Diana v Daniel
2012 NY Slip Op 31251(U)
April 30, 2012
Supreme Court, Nassau County
Docket Number: 765/10
Judge: Joel K. Asarch
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU: I..A. PART 13

---X

EMILIO DIANA and EMMA DIANA,

Plaintiffs,

- against -

BRENDON DANIEL,

Defendant.

---X

BRENDON DANIEL,

Third-Party Plaintiff,

- against -

EMILIO DIANA,

Third-Party Defendant.

---X

Index No: 765/10

DECISION AND ORDER

Motion Sequence No: 001 to 004
Original Return Date: 11-02-11

P R E S E N T :
HON. JOEL K. ASARCH,
Justice of the Supreme Court.

The following named papers numbered 1 to 14 were submitted on these four (4) Motions on February 6, 2012 and February 15, 2012:

	Papers numbered
Notice of Motion and Affirmation (Seq. 001)	1-2
Affirmation in Opposition	3
Order to Show Cause and Affirmation in Support (Seq. 002)	4-5
Affirmation in Opposition	6
Reply Affirmation	7
Notice of Motion, Affirmation and Affidavits [2] (Seq. 003)	8-11
Notice of Motion and Affirmations [2] (Seq. 004)	12-14
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The motion by the plaintiff, Emilio Diana, for an Order, pursuant to CPLR 3215[c], granting

him dismissal of the defendant Brendon Daniel's counterclaim on the grounds that the defendant has abandoned said claim (motion sequence 001); the motion by Order to Show Cause by the third-party defendant, Emilio Diana, pursuant to CPLR 603, for an Order granting him severance of the third-party action on the grounds that the underlying case has been certified without due and owing discovery to the third party defendant (motion sequence 002); the motion by the plaintiffs, Emilio Diana and Emma Diana, pursuant to CPLR 3403(a)(4), for an Order awarding them a preference in the trial of this action on the grounds that they are over 70 years of age (motion sequence 003); and the motion by defendant, Brendon Daniel, for an Order granting him summary judgment dismissing the plaintiffs' complaint on the grounds that Emilio Diana's injuries do not satisfy the "serious injury" threshold requirement of Insurance Law §5102(d) (motion sequence 004), are decided as follows:

Briefly, this action arises out of an automobile accident that occurred on November 17, 2009 at the intersection of Route 110 and Great Neck Road in Babylon, County of Suffolk, New York. Plaintiff's vehicle, heading south on Route 110, collided with the defendant's vehicle, which was heading north on Route 110, when the defendant made a left turn in front of plaintiff's vehicle (Emilio Diana Tr., p. 41). In his answer to the plaintiffs' complaint, the defendant denies the material allegations and asserts a counterclaim solely against the plaintiff Emilio Diana, that reads in full as follows:

> 13. That if the plaintiff was damaged as alleged in the complaint, all of which is denied by the defendant(s), then such damage was caused wholly or in part by the negligence of the plaintiff, Emilio Diana, in the ownership, operation and control of plaintiff's motor vehicle.

14. That if the defendant(s) are held liable as to the cause of action on behalf of Emma Daniel (sic) then the plaintiff, Emilio Daniel (sic), is liable wholly or in part for any damages that may be awarded and such damages should be apportioned accordingly as the proportion of their respective liability shall be determined.

(Answer, ¶¶13-14).

These allegations of the defendant's counterclaim also form the basis of the defendant's third-party action against Emilio Diana (Third Party Complaint, ¶¶4-6).

Summary Judgment – Serious Injury (motion sequence 004)

Defendant Brendon Daniel has moved for an Order pursuant to CPLR 3212, awarding him summary judgment dismissing the plaintiffs' complaint on the grounds that Emilio Diana's injuries do not satisfy the "serious injury" threshold requirement of Insurance Law §5102(d). For reasons hereafter stated, this motion is **granted in part and denied in part**. That is, although both plaintiffs claim to have sustained serious injuries as a result of this motor vehicle accident, defendant's motion seeks to dismiss only plaintiff Emilio Diana's claims. Thus, while the plaintiff Emilio Diana's claims are dismissed in their entirety, plaintiff Emma Diana's claims are unaffected, *infra.*

Specifically, plaintiff Emilio Diana claims that, as a result of the collision, he sustained, *inter alia*, the following serious injuries: "a flexion-extension type injury caused by a sudden, violent, involuntary and unexpected thrust of the head and neck...with resultant pain, inflammation, tearing, stretching ad injury to the surrounding soft tissues, muscles, tendons and ligaments in the neck, back and shoulder area resulting in muscle spasm and restriction and limitation thereof;" and "injury to back, neck and shoulders requiring physical therapy for three (3) months" (Bill of Particulars, ¶5).

