

Fabre v Roes
2018 NY Slip Op 34108(U)
December 10, 2018
Supreme Court, Rockland County
Docket Number: Index No. 031338/2017
Judge: Thomas E. Walsh II
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

-----X
ARVIN FABRE,

Plaintiffs,

Index # 031338/2017

H.R. ROES,

Motion.# - MD

DC - N

Adj: 1/23/18

Defendants.
-----X

Hon. Thomas E. Walsh II, J.S.C.

The following papers numbered 1- 3 read on this motion by Defendant for an Order pursuant to Civil Practice Law and Rules § 3212(a), granting the Defendant H.R. Rose, summary judgment dismissing Plaintiff’s claims in their entirety, on the grounds that Plaintiff cannot meet the statutory threshold for “serious injury” as defined by New York State Insurance Law § 5102(d), as a matter of law together with such other and further relief as the Court may deem just and proper:

<u>PAPERS</u>	<u>NUMBER</u>
Notice of Motion/Affirmation of Daniel E. O’Neill, Esq./Exhibits (A-G)	1
Affirmation of Ira H. Lapp, Esq. In Opposition/Exhibit A	2
Reply Affirmation of Daniel E. O’Neill, Esq.	3

The motor vehicle collision giving rise to this action took place on December 23, 2016 on North Route 303 at its intersection with Casper Hill Road, Clarkstown, New York. This action was commenced by the filing of a Summons and Complaint on March 24, 2017. Issue was joined by Defendant by the filing of a Verified Answer on April 5, 2017. Defendant raised five (5) affirmative defenses, including the lack of a serious injury pursuant to Insurance Law § 5102(d).

At the outset the Court notes that a Note of Issue was filed on June 5, 2018. Subsequently, Defendant filed the instant timely Motion of Summary Judgment with a return

date of September 14, 2018, which was timely as per the Court's directive at the Compliance Conference held on June 5, 2018. The Plaintiff filed opposition and Defendant e-filed a Reply.

Turning now to the assertions in the instant motion for summary judgment, the Court notes that in this action the Plaintiff's bill of particulars alleged that she sustained the following injuries: tear of the right patellar tendon at the level of the patellar attachment, internal derangement of the right knee, cervical strain and sprain, cervical radiculopathy, sprain and strain of the lumbar spine, lumbar radiculopathy, sprain and strain of the left wrist, internal derangement of the left wrist, sprain and strain of the left humerus, internal derangement of the left elbow, limitation of motion and increased pain upon motion and increased pain upon inclement weather.

Plaintiff's Bill of Particulars further alleged that Plaintiff sustained a serious injury as defined by *Insurance Law* § 5102. Plaintiff alleged that the injuries and conditions prevented the Plaintiff from enjoying the normal fruits of social activities. Further, Plaintiff contends that the injuries, resulting disabilities, aggravations, exacerbations and involvements were associated with further soft tissue injuries to the areas traumatically affected, including: tearing, derangement and damage to the associated muscle groups, ligaments, tendons, cartilage, blood, tissue, epithelial tissue, all concomitant to the specific injuries and related to the specific portions of the body mentioned herein above, with resultant scars, hemorrhage, pain, ecchymosis, deformity and disability; stiffness, tenderness, weakness and partial restriction and limitation of motion, pain on motion and loss of use of the abovementioned parts; atrophy, anxiety and mental anguish; all of which substantially prevented the Plaintiff from enjoying the normal fruits of social activities. Additionally, the Bill of Particulars submits that the Plaintiff was confined to his home intermittently as a result of the injuries sustained in the accident, that Plaintiff was confined to bed intermittently as a result of injuries sustained in the accident, Plaintiff was totally disabled as a result of the accident and remains partially disabled. Plaintiff admits there is no current claim for lost wages.

