

**Romagnolo v Pota**

2016 NY Slip Op 30132(U)

January 6, 2016

Supreme Court, Suffolk County

Docket Number: 12-19689

Judge: Daniel Martin

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 9 - SUFFOLK COUNTY

**PRESENT:**

Hon. DANIEL MARTIN

MOTION DATE 1-13-15  
ADJ. DATE 4-28-15  
Mot. Seq. # 004 - MD

-----X  
RACHEL ROMAGNOLO, Individually and as  
Parent and Natural Guardian of ANTHONY  
ROMAGNOLO, an infant,

Plaintiffs,

- against -

ANNA MARIE POTA, ANTHONY POTA,  
FIRST STUDENT, INC., and FRANCES  
RATHJENS,

Defendants.  
-----X

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Upon the following papers numbered 1 to 93 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 58; Notice of Cross Motion and supporting papers    ; Answering Affidavits and supporting papers 59-90; Replying Affidavits and supporting papers 91-93; Other    ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

**ORDERED** that the motion of defendants First Student, Inc., and Frances Rathjens for summary judgment dismissing the complaint against them is denied.

Plaintiff Rachel Romagnolo, individually and on behalf of her son, plaintiff Anthony Romagnolo, commenced this action seeking damages for injuries allegedly sustained from an automobile accident that happened on May 21, 2012. By his bill of particulars and deposition testimony, Anthony Romagnolo attests he was a rear seat passenger in a vehicle operated by defendant Anthony Pota when the vehicle collided with a school bus owned by defendant First Student Inc., and operated by defendant Francis Rathjens, who allegedly failed to yield the right of way. The accident occurred on

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May 21, 2012, at approximately 2:30 p.m., at the intersection of Rocky Point Road and Miller Place Yaphank Road in the Town of Brookhaven. By his bill of particulars, Anthony Romagnolo alleges that he suffered various personal injuries to his cervical and lumbar regions and to his abdomen.

Defendants First Student Inc. and Frances Rathjens now move for summary judgment in their favor on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law 5102 (d). In support of their motion, defendants submit copies of the pleadings, the bill of particulars, the transcripts of plaintiffs' deposition testimony, medical records, and two affirmed medical reports.

Anthony Romagnolo (hereinafter plaintiff) testified at an examination before trial held on June 3, 2013, that immediately after the accident, he was taken by ambulance to Stony Brook University Hospital with complaints of neck, shoulder and abdominal pain. He testified that he was wearing a seat belt at the time of the accident, and that the lap portion of the seatbelt caused a laceration to his bowel which caused bleeding. He testified that he spent four or five days in the hospital and was released after his doctors determined that his colon stopped bleeding and he did not need surgery. Plaintiff testified that after he was discharged, he began having diarrhea, abdominal cramps and observed blood in his stools. He treated with Dr. Richard Scrivens, a pediatric surgeon who referred him to a gastroenterologist, Dr. Rupinder Gill. Plaintiff testified Dr. Gill diagnosed him with a bacterial infection, *Clostridium difficile* (C.Diff), and prescribed antibiotics to treat the infection. Plaintiff testified that he has chronic diarrhea, abdominal cramps and is unable to "hold his food down" since the accident. When asked about his neck, shoulder and back injuries, he testified that he has no restriction in movement and is doing well. Plaintiff testified that he missed two weeks of school immediately following the accident, and missed an additional month intermittently due to lateness caused by his frequent need to use the bathroom. Plaintiff testified that he was in bed for part of the summer but started working in August, 2012 and started school in September, 2012. Further, he testified that he went on a cruise with his family for one week during the summer following the accident.

Rachel Romagnolo testified at an examination before trial on June 3, 2013. She testified that she went to the scene of the accident immediately after her son phoned her, informing her of the accident. She testified that she accompanied him in the ambulance, which took them to Stony Brook University Hospital, and that he stayed in the hospital for approximately three days. Rachel Romagnolo testified that plaintiff started having stomach issues immediately after he was discharged, and that he was lethargic, slept a lot, and had frequent diarrhea. She testified that Dr. Scriven referred plaintiff to Dr. Gill, who conducted tests and diagnosed plaintiff with C diff., and prescribed antibiotics. Rachel Romagnolo testified that plaintiff improved while he was taking the antibiotics, but that his symptoms would return when the antibiotic treatment ended.

