When asked what portion of his car crossed the double yellow line, Justin M. Sardis stated "the driver's wheel and I'd say half the car", the front end half.

CPLR §3212(b) states that a motion for summary judgment "shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admission." If an attorney lacks personal knowledge of the events giving rise to the cause of action or defense, his ancillary affidavit, repeating the allegations or the pleadings, without setting forth evidentiary facts, cannot support or defeat a motion by summary judgment (*Olan v. Farrell Lines, Inc.*, 105 AD 2d 653, 481 NYS 2d 370 (1st Dept., 1984; aff'd 64 NY 2d 1092, 489 NYS 2d 884 (1985); *Spearman v. Times Square Stores Corp.*, 96 AD 2d 552, 465 NYS 2d 230 (2nd Dept., 1983); Weinstein-Korn-Miller, *New York Civil Practice* Sec. 3212.09)).

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]). To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). 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" CPLR3212 [b]; *Gilbert Frank Corp. v Federal Insurance Co.*, 70 NY2d 966, 525 NYS2d 793, 520 NE2d 512 [1988]; *Zuckerman v City of New*

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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]). Furthermore, the evidence submitted in connection with a motion for summary judgment should be viewed in the light most favorable to the party opposing the motion (*Robinson v Strong Memorial Hospital*, 98 AD2d 976, 470 NYS2d 239 [4th Dept 1983]).

On a motion for summary judgment the court is not to determine credibility, but whether there exists a factual issue (see *S.J. Capelin Associates v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [1974]). However, the court must also determine whether the factual issues presented are genuine or unsubstantiated (*Prunty v Keltie's Bum Steer*, 163 AD2d 595, 559 NYS2d 354 [2d Dept 1990]). If the issue claimed to exist is not genuine but is feigned and there is nothing to be tried, then summary judgment should be granted (*Prunty v Keltie's Bum Steer*, *supra*, citing *Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93, 239 NE2d 725 [1968]; *Columbus Trust Co. v Campolo*, 110 AD2d 616, 487 NYS2d 105 [2d Dept 1985], *affd*, 66 NY2d 701, 496 NYS2d 425, 487 NE2d 282).

Based upon a review of the motion papers the Court concludes that the plaintiff, Vincent Lucarelli, has establish entitlement to judgment as a matter of law and that there are no material and triable issues of fact presented as to the plaintiff, Vincent Lucarelli, not breaching any duty owed to the plaintiff, Christine Lucarelli, and he was not negligent as a matter of law, thus the motion for summary judgment dismissing the counterclaim is granted and the counterclaim is dismissed.

Defendant's Motion to Dismiss Complaint as to Vincent Lucarelli

Defendants move for an order granting summary judgment in their favor on the ground that plaintiff, Vincent Lucarelli, did not suffer a "serious injury" within the meaning of Insurance Law § 5102 (d) as a result of the subject accident.

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 this motion for summary judgment on the issue of serious injury as defined by Insurance Law § 5102 (d), the initial burden is on the moving party to present evidence in competent form, showing that the plaintiff did not sustain a serious injury as a result of the accident (see *Rodriguez v Goldstein*, 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once that burden has been met, the opposing party must then, by competent proof, establish a *prima facie* case that such serious injury does exist (see *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 (*Cammarere v Villanova*, 166 AD2d 760, 562 NYS2d 808, 810 [3d Dept 1990]).

When a defendant seeking summary judgment based on the lack of a serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, i.e., affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (*Pagano v Kingsbury*, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992]). A defendant also may establish entitlement to summary judgment using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (see *Fragale v Geiger*, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; *Torres v Micheletti*, 208 AD2d 519, 616 NYS2d 1006 [2d Dept 1994]; *Craft v Brantuk*, 195 AD2d 438, 600 NYS2d 251 [2d Dept 1993]; *Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692). Once a defendant meets this burden, the plaintiff must present proof in admissible form which creates a material issue of fact (see *Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990; *Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692; see generally *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

A tear of the meniscus is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the injury and its duration (see *Larson v Delgado*, 71 AD3d 739, 897 NYS2d 167 [2d Dept 2010]; see also *McLoud v Reyes*, 82 AD3d 848, 919 NYS2d 32 [2d Dept 2011]).

In *Nannarone v Ott*, 41 AD3d 441, 441-442 [2nd Dept 2007], the Court held

The defendant made a *prima facie* showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) (see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 774 NE2d 1197, 746 NYS2d 865 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 591 NE2d 1176, 582 NYS2d 990 [1992]). In opposition, the plaintiff failed to raise a triable issue of fact. The plaintiff failed to proffer competent medical evidence that was contemporaneous with the subject accident which showed any range of motion limitations in her right knee (see *Bell v Rameau*, 29 AD3d 839, 814 NYS2d 534 [2006]; *Ranzie v Abdul-Massih*, 28 AD3d 447, 448, 813 NYS2d 473 [2006]). The magnetic resonance imaging reports of the plaintiff's right knee which showed, *inter alia*, a meniscal tear did not, alone, establish a serious injury (see *Yakubov v CG Trans Corp.*, 30 AD3d

509, 510, 817 NYS2d 353 [2006]; *Cerisier v Thibiu*, 29 AD3d 507, 508, 815 NYS2d 140 [2006]; *Kearse v New York City Tr. Auth.*, 16 AD3d 45, 49, 789 NYS2d 281 [2005]).