The Plaintiff was examined by Dr. Robert Hendler at the Defendant's request. In his report of that examination, Dr. Hendler states that he conducted a physical examination of the Plaintiff and that he reviewed Plaintiff's medical records. Dr. Hendler reported: that Plaintiff was involved in a motor vehicle accident on December 23, 2016 and he was the seat-belted

driver in an automobile which struck an automobile that entered into his pathway causing the airbags to deploy; that following the accident he was taken to Nyack Hospital where he was evaluated in the emergency room, x-rayed and discharged; that Plaintiff was seen by Dr. Paul I. Brief who obtained an MRI of the Plaintiff's right knee which showed a subtle partial tearing of the patella tendon at the level of the patella attachment and that he treated Plaintiff with physical therapy for three (3) to four (4) months. Dr. Hendler further reports he reviewed the Verified Bill of Particulars, a CD containing diagnostic studies, Emergency Department records of the Nyack Hospital dated December 23, 2016 including x-ray reports of the left ankle left humerus, right tibia-fibula and left wrist, office records of Dr. Paul Brief dated from December 29, 2016 through February 5, 2018, treatment records of ProCore Physical Therapy dated from February 23, 2017 through March 24, 2017 and a MRI report of the right knee dated January 14, 2017, Rockland Diagnostic Imaging.

Dr. Hendler reported that the Plaintiff was a customer service representative for an AeroTech company at the time of the accident, but was unemployed at the time of the evaluation. At the time of the evaluation, Dr. Hendler further reported that the Plaintiff complained of minimal aches and pain in his neck with no radiation of the pain into his arms, no numbness, weakness or paresthesias reported in the upper extremities. As to the Plaintiff's lower back, Dr. Hendler reported that the Plaintiff complained of intermittent aches and pain, with no radiation of the back pain in his legs, no numbness, weakness or paresthesias in the lower extremities. Dr. Hendler reported that the Plaintiff complained that he had "fairly frequent" aches and pain in his right knee, a throbbing sensation, but no locking and buckling of his knee. In regards to Plaintiff's left arm, Dr. Hendler reports that the Plaintiff complained of pain in the mid humeral area which resulted in him having difficulty doing certain activities of daily living. Additionally, Dr. Hendler surmises that Plaintiff suffered a cervical and lumbosacral sprain, a possible contusion to his right knee and a possible contusion to his upper extremity, which he believes have resolved.

In opposition Plaintiff submitted the affirmed medical report of, Dr. Paul Brief, which states that he saw the Plaintiff on December 29, 2016 and again on January 12, 2017, January 17, 2017, February 21, 2017, March 23, 2017, January 16, 2018, January 23, 2018 and January 29, 2018. At the time of Dr. Brief's initial examination in 2016 he presented with complaints of pain

in his neck, low back and right knee. As a result of the records review and physical examination, Dr. Brief stated that in his medical opinion that based on Plaintiff's continued right knee complaints along with the findings of partial patella tendon rupture that the prognosis for full improvement of Plaintiff's right knee is guarded. Further, Dr. Brief opined that the Plaintiff's complaints as to his back, neck and right knee were directly causally related to the motor vehicle in which the Plaintiff was involved in on December 23, 2016. Additionally, Dr. Brief reported that based upon the Plaintiff's injury to his knee he deems that the Plaintiff suffers from a mild partial disability, permanent, which affects Plaintiff's right knee. Dr. Brief contends that based upon the Plaintiff's continued complaints regarding his right knee, the MRI findings of January 14, 2017 and x-ray findings of January 29, 2018 the Plaintiff has suffered a 20% loss of the use of his right lower extremity.

In order to be entitled to summary judgment it is incumbent upon the defendant to demonstrate that plaintiff did not suffer from *any* condition defined in Insurance Law §5102(d) as a serious injury [*Healea v. Andriani*, 158 A.D.2d 587 (2d Dept 1990)]. As the proponent of this summary judgment motion defendants must make a prima facie showing of entitlement to judgment as a matter of law, by tendering sufficient evidence to eliminate any material issues of fact from the case and to warrant a court to direct judgment in their favor, as a matter of law [*Civil Practice Law and Rules* § 3212(b); *Giuffrida v. Citibank Corp., et al*, 100 NY2d 72 (2003), citing *Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986); and *Zuckerman v. City of New York*, 49 NY2d 557 (1980)]. Summary judgment will be granted only if there is no triable issue of fact, issue finding, rather than issue determination, is the key to summary judgment, and the papers on the motion should be scrutinized carefully in the light most favorable to the party opposing the relief [*Judice v. DeAngelo*, 272 AD2d 583 (2d Dept 2000)].