Plaintiff claims that following this accident, he was "intermittently" confined to his bed and

home as a result of this accident (*Id.* at ¶7).

At his oral examination before trial, plaintiff Emilio Diana testified that "a few months before this accident," he was involved in another motor vehicle accident (Emilio Diana Tr., p. 16) but that neither he nor his wife, Emma Diana, were injured in that accident (*Id.* at p. 19).

Plaintiff Emilio Diana was retired at the time of this accident. With respect to activities that may have been impaired as a result of this accident, he testified that he did not "do anything at all" before this accident (*Id.* at p. 83). He stated "Nothing. I didn't do anything. I don't do anything....No, I don't have any hobbies at all. I watch TV, baseball, sports. That was about it" (*Id.* at pp. 83-84). He did, however, state that he can no longer stand too long in the kitchen to cook; instead he is forced to sit down because of his back (*Id.* at p. 84).

Plaintiff, who was 82 years old at the time of the accident, claims that his injuries fall within the following six categories of the serious injury statute: to wit, significant disfigurement; a fracture; 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; and 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 (Bill of Particulars ¶6).

However, based upon a plain reading of the papers submitted herein, including the plaintiff's bill of particulars and testimony, it is clear that the plaintiff Emilio Diana did not fracture any bone as a result of this accident. His injuries therefore do not satisfy the statutory definition of a "fracture" (*Catalan v. Empire Storage Warehouse*, 213 AD2d 366 [2nd Dept 1995]).

His claim that his injuries fall within the "significant disfigurement" category are also dismissed. The standard by which significant disfigurement is to be determined within the meaning of the statute is whether a reasonable person would view the condition as unattractive, objectionable, or as the subject of pity or scorn (see, *Tugman v. PJC Sanitation Service, Inc.*, 23 AD3d 457 [2nd Dept.2005]; *Sirmans v. Mannah*, 300 AD2d 465 [2nd Dept.2002]). A disfigurement may be considered "significant" and thus constitute a "serious injury" if a reasonable person viewing the injured party's body in its altered state would regard the condition as unattractive, objectionable, or a subject of pity or scorn (*Spevak v. Spevak*, 213 AD2d 622 [2nd Dept 1995]). In the absence of any claim in his bill of particulars or his deposition referencing any "unattractive, objectionable" condition, it is clear that the plaintiff has also abandoned his claim that his alleged injuries left his body in an altered state that is a "subject of pity or scorn."

Further, inasmuch as the plaintiff has failed to allege and claim that he has sustained a "total loss of use" of a body organ, member, function or system as a result of this accident, it is clear that his injuries also fail to satisfy the "permanent loss of use" category of Insurance Law §5102(d) (*Oberly v. Bangs Ambulance,* 96 NY2d 295 [2001]).

Similarly, any claims that plaintiff's injuries satisfy the 90/180 category of Insurance Law §5102(d) are also contradicted by his own testimony, wherein he states that he was only "intermittently" confined to his bed and home as a result of this accident. Further, no where does the plaintiff claim that as a result of his alleged injuries, he was "medically" impaired from performing any of his daily activities (*Monk v. Dupuis*, 287 AD2d 187, 191 [3rd Dept. 2001]), or that he was curtailed "to a great extent rather than some slight curtailment" (*Licari v. Elliott*, 57 NY2d 230, 236 [1982]; *Sands v. Stark*, 299 AD2d 642 [3rd Dept. 2002]). In light of these facts, this Court

determines that plaintiff has effectively abandoned his 90/180 claim for purposes of defendant's initial burden of proof on a threshold motion (*Joseph v. Forman*, 16 Misc.3d 743 [Sup. Ct. Nassau 2007]).

