

Tsamos v Diaz

2010 NY Slip Op 33903(U)

March 25, 2010

Supreme Court, Bronx County

Docket Number: 20110/07

Judge: Patricia Anne Williams

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This opinion is uncorrected and not selected for official publication.

L.W.

PART 25 24

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF BRONX:

Case Disposed
 Settle Order
 Schedule Appearance

-----X
 TSAMOS, DIMITRIOS

Index No. 0020110/2007

-against-

Hon. [REDACTED]

-----X
 DIAZ, ALBATANI

PATRICIA ANN WILLIAMS Justice.

The following papers numbered 1 to _____ Read on this motion, SUMMARY JUDGMENT DEFENDANT
 Noticed on August 28 2009 and duly submitted as No. _____ on the Motion Calendar of _____

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this motion is decided in accordance with the annexed decision and order of same date.

Motion is Respectfully Referred to:
 Justice: _____
 Dated: _____

Dated: 3 12 25 2010

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Hon. *Patricia Ann Williams*
 [REDACTED]

PATRICIA ANN WILLIAMS

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX: PART IA 24**

-----X
DIMITRIOS TSAMOS,

Plaintiff,

DECISION & ORDER

- against -

Index No. 20110/07

ALBATANI DIAZ and CEPIN LIVERY CORP.,

Defendants.

-----X
WILLIAMS, PATRICIA ANNE, J.

The defendants Albatani Diaz and Cepin Livery Corp., have jointly moved for an order granting summary judgment pursuant to Rule 3212 of the Civil Practice Law and Rules (the "CPLR") and the dismissal of the plaintiff's complaint. The defendants allege that the plaintiff Dimitrios Tsamos has not sustained a "serious injury" as that term is defined by Section 5102 of the New York State Insurance Law. The plaintiff has responded in opposition to the defendants' motion. For the reasons set forth hereinafter the defendants' motion is denied in its entirety.

Since the moving papers lack any of the underlying facts of this case, the background factual information set forth hereinafter is taken from the plaintiff's opposition papers as well as his Verified Bill of Particulars and the plaintiff's August 13, 2008, deposition transcript.

On July 15, 2005, at approximately 9:21 A.M. the plaintiff was driving southbound on Broadway in New York County. The plaintiff, was both at the time of the accident and of his deposition, employed by PSEC Plumbing and Heating. At the time of the accident plaintiff was driving a company vehicle and was on his way to his first job of

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the day when he stopped at a red light at the intersection of Broadway and West 122nd Street. The plaintiff testified that there were two cars ahead of him already stopped at the red light. The plaintiff was at the red light for approximately ten seconds when his vehicle, a 2001 Ford F150 was hit in the rear by defendant Albatani Diaz. The defendant Diaz was a livery cab driver who allegedly informed the plaintiff that he did not see his vehicle stopped at the light because he had been reaching for something in the back seat. The police responded to the scene and Mr. Tsamos was taken by ambulance to St. Luke's Roosevelt Hospital Center Emergency Room where he complained of pain to his neck and right shoulder. He was examined in the hospital, given pain medication, released. Mr. Tsamos, then sought treatment with his general practitioner Dr. Vienis who referred him to an orthopedic specialist, Dr. Touliopoulos. Dr. Touliopoulos conducted surgery on plaintiff's right shoulder on July 13, 2007.

The plaintiff commenced the instant action by filing his Summons and Verified Complaint with the Bronx County Clerk's Office on August 30, 2007. Issue was joined by the defendants with the service of their joint Verified Answer with Demand for Bill of Particulars on or about November 26, 2007. The plaintiff served his Verified Bill of particulars on or about December 17, 2007. A supplemental Bill of Particulars was served in December 2008. The plaintiff's injuries as detailed in his Bill of Particulars are as follows:

Trauma to the cervical spine, internal derangement, C5-C6 and C7-T1 levels with radiculopathy, 2m disc bulges, pain, tenderness, restriction and limitation of motion, function and use thereof; trauma to the lumbar spine, internal derangement, left neural foraminal disc bulge L4-L5, foraminal stenosis L4-L5 and L5-S1, pain, tenderness, restriction and limitation of motion, function and use thereof with resultant course of epidural transforaminal steroidal injections at L5-S1 with occult ligamental

instability; trauma to the right shoulder requiring surgical intervention via arthroscopy, decompression and debridement thereof; together with severe pain, restriction and limitation of motion, function and use thereof; trauma to right ankle with right Achilles post-traumatic tendonitis; trauma to the nerves and nervous system, nervousness.

