

Sammartino v Brathwrite

2013 NY Slip Op 31706(U)

July 15, 2013

Sup Ct, Suffolk County

Docket Number: 17117/2011

Judge: William B. Rebolini

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Short Form Order

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SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

 Joseph Sammartino,

Plaintiff,

-against-

Mark Brathwrite and Hertz Vehicles, LLC,

 Defendants.
Motion Sequence No.: 002; MOT.DMotion Date: 3/28/13Submitted: 6/18/13Index No.: 17117/2011Attorney for Plaintiff:

The Law Offices of
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Attorney for Defendants:

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Clerk of the Court

Upon the following papers numbered 1 to 15 read upon this motion for summary judgment: Notice of Motion and supporting papers, 1 - 12; Answering Affidavits and supporting papers, 14-27; Replying Affidavits and supporting papers, 28 - 29; Other, 13; 14 - 15; it is

ORDERED that the motion is granted only to the extent that defendant Hertz Vehicles, LLC, is awarded summary judgment pursuant to CPLR 3212 dismissing the complaint as asserted against it and such motion is otherwise denied.

Plaintiff Joseph Sammartino commenced this action to recover damages for personal injuries

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allegedly sustained on February 21, 2011, when he was struck by the 2011 Toyota vehicle operated by defendant Mark Brathwrite and leased from defendant Hertz Vehicles LLC. On or about April 8, 2013, a stipulation was signed by counsel for both plaintiff and defendants agreeing that the action against Hertz Vehicles LLC is discontinued with prejudice. Accordingly, that part of motion by defendant Hertz LLC for summary judgment dismissing the complaint against it on the basis that the Graves Amendment, 49 USC § 30106, exempts it from liability in this action is granted. The defendants also seek summary judgment dismissing the complaint on the basis that the plaintiff did not sustain a serious injury as defined by Insurance Law § 5102 (d). Plaintiff has opposed such application.

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]). 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” (CPLR3212 [b]; see *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.”

On the issue of serious injury as defined by Insurance Law § 5102 (d), the initial burden is on the moving party to present evidence in competent form showing that the plaintiff did not sustain a serious injury as a result of the accident (see *Rodriquez v Goldstein*, 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once that burden has been met, the opposing party must then establish by competent proof a *prima facie* case that such serious injury does exist (see *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 (*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.*,

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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]). 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]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*Licari v Elliott, supra*).

The plaintiff alleges in his bills of particulars that as a result of this accident, he sustained injuries consisting of: traumatic herniation at C6-7 with instability at C5-6-7; anterior cervical decompression of C5-6, C6-7; foramina disc herniation at C6-7, and central herniated nucleus pulposus at C5-6 as per intra-operative report; intervertebral implants at C5-6-7; arthrodesis at C5-C6-C7; anterior discectomy at C5-6, mild diffuse disc bulge with impression of the anterior thecal sac at C3-4; mild diffuse disc bulge with impression of the anterior thecal sac at C4-5; diffuse disc herniation with compression of the anterior thecal sac and impingement on the neural foramina at C5-6; posterior central disc herniation with extrusion superiorly and anterior disc bulge osteophyte complex at C6-7; straightening of the cervical lordosis; cervical and lumbar radiculopathy; L3-4 left foramina disc herniation with impingement on the left lateral recess, neural foramina, and left L3 nerve root with moderate spinal canal stenosis and facet hypertrophic changes; L4-5 mild diffuse disc bulge with mild impression on the neural foramina; L5-S1 large right foramina disc herniation with severe impingement of the right neural foramina and right paracentral and far right lateral disc herniation of 4mm with spinal stenosis; straightening of the lumbar lordosis; transitional vertebrae, lumbosacral junction; 1.4 cm relatively hypodense lesion adjacent to the right renal pelvis with internal attenuation inconsistent with a simple cyst; loss of consciousness; anterior scalp lacerations and abrasions; limitation of range of motion; aggravation, activation and/or precipitation of any underlying hypertrophic, degenerative, arthritic, circulatory, arterial venous or systemic condition complained of; aggravation and/or exacerbation of low back pain and dysthymia and derangement; aggravation and/or exacerbation of low back bilateral sciatic radiculitis; aggravation and/or exacerbation of straightening of cervical lordosis; herniations at C5-6 and C6-7 with element of cord impingement and spinal stenosis; aggravation and/or exacerbation of lumbosacral disc disease and herniated nucleus pulposus at L5-S1; aggravation and/or exacerbation of right lateral herniated nucleus pulposus at L5-S1 compressing right S1 nerve root as well as encroaching the right neuroforamen with compression of the right L5 nerve root; swelling of S1 nerve root below the herniated disc; posterior bulging disc L5-6 deforming the thecal sac and proximal bilateral L5 nerve roots; loss of normal disc signal intensity at L5-S1 disc spaces; scarring; cervical and lumbar pain with decreased sensation; sharp stabbing pain radiating into the buttocks and upper and lower extremities, shoulders and arms; impaired ability to sleep, lift, grasp, hold, climb, twist, bend, sit, carry, walk, run, bathe, groom and/or eat.