Thus, this Court will restrict its analysis to the remaining two categories as it pertains to the plaintiff Emilio Diana; to wit, permanent consequential limitation of use of a body organ or member and significant limitation of use of a body function or system.

Under the no-fault statute, to meet the threshold significant limitation of use of a body function or system or permanent consequential limitation, the law requires that the limitation be more than minor, mild, or slight and that the claim be supported by medical proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition (*Licari v. Elliot*, supra; *Gaddy v. Eyler*, 79 NY2d 955 [1992]; *Scheer v. Koubeck*, 70 NY2d 678 [1987]). A minor, mild or slight limitation shall be deemed "insignificant" within the meaning of the statute (*Licari v. Elliot*, supra; *Grossman v. Wright*, 268 AD2d 79, 83 [2nd Dept. 2000]).

When, as in this case, a claim is raised under the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, then, in order to prove the extent or degree of the physical limitation, an expert's designation of a numeric percentage of plaintiff's loss of range of motion is acceptable (*Toure v. Avis Rent A Car Systems,* 98 NY2d 345, 353 [2002]). In addition, an expert's qualitative assessment of a plaintiff's condition is also probative, provided that: (1) the evaluation has an objective basis, and (2) the evaluation compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system" (*Id*). Recently, the Court of Appeals in *Perl v. Meher*, 18 NY3d 208 [2011], held that a quantitative assessment of a plaintiff's injuries does not

have to be made during an initial examination and may instead be conducted much later, in connection with litigation (*Id*).

With these guidelines in mind, this Court will now turn to the merits of the motion at hand.

In support of his motion, the defendant relies solely upon the plaintiff's deposition transcript and the affirmed report of Dr. J. Serge Parisien, M.D., an orthopedic surgeon, who performed an independent examination of the plaintiff on October 20, 2011. This proof establishes that the plaintiff did not sustain a "serious injury" within the meaning of Insurance Law §5102(d) (*Staff v. Yshua*, 59 AD3d 614 [2nd Dept. 2009]; *Cantave v. Gelle*, 60 AD3d 988 [2nd Dept. 2009]). Specifically, the affirmed report of Dr. Parisien, who examined the plaintiff and performed quantified range of motion testing on his cervical spine, lumbosacral spine and both shoulders with a goniometer, compared his findings to normal range of motion values and concluded that the ranges of motion measured were normal, sufficiently demonstrates that the plaintiff did not sustain a "serious injury" as a result of this accident. The defendant's medical proof confirms that despite extensive motor and sensory testing, there were no deficits, and based on the clinical findings and medical records review, "[t]he claimant presents with status post cervical and lumbar sprain/strain and status post bilateral shoulder sprain with pre-existing history of degenerative changes of the cervical and lumbar spine and bilateral shoulders as well as pre-existing history of right shoulder surgery and lower back injury."

Having made a *prima facie* showing that the plaintiff Emilio Diana did not sustain a "serious injury" within the meaning of the statute, the burden shifts to the plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating a triable issue of fact that a "serious injury" was sustained (*Pommels v. Perez,* 4 NY3d 566 [2005]; *Grossman v. Wright*, supra).

Here, counsel for the plaintiff fails to submit any medical proof or even proffer the affidavit

of the plaintiff himself in opposition to the defendant's motion for summary judgment (CPLR 3212[b]; *Roche v. Hearst Corp.*, 53 NY2d 767 [1981]). 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, in opposition to defendant's motion, to produce evidence in admissible form to support the claim for serious injury (*Licari v. Elliot*, supra). 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 examinations, tests and observations and review of the record, rather than manifesting only the plaintiff's subjective complaints (*Grasso v. Angerami*, 79 NY2d 813 [1991]). The plaintiff's failure to present any such evidence is fatal to his opposition.