In support of their motion for summary judgment the defendants rely upon, *inter alia*, the affirmed medical reports of radiologist Dr. David A. Fisher who reviewed the MRI films taken of the plaintiff's right shoulder, lumbar spine and cervical spine; the affirmed medical report of orthopedic surgeon Dr. Gregory Montalbano who conducted an independent medical examination of the plaintiff on September 19, 2008; as well as the plaintiff's own medical records from Dr. Steven Touliopoulos, and St. Luke's Roosevelt Hospital Center. In opposition to the defendants' motion the plaintiff submits the detailed affirmed medical report of his treating orthopedic surgeon Dr. Steven Touliopoulos, as well as affirmations from radiologists Dr. Daniel Beyda and James McCleavey, respectively, together with their MRI reports and his own affidavit.

Discussion

"Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue" or where the issue is arguable. *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y. 2d 223, 231, 413 N.Y.S.2d 141, 145 (1978). Therefore, to obtain an order of summary judgment, the moving party must establish his cause of action or defense sufficiently to warrant the court granting judgment in his favor as a matter of law. The function of summary judgment is issue finding, not issue determination. The court must scrutinize the papers on the motion carefully in the light most favorable to the party opposing summary judgment and should draw all

reasonable inferences in favor of the non-moving party. *Sosnoff v. Jason D. Carter, et al.*, 165 A.D.2d 486, 492, 568 N.Y.S.2d 43, 47 (1st Dept. 1991); *Assaf, et al. v. Ropog Cab Corp., et al.*, 153 A.D.2d 520, 521, 544 N.Y.S.2d 834, 835 (1st Dept. 1989).

In order to maintain an action for personal injury pursuant to the "no-fault" provisions of the Insurance Law, the plaintiff must establish that he or she sustained "serious injury" as that term is defined in Insurance Law § 5102(d)¹. On a motion for summary judgment where the issue is whether the plaintiff suffered "serious injury" the defendant bears the initial burden of presenting evidence, in competent form, to establish that the plaintiff has no cause of action as a matter of law. The plaintiff does not have to present proof that he or she sustained a serious injury unless the defendant meets its initial burden. *Cassagnol v. Williamsburg Plaza Taxi Inc.*, 234 A.D.2d 208, 651 N.Y.S.2d 518 (1st Dept. 1996). However, where the defendant's moving papers are sufficient to raise the issue of whether a "serious injury" has been sustained, the burden shifts to the plaintiff to come forward with *prima facie* evidence in admissible form to establish that he or she sustained a serious injury pursuant to Insurance Law § 5102(d). *Gaddy v. Eyler*, 79 N.Y.2d 955, 582 N.Y.S.2d 990 (1992).

In support of a claim that plaintiff has not sustained a serious injury, the

¹ "Serious injury" is defined 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).

defendant may rely either upon the sworn statements of the defendants' examining physicians or the unsworn reports of plaintiff's examining physician. See, *Pagano v. Kingsbury*, 182 A.D.2d 268, 587 N.Y.S.2d 692 (2nd Dept 1992). Once the defendant has established that the plaintiff does not make out a claim of serious injury, the plaintiff must then respond with proof in admissible form to rebut the defendant's claim. Proof in admissible form includes a medical affirmation or affidavit which is based on the physician's personal examination and observations of the plaintiff. *O'Sullivan v. Atrium Bus Company*, 246 A.D.2d 418, 668 N.Y.S.2d 167 (1st Dept. 1998). Unsworn medical reports of the plaintiff's examining doctor or chiropractor are insufficient to defeat a motion for summary judgment. *Grasso v. Angerami*, 79 N.Y.2d 813, 580 N.Y.S.2d 178 (1991).