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In support of the motion defendants submitted the affirmed medical report of William A. Healy III, M.D., who reviewed numerous records which were identified. None of the medical records that were reviewed by the examining physician, however, including the reports from plaintiff's cervical and lumbar CT scans and MRIs, surgical admission hospital records, neurology records and studies have been submitted in support of his opinions. Upon his examination of plaintiff on June 27, 2012, Dr. Healy obtained cervical spine and lumbar spine ranges of motion values which demonstrated rather significant deficits when compared to the normal range of motion values. Dr. Healy has failed to set forth the objective method employed to obtain such range of motion measurements of the plaintiffs' cervical and lumbar spine, however, such as the goniometer, inclinometer or arthroidal protractor (*see Martin v Pietrzak*, 273 AD2d 361, 709 NYS2d 591 [2d Dept 2000]; *Vomero v Gronrous*, 19 Misc3d 1109A, 859 NYS2d 907 [Sup Ct Nassau County 2008]). The doctor commented that while the plaintiff appeared to have a normal range of motion in his cervical spine, on specific motion testing he had the deficits in flexion at 10/45 degrees, extension at 10/45 degrees, lateral flexion on the right and the left at 10/30-45 degrees, and right and left rotation at 10/80 degrees. Dr. Healy also stated that he thought the plaintiff had an exaggerated response to his examination with subjective complaints of pain, and the doctor concluded that the plaintiff was less than forthcoming in his history since he reported no history of prior neck issues. Dr. Healy acknowledged, however, that the plaintiff reported decreased sensation to touch from his neck to his left shoulder to the mid-aspect along the lateral aspect of his left arm. The doctor also found that the plaintiff "has no reflex deficits in either upper extremity." The plaintiff also showed decreased range of motion of the lumbar spine, with flexion at 10/90 degrees, extension at 10/30 degrees, right and left lateral flexion at 10/30 degrees and right and left rotation at 10/30 degrees, with subjective complaints of pain. The doctor also reported that the plaintiff noted "decreased sensation to his right fourth and fifth toes."

Although Dr. Healy opined that the plaintiff had a pre-existing degenerative condition concerning his neck and back, he did not set forth a comparison between the pre- and post-accident diagnostic studies to demonstrate to this Court that the plaintiff's condition was not exacerbated by the accident. Dr. Healy commented that in May 2011 the plaintiff underwent an anterior cervical discectomy and fusion and that the operative report described the procedure as "anterior cervical decompression C5-6, additional levels C6-7, intervertebral implant x2, arthrodesis C5-6, additional levels C6-7, anterior instrumentation."

Defendants' examining physician offered no opinion as to whether the plaintiff was incapacitated from substantially performing her activities of daily living for a period of ninety days in the 180 days following the accident, and he 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]).

The defendants also submitted the affirmed reports of Stephen W. Lastig, M.D. concerning his review of cervical and lumbar CT and MRI studies. He stated that his limited review of the transaxial images of the pre-accident lumbar CT study of March 7, 2007 revealed a broad-based posterior right-sided disc herniation at L5-S1 which caused displacement of the traversing right S1 nerve root and extended into the right neural foramen impinging on the exiting L5 nerve root. He