It is well settled that a party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067, 416 NYS2d 790 [1979]). The failure of the moving party to make a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in

admissible form sufficient to require a trial of the material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The court's function is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (see *Doize v Holiday Inn Ronkonkoma*, 6 AD3d 573, 774 NYS 2d 792 [2d Dept 2004]; *Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

In order to recover for non-economic loss resulting from an automobile accident under the statute, Insurance Law § 5104, the plaintiff must establish, as a threshold matter, that the injury suffered was a "serious injury" within the meaning of the statute. It is indisputable that five of the nine categories of serious physical injuries discussed by Insurance Law 5102 (d) are not applicable in the instant case, as there is no allegation of death, dismemberment, significant disfigurement, fracture or a loss of a fetus. Therefore, the court must determine if the plaintiff's injuries constitute either: permanent loss of use of a body organ, member, function or system; a permanent consequential limitation of use of a body function or system; a 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 90 days during the 180 days immediately following the occurrence of the injury or impairment.

To establish a prima facie case of serious injury, a plaintiff must produce competent medical evidence that the injuries are either "permanent" or involve a "significant" limitation of use (see *Perl v Meher*, 18 NY3d 208, 936 NYS2d 655 [2011]). A finding of "significant limitation" requires more than a mild, minor or slight limitation of use (*Broderick v Spaeth*, 241 AD2d 898, 660 NYS 2d 232 [3d Dept], *lv denied*, 91 NY2d 805, 668 NYS2d 560 [1998]; *Gaddy v Eyler*, 167 AD2d 67, 570 NYS2d 853, *aff'd*, 79 NY2d 955, 582 NYS2d 990 [1992]). Strictly subjective complaints of a plaintiff unsupported by credible medical evidence do not suffice to establish a serious injury (*Scheer v Koubek*, 70 NY2d 678, 518 NYS2d 788 [1987]). Under the permanent loss of use category, plaintiff must demonstrate that he has a total loss of use of a body function or system (*Oberly v Bangs Ambulance*, 96 NY2d 295, 727 NYS2d 378 [2001]).

To satisfy the requirement that plaintiff suffered a medically determined injury preventing him from performing substantially all of his material activities during 90 out of the first 180 days, plaintiff must show that "substantially all" of his usual activities were curtailed (*Gaddy v Eyler* 167 AD2d 67, 570 NYS 2d 853). The "substantially all" standard requires a showing that plaintiff's activities have been restricted to a great extent rather than some slight curtailment (*Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]; *Johnson v Cristino*, 91 AD3d 604, 936 NYS2d 275 [2d Dept 2012]).

In a personal injury action, a defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred by the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that plaintiff did not sustain a "serious injury" (see *Baez v Rahamatali*, 6 NY3d 868, 817 NYS2d 204 [2006]; *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 746 NYS2d 865 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]). The movant must provide medical

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proof in admissible form to satisfy its burden (*see Grasso v Angerami*, 79 NY2d 813, 580 NYS2d 178 [1991]). While defendant may not rely on unsworn reports of its own experts, a defendant may rely on unsworn reports of plaintiff's own physicians and hospital records in its motion for summary judgment (*see Gleason v Huber*, 188 AD2d 581, 591 NYS2d 69 [2d Dept 1992]).

Defendants submit the hospital records from Stony Brook University Hospital, correspondence among plaintiff's doctors, and two affirmed medical reports. Two letters from Dr. Scrivens, addressed to plaintiff's pediatrician, Dr. Harvey Kolker, were submitted. In these letters, Dr. Scrivens states that he saw plaintiff on June 1, 2012 and June 8, 2012. He states that he examined plaintiff on June 8 at Rachel Romagnolo's request, as she believed plaintiff had a low grade fever, was pale in complexion, and complained of pain. Further submitted is a letter from Dr. Bradley Kessler addressed to Dr. Jennifer Byrne. Dr. Kessler saw plaintiff on October 28, 2013 and suggested that plaintiff has irritable bowel syndrome, but recommended further objective evaluation because of plaintiff's history of C.diff and laceration to his colon.