Based on their examination of Mr. Tsamos, the defendants' medical doctors allege that his injuries were not a result of the July 15, 2005 automobile accident. Specifically, Dr. Gregory Montalbano, alleged that based upon his September 19, 2008, examination of Mr. Tsamos and his review of various medical records, in particular the emergency room records from St Luke's Roosevelt Hospital Center, that Mr. Tsamos did not sustain injuries to his right shoulder, lower back, or right ankle as a result of the accident. Dr. Montalbano's allegations are based on the fact that the emergency room records do not make mention of the plaintiff expressing any complaints with regard to these areas. Rather, the emergency room records focus primarily on pain in the plaintiff's neck which he described as radiating to his right shoulder. Dr. Montalbano is quite certain that had the plaintiff been experiencing pain in either his lower back, right shoulder and/or right ankle, such complaints would have been documented in the

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records and diagnostic tests conducted. This was not done. However, Dr. Montalbano, does not set forth in his affirmation that he has any specific knowledge of the inner workings of the emergency room at St Luke's-Roosevelt Hospital Center. Indeed, despite, the surgical report of the plaintiff's orthopedic surgeon, Dr. Montalbano continues to insist that the injuries to the plaintiff's right shoulder and resulting surgery were not due to the July 15, 2005 automobile accident. Rather Dr. Montalbano speculates that Mr. Tsamos shoulder injury may be due to overuse in his profession as a plumber and/or Mr. Tsamos' history of weight training. In addition, Dr. Montalbano opined in his report that Mr. Tsamos had full and complete range of motion on all planes in his cervical and lumbar spines. Dr. Montalbano also found full range of motion with respect to the plaintiff's right shoulder on all planes except upon flexion where the plaintiff's flexion was measured at 170 degrees, normal being 180 degrees. Dr. Montalbano also found full and complete range of motion in the plaintiff's left shoulder and right and left ankle.

The defendants' radiologist Dr. David Fisher, following his review of the MRI of the plaintiff's right shoulder taken on October 31, 2005, approximately three months after the accident, he found "no evidence of cuff tear or significant tendinopathy." He also found no significant joint effusion or bursal fluid collection. Overall his impression was that the MRI of the plaintiff's right shoulder revealed a normal study with no evidence of recent traumatic injury. Similarly, with regard to the MRI taken of the plaintiff's lumbar spine on July 6, 2006, Dr. Fisher found that the lumbar vertebral bodies were normal in height and alignment. The disc spaces were well maintained and there was no evidence of herniation or significant annular bulge. He concluded

that there was no evidence or recent traumatic injury. With regard to the MRI of the plaintiff's cervical spine, also taken on July 6, 2006, Dr. Fisher found that the film revealed degenerative changes most pronounced at the C5/6 level. Dr. Fisher states that this was manifested by disc dehydration, disc space narrowing and endplate spurring. There was an accompanying mild disc bulge at C5/6. This disc bulge Dr. Fisher stated was compatible with the degenerative changes and not with traumatic injury.

In opposition to the defendants' motion Mr. Tsamos relies upon the detailed affirmation of his treating orthopedic surgeon Dr. Steven Touliopoulos. In his twenty page affirmation, Dr. Touliopoulos sets forth each of Mr. Tsamos' office visits beginning with the initial consultation on July 27, 2005 as well as the surgery to his right shoulder on July 13, 2007, through to his most recent examination on September 16, 2009. Upon his initial examination of Mr. Tsamos, Dr. Touliopoulos noted that he had significantly decreased range of motion in his right shoulder. Mr. Tsamos also had decreased strength in his shoulder shrug and a slight decrease in rotator cuff strengthening on the right side as compared to the left shoulder. Mr. Tsamos' range of motion in his right shoulder was as follows:

Forward flexion revealed 0 to 120 degrees (normal is 0 to 180 degrees),
Abduction 0 to 90 degrees (normal is 180), external rotation 0 to 40
degrees and internal rotation to approximately L5 (normal is > 60
degrees).

Dr. Touliopoulos' examination of Mr. Tsamos' lumbar spine revealed "diffused lower tenderness over the vertebra and bilateral paraspinal muscles spasm." Mr. Tsamos also had limited range of motion in all fields throughout his lumbar spine.