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further noted mild degenerative spondylosis with mild degenerative hypertrophic changes in the lower lumbar facet joints. Dr. Lastig's review of the pre-accident lumbar MRI study dated December 18, 2004 revealed a straight lumbar spine with a mild degree of anterior listhesis of L3 on L4, degenerative disc disease with disc space narrowing and desiccation at the L5-S1 level, mild degenerative spondylosis with marginal vertebral end-plate bony spurring at L5-S1, and a large right paracentral to right lateral disc herniation at L5-S1 which extended into the right subarticular recess and right neural foramen, causing posterior displacement of the traversing right S1 nerve root and impingement on the exiting L5 nerve root. His review of the post-accident lumbar MRI dated April 4, 2011 revealed a straight lumbar spine with a mild degree of anterior listhesis of L3 on L4, degenerative disc disease with disc space narrowing and desiccation at the L5-S1 level, mild degenerative spondylosis with marginal vertebral end-plate bony spurring at L5-S1, and a new multilevel mild disc desiccation at the L2-L3 through L4-L5 levels. There was also a large right paracentral to right lateral disc herniation at L5-S1 with the herniated disc material extending into the right subarticular recess and right neural foramen, causing posterior displacement of the traversing right S1 nerve root impinging on the exiting L5 nerve root which appeared "unchanged in size compared with the prior study of 12/18/2004." Dr. Lastig opined that there were no findings causally related to the subject accident and that the new multilevel disc desiccation at L2-3 through L4-5 is consistent with degenerative disc disease, though he sets forth no basis for such opinion.

Dr. Lastig also reviewed the MRI study of the plaintiff's cervical spine dated November 20, 2004, which revealed multilevel degenerative disc disease with multilevel disc desiccation. He noted mild narrowing of the C5-6 and C6-7 disc spaces with multilevel degenerative spondylosis with marginal vertebral end-plate bony spurring, most pronounced at the C5 and C6 levels, a large focal right paracentral disc herniation at C5-6 which elevated the posterior longitudinal ligament and caused mild flattening of the right ventral aspect of the cervical cord, bilateral foraminal narrowing, and posterior left-sided disc herniation at C6-7 causing mild compression of the left ventral aspect of the cervical cord extending into the left neural foramen. His review of the cervical spine MRI of March 21, 2011 differed from the previous reading in that at the C6-7 level the large posterior left-sided disc herniation appeared to have diminished mildly in size when compared with the prior study. He opined that there are no findings attributable to the subject accident.

In opposition to the motion, plaintiff submitted numerous documents, including the May 13, 2013 affirmed medical report of Sebastian Lattuga, M.D., who first examined the plaintiff on May 6, 2011, when he presented with complaints of neck and back pain, upper and lower extremity radiation with numbness, tingling and dysesthesias. There were also complaints that the symptoms worsened and interfered with daily activities such as "moving around, lying on side, walking, lifting, carrying, bending, standing/sitting for prolonged periods of time, ascending/descending stairs." An examination using a goniometer showed tenderness and spasm in the cervical spine with restricted range of motion in flexion at 15/70 degrees, extension at 10/45 degrees, and bilateral turning at 20/80 degrees. Thoracolumbar range of motion was 10/90 degrees flexion, 5/40 degrees extension, and 5/60 degrees in left and right turning. A diagnosis of cervical spine radiculopathy and "HNP" (herniated nucleus pulposus) as well as lumbar spine radiculopathy and "HNP" was made, and it was noted that the plaintiff underwent an anterior cervical discectomy and fusion at C5-6 and C6-7 on May 11, 2011. Postoperative examinations on May 19, 2011, February 7, 2012, September 6, 2012 and May 10, 2013 revealed cervical tenderness and spasms with restricted ranges of motion. The

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doctor made the following conclusion: "Although the patient had prior neck and low back degenerative disease, the patient was stable and not receiving treatment at the time of this accident for his neck or low back, this accident exacerbated the neck and low back causing the need for surgery." The doctor also opined that, if the information provided by plaintiff to him is accurate, his cervical and lumbar injury, symptomatology and surgery "are directly and causally related to the motor vehicle accident on 02/11/2011." It was noted that an MRI of the lumbar spine dated 6/4/1994 revealed, among other findings, that there was a "[s]light loss of the normal disc signal intensity... from the L5-S1 disc space level." It was noted in the MRI report dated 04/04/2011, however, that there exists a "large right foraminal disc herniation with severe impingement of the right neural foramina" at L5-S1. In addition, the doctor noted that while surgery had been recommended for a small disc herniation, the patient "has a large disc herniation at L5-S1 due to this accident." The doctor concluded that the "prognosis for a full complete recovery to a pre accident level of pain of the cervical and lumbar spine is poor." Such evidence is sufficient to raise a triable issue of fact (*see Mela v Gentile*, 306 AD2d 388, 761 NYS2d 482[2d Dept 2003]; *see also Singh v Varano*, 306 AD2d 340, 760 NYS2d 545 [2d Dept 2003]).

Accordingly, that branch of motion for summary judgment dismissing the complaint on the basis that the plaintiff did not sustain a "serious injury" is denied.

Dated:

7/15/2013



HON. WILLIAM B. REBOLINI, J.S.C.

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION