Zito v Saltzman
2013 NY Slip Op 33078(U)
December 3, 2013
Sup Ct, Suffolk County
Docket Number: 12-21425
Judge: Peter H. Mayer

SHORT FORM ORDER

INDEX No. 12-21425
CAL No. 13-00911MV

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 6-21-13
ADJ. DATE 9-5-13
Mot. Seq. # 001 - MD

----------X

ROCCO ZITO, JR. and LAUREN ZITO,

Plaintiffs,

- against -

JONATHAN P. SALTZMAN and STEVEN SALTZMAN,

Defendants.

----------X

GRUENBERG KELLY DELLA
Attorney for Plaintiffs
700 Koehler Avenue
Ronkonkoma, New York 11779

RUSSO, APOZNANSKI & TAMBASCO
Attorney for Defendants
875 Merrick Avenue
Westbury, New York 11590

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendants, dated May 16, 2013, and supporting papers 1-10; (2) Affirmation in Opposition by the plaintiff, dated July 29, 2013, and supporting papers 11-13; (3) Reply Affirmation by the defendant, dated August 14, 2013, and supporting papers 14-15; (and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that motion (001) by the defendants, Jonathan P. Saltzman and Steven Saltzman, pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that the plaintiff, Rocco Zito, Jr., has not sustained a serious injury as defined by Insurance Law § 5102 (d), is denied.

This action arises out of an automobile accident which occurred on February 29, 2012, on Northern State Parkway, one-half mile west of Route 231, in Huntington, New York, when the vehicle operated by the plaintiff, Rocco Zito, Jr., and the vehicle owned by defendant Steven Saltzman, and operated by the defendant Jonathan P. Saltzman, came into contact. The plaintiff alleges that as a result of this accident he sustained a serious injury as defined by Insurance Law § 5102 (d). A derivative claim has been pleaded on behalf of the plaintiff's spouse, Lauren Zito.

The defendants seek summary judgment dismissing the complaint on the basis that the plaintiff, Rocco Zito, Jr., did not sustain a serious injury as defined by Insurance Law § 5102 (d).

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]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). 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" (CPLR 3212[b]; ***Zuckerman v City of New 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]).

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 a motion for summary judgment to dismiss a complaint for failure to set forth a prima facie case of serious injury as defined by Insurance Law § 5102(d), the initial burden is on the defendant to "present evidence in competent form, showing that plaintiff has no cause of action" (***Rodriquez v Goldstein***, 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once the defendant has met the burden, the plaintiff must then, by competent proof, establish a *prima facie* case that such serious injury exists (***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, here the plaintiff (***Cammarere v Villanova***, 166 AD2d 760, 562 NYS2d 808, 810 [3d Dept 1990]).

In order to recover under the "permanent loss of use" category, a 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 a specific percentage of the loss of range of motion must be

ascribed or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott***, *supra*).

In support of this motion, the defendants have submitted, inter alia, an attorney's affirmation; a copy of the summons and complaint, defendants' answer, and plaintiff's verified bills of particulars and first supplemental bill of particulars; a signed and certified copy of the transcript of the plaintiff's examination before trial dated February 27, 2013; and the signed report of Joseph Y. Margulies, M.D., PhD, dated April 2, 2013 concerning the independent orthopedic examination of the plaintiff.

In opposing this application, the plaintiff has submitted, inter alia, an attorney's affirmation; the affidavit of Rocco Zito; and the affidavit of Dr. Salvatore Corso.

By way of the bills of particulars, the plaintiff alleges that as a result of this accident, he sustained injuries consisting of left C2-3 neural foramina narrowing; left C3-4 neural foramina narrowing; loss of normal cervical lordosis; cervical sprain/strain; loss of range of motion to the cervical spine; pain, weakness, tingling and numbness to cervical spine and upper extremities; lumbar sprain/strain; loss of range of motion of the lumbar spine; pain, weakness, tingling and numbness to lumbar spine and lower extremities; and diffuse disc bulging at L5-S1 resulting in bilateral encroachment of the L5 intervertebral foramen, and effacement of the L5 nerve roots as per lumbar spine MRI of February 13, 2013.

Defendants' expert, Joseph Margulies, M.D. has failed to provide a copy of his curriculum vitae, or set forth any basis to qualify as an expert physician in this action. Even assuming that Dr. Margulies does qualify as an expert to render an opinion in this matter, based upon a review of the evidentiary submissions, it is determined that the defendants have not established prima facie entitlement to summary judgment dismissing the complaint on the issue that the plaintiff did not sustain a serious injury as defined by Insurance Law §5102 (d) under either category of injury.