Examination of the plaintiff's upper extremities revealed slight right hand swelling compared to the left and there was decreased grip strength to the right upper extremity as compared to the left. Mr. Tsamos had a follow-up visit with Dr. John Vlattas (another physician in Dr. Touliopoulos' practice) on August 31, 2005. At that time he complained of continued neck pain radiating bilaterally to both shoulders, more so on the right accompanied by numbness, tingling and weakness of the right upper arm. Mr. Tsamos continued to have limited range of motion in his lumbar spine. Straight leg raising test on the right was positive resulting in pain in the lower back, buttock and posterior thigh to the calf at about 45 degrees.

Mr. Tsamos continued to have decreased range of motion in his right shoulder and lumbar spine. Having achieved minimal relief with physical therapy and cortisone shots to his right shoulder Mr. Tsamos underwent arthroscopic surgery at Mr. Sinai Hospital of Queens on July 13, 2007. That surgery was performed by Dr. Touliopoulos assisted by another orthopedic surgeon from his practice. Dr. Touliopoulos' operative notes indicate that during the operation right shoulder instability was noted as well as fraying around the humeral head and biceps tendon. A partial undersurface rotator cuff tear was noted in the distal supraspinatus tendon. This tear was not deep and was able to be treated conservatively during the surgery. In addition, Mr. Tsamos' rotator cuff was noted to be abnormally widened. Dr. Touliopoulos further states in his notes that the arthroscopic findings were consistent with the pre-operative diagnosis of posttraumatic right shoulder anterior instability. Specifically Dr. Touliopoulos' post-operative diagnosis was "posttraumatic right shoulder anterior instability with impingement syndrome, intra-articular synovitis, and partial undersurface rotator cuff

tear.”

Mr. Tsamos continued to treat with Dr. Touliopoulos seeing him following the surgery on July 23, 2007. At that time he was experiencing expected stiffness, weakness, and discomfort of the right shoulder. Dr. Touliopoulos also noted significant tenderness and muscle spasm upon palpation of the plaintiff's lumbar spine and also tenderness with regards to Mr. Tsamos' cervical spine. Mr. Tsamos continued to have range of motion deficits in both his cervical and lumbar spines.

Turning to Mr. Tsamos' last detailed medical examination of September 16, 2009, Dr. Touliopoulos said that there was still some residual crepitus of the right shoulder upon motion and that he continued to have decreased range of motion in the right shoulder. Upon forward flexion Mr. Tsamos' range was approximately 155 degrees, abduction was 145 degrees, external rotation was 60 degrees, and internal rotation to T12.² Dr. Touliopoulos further stated that the plaintiff's right shoulder, neck and back injuries were directly related to the automobile accident of July 15, 2005. With regard to his right shoulder, Dr. Touliopoulos states that at the time of the accident Mr. Tsamos' right shoulder was hyperextended thus the severity of the injury. Dr. Touliopoulos further found that Mr. Tsamos continued to have mild to moderate restrictions in motion in his lumbar spine and his cervical spine (exact numbers were not provided) all as a result of the accident in question. Mr. Tsamos also continues to have muscle spasms in his lumbar spine. As a result Mr. Tsamos has and will continue to experience difficulty sitting and standing for prolonged periods of time. Mr. Tsamos is also unable

² Note the normal values for these ranges of motion were given *supra*.

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to lift and/or carry objects of any great weight.

Having thoroughly reviewed the papers submitted by both the defendants and the plaintiff on the instant application this court finds that the findings of the plaintiff's treating orthopedic surgeon as detailed in his affirmed medical report, based on objective medical testing, are sufficient to set out a *prima facie* case of serious injury and to deny the defendants' summary judgment motion. *Grill v. Keith et al.*, 286 A.D.2d 247, 729 N.Y.S.2d 102 (1st Dept., 2001). Accordingly, this Court finds that the opposing expert affirmation regarding plaintiff's conditions, which were based on objective medical observation, as well as objective testing, are sufficient to create an issue of fact as to whether plaintiff suffered "serious injury" within the meaning of Insurance Law § 5102(d) and therefore defeat the defendants' summary judgment motion in its entirety.

CONCLUSION

The foregoing constitutes the decision and order of this Court.

DATED: MARCH 25, 2010



**PATRICIA ANNE WILLIAMS
ACTING JUSTICE OF THE
SUPREME COURT**