The affirmed report of Dr. Marc Finkelstein, dated August 13, 2013, states that he conducted an independent medical examination on plaintiff, who presented to his office with complaints of abdominal pain and difficulty controlling his bowels. Dr. Finkelstein states that he reviewed the bill of particulars, reports of a colonoscopy and upper endoscopy, the C.diff. toxin report, Dr. Gill's letter, a CAT scan dated September 8, 2012, and a letter of Dr. Sharma. However, Dr. Finkelstein does not address the results of those tests, and, more importantly, no copies of the reports of the colonoscopy, endoscopy, or C.diff toxin testing have been submitted with the motion. Opinion evidence must be based on facts in the record or personally known to the witness (*see Wagman v Bradshaw*, 292 AD2d 84, 739 NYS2d 421 [2d Dept 2002]). Dr. Finkelstein states that he does not have the CT scan from the date of the accident when plaintiff was admitted to the hospital but suspects plaintiff has a mesenteric tear which caused plaintiff's bleeding. Dr. Finkelstein also does not address plaintiff's chief complaints of abdominal pain and chronic diarrhea. Instead, his report merely states: plaintiff's "abdomen is soft, non tender, and no masses were palpable." He then concludes that he does not think the subject accident was related to the onset of *Clostridium difficile*, as he believes that plaintiff would have contracted it before October 2012. The Court notes that, although plaintiff was not diagnosed with C.diff until October 2012, the deposition testimony of the parties indicates that plaintiff suffered from its symptoms within one week of being released from the hospital. Dr. Finkelstein fails to substantiate his conclusions with any objective medical evidence (*Reitz v Seagate Trucking, Inc.*, 71 AD3d 975, 898 NYS2d 173 [2d Dept 2010]), and fails to offer any alternative opinion as to causation (*Jackson v Leung*, 99 AD3d 489, 952 NYS1d 130 [1st Dept 2012]). Furthermore, to have probative value, opinion evidence must be based on a reasonable degree of certainty, not upon suspicion or speculation (*Matott v Ward*, 48 NY2d 455, 423 NYS2d 645 [1979]).

The evidence submitted by defendants fails to establish that plaintiff did not suffer a serious injury to his abdomen under the "significant limitation of use" category. Whether a limitation of use or function is significant or consequential involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 353, 746 NYS2d 865 [2002]; *Dufel v Green*, 84 NY2d 795, 622 NYS2d 900 [1995]). The records show that plaintiff suffered a blunt abdominal trauma with bleeding in his colon,

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he contracted C diff. on more than one occasion since the accident and suffers from chronic diarrhea and abdominal cramps. The records show that plaintiff suffers from, at minimum, irritable bowel syndrome. It is incumbent upon defendant, as the movant, to make a prima facie showing that plaintiff did not sustain a serious injury as a result of the subject motor vehicle accident. Defendant's submissions fail to demonstrate that plaintiff's chronic diarrhea, bacterial infections, and irritable bowel syndrome were not causally related to the abdominal injuries he allegedly sustained in the accident. Thus, defendant's evidence is insufficient to eliminate all material issues of fact (*Pleasant v M & Lenny Taxi Corp.*, 94 AD3d 1072, 942 NYS2d 601 [2d Dept 2012]; *Safer v Silbersweig*, 70 A.D.3d 921, 895 NYS2d 486 [2d Dept 2010]). Such a drastic remedy as summary judgment, requires more than the submissions provided here. Summary judgment "should only be employed when there is no doubt as to the absence of triable issues" (*Andre v Pomeroy*, 35 NY2d 361, 364, 362 NYS2d 131 [1974]).

As defendants have failed to establish their prima facie entitlement to judgment as a matter of law that plaintiff did not suffer a serious injury, it is unnecessary to determine whether plaintiff's papers in opposition are sufficient to raise a triable issue of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316; *Senior v Mikhailov*, 71 AD3d 864, 895 NYS2d 864 [2d Dept 2010]; *Agathe v Tun Chen Wang*, 33 AD3d 737, 822 NYS2d 766 [2d Dept 2006]).

Defendants' motion for summary judgment in their favor is denied.

Dated: JANUARY 6, 2016.

  
A.J.S.C.

       FINAL DISPOSITION      X   NON-FINAL DISPOSITION