Guidone v D.L. Peterson Trust
2012 NY Slip Op 30957(U)
April 10, 2012
Supreme Court, Suffolk County
Docket Number: 10-10526
Judge: Daniel Martin
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SHORT FORM ORDER

COPY

INDEX No. 10-10526
CAL No. 11-01298MV

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

PRESENT:

Hon. DANIEL MARTIN
Justice of the Supreme Court

MOTION DATE 7-29-11 (#002)
MOTION DATE 9-14-11 (#003)
ADJ. DATE 12-20-2011
Mot. Seq. # 002 - MG
003 - XMD

THOMAS J. GUIDONE,

Plaintiff,

- against -

D.L. PETERSON TRUST, ABBOTT LABORATORIES and "JOHN DOE",

Defendants.

SCHWARTZAPPEL PARTNERS, P.C.
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Upon the following papers numbered 1 to 55 read on these motions for summary judgment and to dismiss ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 19 ; Notice of Cross Motion and supporting papers 20 - 37 ; Answering Affidavits and supporting papers 38 - 47 ; Replying Affidavits and supporting papers 48 - 55 ; Other __ ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the plaintiff for an order pursuant to CPLR 3212 granting summary judgment in his favor on the issue of liability is granted; and, it is further

ORDERED that the cross motion by the defendants, D.L. Peterson Trust and Abbott Laboratories, for an order denying plaintiff's motion, dismissing plaintiff's complaint pursuant to CPLR 3212 on the ground that he did not sustain a "serious injury" within the meaning of Insurance Law §5102, dismissing plaintiff's complaint against D.L. Peterson Trust pursuant to 49 USC 30106, striking plaintiff's Supplemental Bill of Particulars, and vacating plaintiff's Note of Issue and Certificate of Readiness is denied in its entirety.

This is an action to recover damages allegedly sustained by plaintiff as a result of a motor vehicle accident which occurred on May 21, 2007 as plaintiff was about to pump gas into his vehicle at a "Track" gas station located on East 12th Street in Mastic Beach in the Town of Brookhaven. Plaintiff was outside

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his vehicle when an automobile owned by defendant D.L Peterson[1] ("the Peterson vehicle") struck plaintiff's vehicle causing it to "jump" into him and "throw" him into the gas pump. The driver of the Peterson vehicle fled the scene of the accident and remains unidentified. Defendant D.L. Peterson Trust ("D.L.") was a commercial lessor of the Peterson vehicle and defendant Abbott Laboratories ("Abbott") was the lessee of the motor vehicle involved in the collision.

Plaintiff now moves for an order pursuant to CPLR 3212 granting him summary judgment on the issue of liability on the ground that the actions of the driver of defendants' vehicle were the sole proximate cause of the accident, and that the ownership of that vehicle was determined conclusively by this Court in the August 25, 2009 order of Justice Molia. In support of his motion, plaintiff submits, *inter alia*, the pleadings, a certified copy of a May 22, 2007 Police Accident Report (including an Amended Report), copies of minutes of a Framed Issue Hearing dated December 29, 2008 and February 11, 2009, Decision after Hearing dated August 25, 2009, copy of plaintiff's examination before trial transcript dated November 4, 2010, and photographs of plaintiff's automobile. Plaintiff alleges that the vehicle owned by defendant D.L. and leased by defendant Abbott struck his automobile, while he was a pedestrian patron at a Track gas station, causing plaintiff's automobile to strike him and cause him serious personal injuries.

Defendants D.L. and Abbott oppose the motion and claim that defendant D.L. is not liable as an owner of a motor vehicle for injuries that arise out of the use or operation of the motor vehicle during the time the said vehicle was being leased pursuant to 49 USC 30106. Defendants assert that Abbott was not a party to the framed issue hearing and, thus, cannot be collaterally estopped from denying "ownership" of the said vehicle.

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see* ***Rotuba Extruders, Inc. v Ceppos***, 46 NY2d 223, 413 NYS2d 141[1978]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). It is well settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (***S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.***, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (***Benincasa v Garrubbo***, 141 AD2d 636, 637, 529 NYS2d 797,799 [2d Dept 1988]). Once this showing by the movant has been established, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (*see* ***Alvarez v Prospect Hosp.***, *supra*).

It is clear that a collision with a stopped vehicle creates a *prima facie* case of negligence against the driver of the moving vehicle and imposes upon that driver a duty to provide a non-negligent explanation

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[1]In an August 25, 2009 decision after a framed issue hearing, the Hon. Denise F. Molia, J.S.C., determined that "a vehicle owned by DL Peterson Trust struck the vehicle owned by Thomas J. Guidone, and then left the scene of the accident."

for the collision (*see* ***Blasso v Parente***, 79 AD3d 923, 913 NYS2d 306 [2d Dept 2010]; ***DeLouise v S.K.I. Wholesale Beer Corp.***, 75 AD3d 489, 904 NYS2d 761 [2d Dept 2010]; ***Mandel v Benn***, 67 AD3d 746, 889 NYS2d 81 [2d Dept 2009]). If the operator of the moving vehicle fails to come forward with evidence to rebut the inference of negligence, the court may award summary judgment as a matter of law (*see* ***Mandel v Benn***, *supra*; ***Russ v Investech Securities, Inc.***, 6 AD3d 602, 775 NYS2d 867 [2d Dept 2004]; ***Jaffe v Miller***, 295 AD2d 743 NYS2d 294 [2d Dept 2002]).