To meet their summary judgment burden plaintiffs must come forward with sufficient evidentiary proof in admissible form to raise a triable issue of fact as to whether Plaintiff suffered a "serious injury" within the meaning of the Insurance Law [*Zoldas v. St. Louis Cab Corp.*, 108 A.D.2d 378 (1st Dept. 1985), *Dwyer v. Tracey*, 105 A.D.2d 476 (3rd Dept. 1984)]. By establishing that any one of several injuries sustained in an accident is a serious injury within the meaning of Insurance Law §5102 (d), a plaintiff is entitled to seek recovery for all injuries incurred as a result of the accident [*Bonner v Hill*, 302 A.D.2d 544 (2d Dept., 2003); *O'Neill v*

O'Neill, 261 A.D.2d 459 (2d Dept., 1999)].

In opposition to defendant's summary judgment motion Plaintiffs submit the affirmed report of Dr. Paul Brief. Based on the medical report of Dr. Brief, Plaintiff argues that he, in response to Defendant's motion, demonstrated factual disputes as to Plaintiff's claim of having sustained a personal injury which resulted in 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 if 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 following the occurrence of the injury or impairment

Where as here Plaintiff's doctor's findings are set forth in admissible form in sworn statements and are based on their personal examination and observations, the such examination and observation form an acceptable basis for that doctor's opinion regarding the existence and extent of Plaintiff's range of motion limitation, and, where those findings conflict with those of the Defendant's examining doctor issues of fact exist that preclude summary judgment and that require a trial [O'Sullivan v. Atrium Bus Co., 246 AD2d 418 (1st Dept 1998)].

Where conflicting medical evidence is offered on the issue of whether the Plaintiff's injuries are permanent or significant, and varying inference may be drawn, the question is one for the jury [Martinez v. Pioneer Transportation Corp., 48 AD 3d. 306 (1st Dept 2008)]. Summary judgment will be granted only if there is no triable issue of fact. Issue finding, rather than issue determination, is the key to summary judgment, and the papers on the motion should be scrutinized carefully in the light most favorable to the party opposing the relief [Judice v. DeAngelo, 272 AD2d 583 (2d Dept 2000)].

Where the medical affirmations submitted create a triable issue of fact on the question of whether Plaintiff sustained a serious injury, Defendant's motion should be denied [Chand v. Asghar, 6 Misc.3d 1010(A), 800 N.Y.S.2d 344, 2005 N.Y. Slip Op. 50025(U)] and discrepancies between the competing reports of the treating physicians and the defendants's examining physicians create issues of credibility and issues of fact that cannot be resolved on summary judgment and that require a trial [Francis v. Basic Metal, Inc., 144 AD2d 634 (2d Dept 1981);

Cassagnol v. Williamsburg Plaza Taxi, 234 AD2d 208 (1st Dept 1996)].

In arriving at this decision the Court has reviewed, evaluated and considered all of the issues framed by these motion papers and the failure of the Court to specifically mention any particular issue in this Decision and Order does not mean that it has not been considered by the Court in light of the appropriate legal authority.

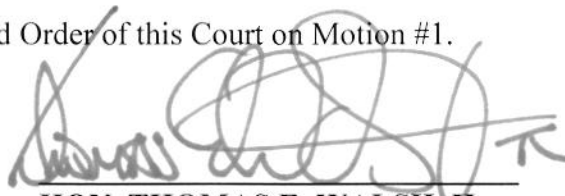
Accordingly, it is hereby

ORDERED that Defendant’s Motion for Summary Judgment (Motion #1) is denied in its entirety; and it is further

ORDERED that the parties are directed to appear for a pre-trial conference on **WEDNESDAY JANUARY 23, 2018 at 9:30 a.m. in TAP** before the Honorable William Sherwood.

The foregoing constitutes the Decision and Order of this Court on Motion #1.

Dated: New City, New York
December 10, 2018



HON. THOMAS E. WALSH, II
Justice of the Supreme Court

TO:

NEIMARK & NEIMARK, LLP
Attorney for Plaintiff
(via e-file)

BOEGGEMAN, CORDE, ONDROVIC & HURLEY, P.C.
Attorney for Defendants
(via e-file)