The moving papers contain Dr. Margulies' report of his independent orthopedic examination of the plaintiff. He set forth the records and reports concerning plaintiff's care and treatment relating to the injuries sustained in this accident, including the MRI report of plaintiff's cervical spine dated April 7, 2012 and left shoulder dated September 26, 2012. However, the MRI report of February 13, 2013 concerning examination of plaintiff's lumbar spine was not reviewed nor mentioned by Dr. Margulies. Copies of those records and reports reviewed by Dr. Margulies have not been provided with the moving papers. The general rule in New York is that an expert cannot base an opinion on facts he did not observe and which were not in evidence, and that the expert testimony is limited to facts in evidence (*see* ***Allen v Uh,*** 82 AD3d 1025, 919 NYS2d 179 [2d Dept 2011]; ***Marzuillo v Isom,*** 277 AD2d 362, 716 NYS2d 98 [2d Dept 2000]; ***Stringile v Rothman***, 142 AD2d 637, 530 NYS2d 838 [2d Dept 1988]; ***O'Shea v Sarro***, 106 AD2d 435, 482 NYS2d 529 [2d Dept 1984]; ***Hornbrook v Peak Resorts,*** Inc. 194 Misc2d 273, 754 NYS2d 132 [Sup Ct, Tomkins County 2002]). Thus, as the records and reports are not in evidence, the court is left to speculate as to the contents of the reports and results of the MRIs of plaintiff's cervical and lumbar spine and left shoulder, precluding summary judgment. The court is also left to speculate as to whether Dr. Margulies' opinion would be affected in any way had he reviewed the plaintiff's lumbar MRI study.

Disc herniation and limited range of motion based on objective findings may constitute evidence of serious injury (***Jankowsky v Smith***, 294 AD2d 540, 742 NYS2d 876 [2d Dept 2002]). Dr. Margulies does not comment upon the plaintiff's allegation that he sustained a bulging disc at L5-S1 resulting in bilateral encroachment of the L5 intervertebral foramen, and effacement of the L5 nerve roots. Dr. Margulies does not rule out that the bulging lumbar disc, which the plaintiff alleges was caused by this accident, is not causally related to the subject accident. Again, the court is left to speculate as to these injuries as well, precluding summary judgment. Additionally, a report from a neurologist has not been submitted by defendants concerning the plaintiff's claim of nerve root effacement at L5 (*see* ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]), although the plaintiff has been treated by both a neurologist and an orthopedist, thus raising further factual issues which preclude summary judgment.

Accordingly, defendants have not demonstrated prima facie entitlement to summary judgment as to the first category of serious injury defined in Insurance Law § 5102 (d).

The defendants' expert has offered no opinion as to whether the plaintiff was incapacitated from substantially performing the activities of daily living for a period of ninety days in the 180 days following the accident, and defendants' expert did not examine the plaintiff during that statutory period (*see* ***Blanchard v Wilcox***, 283 AD2d 821, 725 NYS2d 433 [3d Dept 2001]; *see*, ***Uddin v Cooper***, 32 AD3d 270, 820 NYS2d 44 [1st Dept 2006]; ***Toussaint v Claudio,*** 23 AD3d 268, 803 NYS2d 564 [1st Dept 2005]; ***Delayhaye v Caledonia Limo & Car Service, Inc.***, 61 AD3d 814, 877 NYS2d 438 [2d Dept 2009]), thus raising factual issues concerning this category of injury. Additionally, Rocco Zito testified that following the accident, he rented a car and went to work for an hour, but had to leave work to go to the hospital emergency room as he was dizzy, lightheaded, and throwing up. He followed up with Dr. Dowling of Long Island Spine Specialists, for back, neck, chest pain, and left shoulder pain, which developed within a day or two of the accident. He attended physical therapy twice a week for about seven months. He was prescribed a lumbar support which he continues to wear. He was seen by Dr. Corso for the pain in his neck for which additional physical therapy was recommended. He refused epidural injections as he does not like needles. Due to a change in insurance, he is now seeing a new neurologist, Dr. Ostrovsky, and a new orthopedist, Dr. Silber. Flexeril has been prescribed, which he still takes for pain that radiates down his left arm and left leg, and pain in his neck and back, however, the medication makes him tired. He has to use a pillow for his chair at work and works longer hours as he cannot get his work done in the same period of time due to the pain. He must get up and walk frequently. He experiences pain driving to and from work. He gets pain if he sits in a chair too long. He has a lot of pain at night and has difficulty sleeping and wakes every hour. He is stressed at work as he is so tired. He can no longer work on his property as he did prior to the accident unless he takes breaks. He has difficulty swimming and is unable to swim across his pool any longer as he gets pain when he places his left arm over his head.

Based upon the foregoing, the defendants have failed to establish that the plaintiff did not sustain a serious injury under the second category of injury set forth in Insurance Law § 5102 (d).

In view of the foregoing, the factual issues raised in defendants' moving papers preclude summary judgment. The defendants failed to satisfy their burden of establishing, prima facie, that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law 5102 (d) (*see* ***Agathe v Tun Chen Wang***, 98 NY2d 345, 746 NYS2d 865 [2006]); *see also* ***Walters v Papanastassiou***, 31 AD3d 439, 819 NYS2d 48 [2d Dept 2006]). Inasmuch as the moving party failed to establish prima facie entitlement to judgment as a

matter of law in the first instance on the issue of "serious injury" within the meaning of Insurance Law § 5102 (d), the burden has not shifted to the plaintiff to raise a sufficient trial it is unnecessary to consider whether the opposing papers were sufficient to raise a triable issue of fact (*see* ***Yong Deok Lee v Singh***, 56 AD3d 662, 867 NYS2d 339 [2d Dept 2008]); ***Krayn v Torella***, 40 AD3d 588, 833 NYS2d 406 [2d Dept 2007]; ***Walker v Village of Ossining***, 18 AD3d 867, 796 NYS2d 658 [2d Dept 2005]).

Accordingly, the defendant's motion (001), for summary judgment dismissing the complaint is denied.

Dated: 12/3/13

PETER H. MAYER, J.S.C.