In their answer, defendant D.L. admits ownership of the vehicle described by plaintiff as having struck his vehicle and defendant Abbott admits leasing the said vehicle from defendant D.L. Neither defendant has produced a witness for an examination before trial, although demand for same was made by plaintiff. Although defendants submit a very terse affidavit from the "Litigation Administrator" for defendant D.L. which indicates only that defendant D.L. was in the business of leasing motor vehicles on May 21, 2007, including the one bearing the New York license plate number which was involved in the accident, they fail to submit any documentation which evidences that the vehicle involved in the May 21, 2007 accident was actually leased and to whom it was leased on that said date. Nothing has been provided by defendants which indicates whether the owner/lessor remained obligated, under the terms of the lease, for injuries arising out of the use or operation of the motor vehicle nor has a lease, or portion thereof, been set forth evidencing that it was made pursuant to 49 USC 30106. Additionally, inasmuch as neither defendant has provided any witness to testify as to the ownership, operation, or use of the said vehicle on the date in question, or an affidavit of facts indicating that the vehicle was being operated without permission of the owner, lessor, or lessee been submitted, they have failed to establish that the driver did not have permission to use, operate or control the vehicle. Accordingly, as defendants D.L. and Abbott, owner and lessee of the vehicle which struck plaintiff's stopped vehicle, have not come forth with a non-negligent explanation for the happening of the accident, summary judgment on the issue of liability is granted to plaintiff.

By his verified bill of particulars plaintiff alleges that as a result of the subject accident, he sustained serious injuries including, tears of the posterior horn of the left medial meniscus and meniscus body, internal derangement, joint effusion, synovitis, and deep crevice of the tibial plateau of the left knee which resulted in arthroscopy, synovectomy, medial meniscectomy, and rejection of body and posterior horn of the medial meniscus; herniated discs at T12-L1, L1-2, bulging disc at L1-2 flattening the ventral thecal sac and encroaching upon the neural foramina bilaterally, lumbosacral radiculopathy, displacement of the lumbar intervertebral disc, thoracic and lumbar paraspinal spasms, right sided S1 radiculopathy hyperechoic areas of bilateral facet joint capsules, cervical spasms and sprain resulting in epidural steroid injections of the lumbar and cervical spine and trigger point injections of the cervical spine, trapezius muscle and levator scapular. Additionally, he claims that he was confined to bed for a period of approximately two weeks and to home for a period of approximately two months, and that he was totally disabled from the date of the accident to June 24, 2010 and continuing, and partially and intermittently disabled to June 24, 2010. Plaintiff also alleges that he sustained a "serious injury" satisfying the following threshold categories under Insurance Law § 5102 (d): fracture; permanent loss of a body organ, member, function, or system; a permanent consequential limitation of use of a body organ or member; a significant limitation of use of a body function or system; and, a medically determined injury or impairment of a non-permanent nature which prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for not

less than 90 days during the 180 days immediately following the date of the accident. He asserts that he sustained economic loss in excess of basic economic loss as provided by the statute.

Defendants D.L. and Abbott now cross-move for summary judgment in their favor dismissing the complaint pursuant to CPLR 3212 on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law §5102 (d). In support of their motion, defendants submit copies of plaintiffs summons and complaint, their answer, plaintiff's verified bill of particulars, a copy of plaintiff's examination before trial transcript dated November 4, 2010, a copy of plaintiff's examination under oath dated November 11, 2004 (taken in connection with a prior accident), copies of plaintiff's medical records from North Shore Surgi-Center from October 4, 2004 thru January 20, 2006, the affirmed report dated May 25, 2011 of defendant's examining physician, Bruce P. Meinhard, M.D. based upon his examination of plaintiff on said date, and the affirmed report dated June 2, 2011 of defendant's examining Psychiatrist and Neurologist, Matthew M. Chacko, M.D. based upon his examination of plaintiff on said date.

Insurance Law § 5102 (d) defines "serious injury" as "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" (Insurance Law § 5102[d]). The Court of Appeals has held that the issue of whether a claimed injury falls within the statutory definition of a "serious injury" is a question of law for the courts in the first instance, which may properly be decided on a motion for summary judgment (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Charley v Goss***, 54 AD3d 569, 863 NYS2d 205 [1st Dept 2008]).

In order to recover under the "permanent loss of use" category, 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 objective evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration based on a recent examination of the plaintiff must be provided or there must be a sufficient description of the "qualitative nature" of the plaintiff's limitations, with an objective basis, correlating the plaintiff's limitations to the normal function, purpose and use of the body part (*see* ***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2000]; ***Mejia v DeRose***, 35 AD3d 407, 825 NYS2d 722 [2d Dept 2006]). It is for the court to determine in the first instance whether a prima facie showing of "serious injury" has been made out (*see* ***Tipping-Cestari v Kilhenny***, 174 AD2d 663, 571 NYS2d 525 [2d Dept 1991]). The initial burden is on the defendant "to present evidence, in competent form, showing that the plaintiff has no cause of action" (***Rodriguez v Goldstein,*** 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once defendant has met the burden, plaintiff must then, by competent proof, establish a prima facie case that such serious injury exists (***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]).