The mere existence of such an injury is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the injury and its duration (see *Yakubov v CG Trans Corp.*, supra; *Kearse v New York City Tr. Auth.*, supra). The plaintiff's self-serving affidavit was insufficient to meet that requirement (see *Yakubov v CG Trans Corp.*, supra). The remaining submission of the plaintiff, an X-ray report, was without probative value in opposing the motion since it was unsworn or unaffirmed (see *Grasso v Angerami*, 79 NY2d 813, 814-815, 588 NE2d 76, 580 NYS2d 178 [1991]; *Felix v New York City Tr. Auth.*, 32 AD3d 527, 528, 819 NYS2d 835 [2006]; *Yakubov v CG Trans Corp.*, supra; *Pagano v Kingsbury*, 182 AD2d 268, 270, 587 NYS2d 692 [1992]).

Further, the plaintiff failed to submit competent medical evidence that the injuries she allegedly sustained in the accident rendered her unable to perform substantially all of her daily activities for not less than 90 days of the first 180 days subsequent to the subject accident (see *Bell v Rameau*, supra; *Sainte-Aime v Ho*, 274 AD2d 569, 712 NYS2d 133 [2000]).

Defendants' submissions in support of the motion are sufficient to establish a prima facie case that plaintiff, Vincent Lucarelli, did not suffer a serious injury as a result of the September 16, 2010 accident (see *Beltran v Powow Limo, Inc.*, 98 AD3d 1070, 951 NYS2d 231 [2d Dept 2012]; *Lim v Flores*, 96 AD3d 723, 946 NYS2d 183 [2d Dept 2012]; *Kreimerman v Stunis*, 74 AD3d 753, 902 NYS2d 180 [2d Dept 2010]; *Staff v Yshua*, 59 AD3d 614, 874 NYS2d 180 [2d Dept 2009]; *Rodriguez v Huerfano*, 46 AD3d 794, 849 NYS2d 275 [2d Dept 2007]). Dr. Healy's report, which is annexed to the defendants' motion papers as exhibit J, states that plaintiff presented at the September 20, 2010 examination with complaints of left shoulder pain and that "he's also contused and pain to the left knee". The shoulder examination and knee examination both revealed normal range of motion. Dr. Healy stated "rule out rotator cuff tear", "contusion of the knee possible miniscal tear". Dr. Healy's report, which is annexed to the defendants' motion papers as exhibit K, states that plaintiff presented at the October 25, 2010 examination with complaints of pain in particular to the left knee and that plaintiff "states the knee buckled on him yesterday." The knee examination revealed normal range of motion. The recommendation was that plaintiff undergo an MRI.

Plaintiff's own deposition testimony demonstrates prima facie that he does not have a "90/180" claim (see *Clarke v Dangelo*, 109AD3d1194, 971 NYS2d 774 [4th Dept 2013]; *Frisch v Harris*, 101 AD3d 941, 957 NYS2d 235 [2d Dept 2012]; *Bailey v Islam*, 99 AD3d 633, 953

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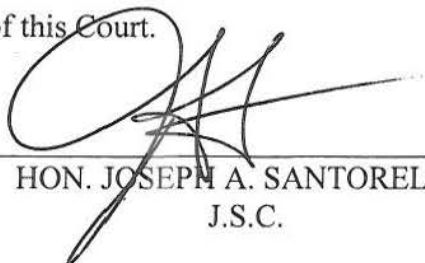
NYS2d 39 [1st Dept 2012]; *Pacheo v Conners*, 69 AD3d 818, 894 NYS2d 782 [2d Dept 2010]; *see also Dembele v Cambisaca*, 59 AD3d 352, 874 NYS2d 72 [1st Dept 2009]). Plaintiff testified that he only missed one day of work and that he was not confined to his bed or home for many period of time. He also testified that he stopped his physical therapy treatments after a few months, and that he has gone back to all activities he did before the accident but suffers from knee pain after several such activities, including playing baseball, skiing and running or walking for extended periods of time. Plaintiff further testified that he is able to work and part of his job requires him to climb “catwalk” type stairs to get up onto rooftops.

Based upon the foregoing, the burden shifted to plaintiff to raise a triable issue of fact (*see Gaddy v Eycler*, 79 NY2d 955, 582 NYS2d 990). In opposition to the defendants’ application, plaintiff’s attorney submitted an affirmation indicating that the plaintiff underwent arthroscopic surgery, cortisone injects and viscosupplementation injections to his knee and has moderate arthritis in his knee post surgery. He additionally has undergone a “series of three Euflexxa injections in his left knee for treatment of posttraumatic arthritis of the knee.” Dr. Healy opined that the plaintiff did sustain these injuries as a result of the subject accident and further opined that he has limitations in essential activities of his daily life and work activities including climbing ladders and stairs at job sites. Plaintiff, Vincent Lucarelli did not submit an affidavit in opposition. At his deposition he testified that he is still an active member of a men’s baseball team, a bowling league and that he continued to work a forty hour work week after the accident. Additionally, he started new employment in April 2013 and commutes by the Long Island Railroad to Manhattan daily for that employment and the only day of employment he missed related to the accident was the day he gave his deposition testimony. He testified that he did not leave his prior job for any reason related to the accident.

The mere existence of an injury, in the absence of objective evidence as to the extent of the alleged physical limitations resulting from the injuries and their duration, is not evidence of serious injury (*Scheker v Brown*, 91 AD3d 751, 752, 936 NYS2d 283 [2d Dept 2012]; *Pierson v Edwards*, 77 AD3d 642, 909 NYS2d 726 [2d Dept 2010], *Casimir v Bailey*, 70 AD3d 994, 896 NYS2d 122 [2d Dept 2010]). In this case, the requisite “objective evidence” is lacking in the plaintiff’s opposition to the defendant’s motion. Therefore, the defendant’s motion for summary judgment dismissing the complaint only as it relates to plaintiff Vincent Lucarelli based on his failure to meet the serious injury threshold is granted.

The foregoing constitutes the decision and Order of this Court.

Dated: August 18, 2015


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

 FINAL DISPOSITION X NON-FINAL DISPOSITION