Therefore, in light of plaintiff's failure to raise any triable issue of fact, defendant's motion for summary judgment dismissal of plaintiff Emilio Diana's complaint on the grounds that he did not sustain a serious injury within the meaning of the Insurance Law, is **granted** (motion sequence 004). Accordingly, plaintiff Emilio Diana's complaint is dismissed in its entirety. The motion is **denied** with respect to the claims of plaintiff Emma Diana. Emma Diana's complaint survives.

Motion for a Trial Preference (motion sequence 003)

With respect to the plaintiff Emma Diana's motion pursuant to CPLR 3403(a)(4) for an Order, awarding her a special preference on the grounds that she is over 70 years of age, such motion is **granted**. Having submitted an affidavit and a copy of her birth certificate, the plaintiff Emma Diana has demonstrated a prima facie entitlement to an age preference pursuant to CPLR 3403(a)(4). Accordingly, she is automatically entitled to a special trial preference (*Borenstein v. City of New York*, 248 AD2d 425 [2nd Dept. 1998]; *Milton Point Realty Co. v. Haas*, 91 AD2d 678 [2nd Dept.

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1982]). A Note of Issue and Certificate of Readiness has been filed, a jury demanded and a calendar number has been assigned (2012H0079). Accordingly, the parties shall appear in the Trial Assignment Part of this Court on **May 17, 2012 at 9:30 a.m.**

Counterclaim and Impleader Issues (motion sequences 001 and 002)

The defendant answered the complaint or about April 5, 2010. A counterclaim was interposed in the answer (although it appears as if there was no reply served). Thereafter, or about October 26, 2011, counsel for the defendant commenced a third-party action against (at the time) the plaintiff Emilio Diana. The gravamen of the third-party complaint was that if the plaintiff Emma Diana recovers a judgment against the defendant, then Emilio Diana should be responsible for his proportionate share of liability and should be responsible for contributing thereto – the same cause of action as contained in the counterclaim.

The availability of third-party practice in New York is governed by CPLR 1007, which provides that "[a]fter the service of his answer, *a defendant may proceed against a person not a party* who is or may be liable to that defendant for all or part of the plaintiff's claim against that defendant ..." (emphasis supplied). Here, at the time the impleader complaint was asserted, it was subject to dismissal as procedural defective as defendant already asserted a claim (identical to his counterclaim) against Emilio Diana as *plaintiff*. All parties had an opportunity to conduct CPLR Article 31 discovery and the case was thereafter certified as trial ready.

Procedurally, based on the dismissal herein of the plaintiff Emilio Diana's claims against the defendant, the defendant's continued use of the counterclaim against Emilio Diana has been lost. Clearly, the defendant has not purposely abandoned his [counter]claim for contribution. But for the fact that the defendant has already commenced the third-party action against Emilio Diana,

defendant's counterclaim would have been deemed a third-party claim. See *Wright v. E.S. McCann & Son, Inc.*, 216 AD2d 73 [1st Dept. 1995]; *Christiansen v. Silver Lake Contracting Corp.*, 188 AD2d 507 [2nd Dept. 1992]. Nevertheless and notwithstanding the lack of abandonment, the motion by the plaintiff on the counterclaim is **granted** and the counterclaim is dismissed (motion sequence 001).

However, the Court declines to sever the timely instituted third-party action against third-party defendant Emilio Diana. No new entity has been joined as a third-party defendant in this proceeding. Emilio Diana was a party when this proceeding commenced. He has been represented by counsel (albeit a different counsel) and has had the opportunity to seek disclosure on the counterclaim. Counsel's arguments that Emilio Diana will be "unduly prejudiced since he has rightfully sought discovery yet same has essentially been ignored and/or overlooked by the parties to this action" are conclusory and fly in the face of the history of this litigation. While discovery demands are attached as Exhibit "D" to the moving papers, such discovery focuses primarily on Emilio Diana's injuries, notice, personal and property damage, and other items more properly sought of a plaintiff and not a third-party defendant. Accordingly, the motion to sever the third-party action is **denied**.

All applications not specifically addressed are **denied**.

This shall constitute the Decision and Order of this Court.

Dated: Mineola, New York
April 30, 2012

ENTER:

JOEL K. ASARCH, J.S.C.

ENTERED
MAY 01 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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