On May 25, 2011, defendant's examining physician, Bruce P. Meinhard, M.D. "visually determined" range of motion on plaintiff's cervical and lumbar spine, right elbow, right wrist, and left knee and compared his observed results to normal measurements and found all to be within normal limits. Dr. Meinhard failed to set forth any objective tests that he used to determine range of motion restrictions or to identify what, if any, instrument was used to calculate measurements (*see* ***Tolstocheev v Bajrovic***, 28 AD3d 473, 811 NYS2d 785 [2d Dept 2006]). His impression was that plaintiff sustained a left knee contusion and exacerbation of degenerative lateral meniscal pathology, Baker's cyst, and chondromalacia Grade III lateral tibial plateau. His report shows that he reviewed a left knee MRI report of August 22, 2007 but not that he reviewed the MRI study itself. He indicated that plaintiff's treatment was appropriate and that at the date of the examination he had returned to pre-accident status. On June 2, 2011, defendant's examining psychiatrist/neurologist, Matthew M. Chacko, M.D., performed range of motion testing on plaintiff's cervical and lumbar spine using a goniometer and compared plaintiff's observed results to normal measurements and found that there were variations from the norm in both the cervical and lumbar areas from ten to twenty degrees in each range tested. Although he indicated that plaintiff reported tenderness on palpation of cervical and lumbar areas, he felt no muscle spasm. He opined that plaintiff exhibited limitation in cervical and lumbar range of motion, but that these were not objective clinical findings and that there was no evidence of any neurological sequelae noted. Dr. Chacko did not examine or comment upon the injuries plaintiff claimed to have sustained to his left knee.

Since Dr. Meinhard offers no basis for his conclusions that plaintiff suffered a left knee "contusion" and that the lateral meniscal pathology was degenerative and not caused by the accident, they are speculative, at best, and have no probative value (*see* ***Borras v Lewis***, 79 AD3d 1084, 913 NYS2d 577 [2d Dept 2010]; ***Powell v Prego***, 59 AD3d 417, 872 NYS2d 207 [2d Dept 2009]). Additionally, since he opined that plaintiff's treatment, which would include the left knee medial meniscectomy for a complex horizontal tear, arthroscopy, and synovectomy and chiropractic care from May 22, 2007 thru August 10, 2010, was appropriate, he has failed to show that plaintiff did not sustain a serious injury, and has shown that plaintiff did suffer an injury that prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than 90 days during the 180 days immediately following the date of the accident. Additionally, Dr. Chacko's findings of limitations of motion of the lumbar and cervical spine created an issue of material fact as to whether plaintiff had sustained a significant limitation of use of a body function or system (*see* ***Charles v Howard***, 78 AD3d 879, 912 NYS2d 407 [2d Dept 2010]; ***Penoro v Firshing***, 70 AD3d 659, 897 NYS2d 110 [2d Dept 2010]; ***Ortiz v S & A Taxi Corp.***, 68 AD3d 734, 891 NYS2d 112 [2d Dept 2009]).

Inasmuch as defendants have failed to satisfy their *prima facie* burden, it is unnecessary to consider whether plaintiff's opposition papers were sufficient to raise a triable issue of fact (*see* ***Joseph v Hampton***, 48 AD3d 638, 852 NYS2d 335 [2d Dept 2008]; ***Coscia v 938 Trading Corp.***, 283 AD2d 538, 725 NYS2d 349 [2d Dept 2001]). Accordingly, that portion of defendants' motion for summary judgment dismissing plaintiff's complaint on the ground that he did not sustain a "serious injury" is denied.

As plaintiff's verified bill of particulars dated June 24, 2010, specifically states that plaintiff sustained "cervical spasms; and cervical sprain", "epidural steroid injections of the cervical spine", and

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"trigger point injections of the cervical spine", his supplemental verified bill of particulars dated August 17, 2011 which indicates that plaintiff underwent surgical procedures on the cervical spine on July 21, 2011 and that he sustained "cervical spondylosis with radiculopathy at C5-C6 and ... at C6-C7" is not violative of CPLR 3043 (b), plaintiff is permitted to supplement his "bill of particulars with respect to claims of continuing special damages and disabilities without leave of court, at any time, but not less than thirty days prior to trial" (***CPLR 3043 [b]***). Defendant may conduct a further examination before trial and further independent medical exam within forty-five days of the date of this order, "but only with respect to such continuing special damages and disabilit[y]" (*id*). The remaining portions of defendants' cross motion are denied in their entirety.

In light of the foregoing, the plaintiff is directed to serve a copy of this order with notice of its entry upon the Calendar Clerk of this Court. Upon such service, the Calendar Clerk is directed to place this matter on the CCP calendar for the next available date.

Dated: April 10, 2012.

J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**