Jean v NJ Giulintano
2013 NY Slip Op 30411(U)
February 25, 2013
Supreme Court, Suffolk County
Docket Number: 10-3020
Judge: Ralph T. Gazzillo
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SHORT FORM ORDER

INDEX No. 10-3020
CAL. No. 12-00318MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH T. GAZZILLO
Acting Justice of the Supreme Court

MOTION DATE 7-19-12
ADJ. DATE 12-15-12
Mot. Seq. # 001 - MD

GUY JEAN,

Plaintiff,

- against -

NJ GIULINTANO,

Defendant.

NICHOLAS GIULINTANO,

Plaintiff,

- against -

NATARAJAN RAMANI, CRAIG SANDERS and DANIELLE R. SANDERS,

Defendants.

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Upon the following papers numbered 1 to 32 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (001) 1-15; Notice of Cross Motion and supporting papers _; Answering Affidavits and supporting papers 16-30; Reply Affidavits and supporting papers_; Other _; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (001) by the defendant/third-party plaintiff, NJ Giulintano (Nicholas Giulintano), pursuant to CPLR 3212 for summary judgment on the basis that the plaintiff, Guy Jean, did not sustain a serious injury as defined by Insurance Law § 5102 (d) is denied.

This is an action to recover damages for personal serious injuries allegedly sustained by the plaintiff, Guy Jean, on February 16, 2006, on Laurelton Parkway at the Cross Island Parkway, Queens County, New York, when his vehicle was struck in the rear by the vehicle operated by defendant, NJ Giulintano as they

were traveling in a northbound direction.

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 application, the defendant has submitted, inter alia, an attorney's affirmation; copies of the summons and complaints, answers, and plaintiff's bill of particulars; uncertified Coney Island Hospital emergency room record; transcript of the plaintiff's examination before trial dated March 25, 2011; and the sworn report of Michael J. Katz, M.D. dated April 29, 2011, and the sworn report of Alan B. Greenfield, M.D. dated March 19, 2012 concerning his review of the MRIs of the plaintiff's cervical spine dated April 6, 2006, and lumbar spine dated April 7, 2006.

By way of the bill of particulars, the plaintiff has alleged that as a result of this accident, he sustained injuries consisting of straightening of the lumbar lordosis; disc herniation at L5-S1 to the left; disc bulges at L3-4 and L4-5; decreased range of motion of the lumbar spine with muscle strength of 3/5; tenderness, spasm, and trigger points of the lumbar paraspinals; hypertonic L1-L5 lumbar paravertebral muscles; tenderness on deep palpation of the quadratus lumborum muscle bilaterally; tenderness on palpation of the multifidus muscle and sacral forament with pain radiating into the buttocks; lumbar sprain; bilateral shoulder pain; tenderness and muscle spasm of the trapezius muscle bilaterally; trigger point in the bilateral trapezius muscle; and neck stiffness and pain radiating to the bilateral shoulders.

Based upon review and consideration of the evidentiary submissions, it is determined that the defendant has failed to establish prima facie entitlement to summary judgment dismissing the complaint on the basis that the plaintiff did not sustain a serious injury as defined by Insurance Law § 5102 (d) in either category of injury. The moving papers raise factual issues which preclude summary judgment. The defendant's examining physicians have not submitted copies of their curriculum vitae to establish their qualifications as experts for the purpose of proffering their opinions in this matter. None of the original MRI reports, CT scans, EMG/NCV studies, x-rays, or medical records reviewed and referred to by the defendant's experts have been provided as evidentiary proof in support of this application, as required pursuant to CPLR 3212. 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, defendants' moving papers are insufficient as a matter of law.

Dr. Katz does not set forth the results of the reports and diagnostic studies which he reviewed, leaving this court to speculate as to whether or not his opinion is consistent with those medical records and reports of the diagnostic testing. Although Dr. Katz performed range of motion evaluations of the plaintiff's neck and lumbar spine, as well as the bilateral shoulders, he has failed to set forth findings for left and right rotation of the lumbar spine, leaving this court to speculate as to the range of motion and raising factual issues. While Dr. Katz opined that the plaintiff shows no sign or symptoms of permanence relative to the musculoskeletal system, he does not comment upon the plaintiff's claimed bulging and herniated cervical/lumbar discs, and does not rule out that these injuries are related to, or exacerbated by the subject accident. Dr. Katz has failed to comment on the acupuncture and nerve block injections administered to the plaintiff following this accident, and does not rule out that such treatment is causally related to the subject accident. Dr. Katz's diagnosis of the plaintiff was that of cervical radiculopathy, resolved, lumbosacral radiculopathy, resolved, and bilateral shoulder contusion. Dr. Katz does not set forth the findings of the NCV/EMG studies, nor does he set forth the basis for his opinion that such radicular injuries are resolved. Additionally, although the plaintiff was evaluated with NCV and EMG studies of the upper and lower extremities, no independent neurological report has been submitted in support of this application as required (***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]), thus raising factual issue precluding summary judgment.

Upon review of the plaintiff's cervical MRI of April 6, 2006, Dr. Greenfield has failed to provide this court with a copy of the report for this MRI study generated by the plaintiff's treating physician, thus leaving this court to speculate whether the interpretations by Dr. Greenfield and the plaintiff's physician are consistent. Dr. Greenfield stated that there was straightening of the cervical lordosis which may be

positional or due to restricted range of motion. He stated that there is diffuse degenerative disc disease at all cervical disc levels and associated with multilevel degenerative disc bulging from C3-C7 with coexistent bone spurs from C5 through C7, which findings are longstanding and degenerative in origin, evolving over a period of years and are unrelated to the accident. However, he does not set forth the basis for such opinion. He continued that there is coexistent disc herniation within the right neural foramen at C5-6 and centrally at C6-7, easily explained on the basis of long-standing degenerative disc disease culminating in herniations at these levels which cannot be attributed to the accident. He stated that there is no bright signal in the region of the disc herniations either at C4-5 or C6-7 to indicate recent post-traumatic inflammatory edema or recently torn annulus fibrosis, however, he does not define "recent", or comment whether, if there was post-traumatic edema or a torn annulus fibrosis, it could have resolved over the four month period from the date of injury to the date of the MRI study.

Upon review of the plaintiff's lumbar MRI study of April 7, 2006, Dr. Greenfield does not set forth the findings or interpretation by the plaintiff's examining physician and has not provided a copy of the same, leaving this court to speculate as to whether there is any disagreement between the two reports. Dr. Greenfield set forth that the plaintiff has diffuse degenerative disc disease in all lumbar disc levels and is greatest at L5-S1 where there is a degenerative disc bulges and degenerative bone spur formation. He stated that there are "minor degenerative disc bulges of doubtful clinical concern at L3-4 and L4-5, with flattening of the dural sac. However, he has not correlated this opinion with a clinical examination of the plaintiff or the symptoms presented by the plaintiff to support that such finding is "minor" and of "doubtful clinical concern" although there is flattening of the dural sac. He continued that these findings are long-standing and degenerative in origin, evolving over a period of years, and are unrelated to the accident. However, Dr. Greenfield does not set forth the basis for this conclusory opinion. Dr. Greenfield continued that there is coexistent disc herniation in the midline extending toward the left side at L5-S1 which is long-standing degenerative disc disease and discopathy, culminating in degenerative disc herniation as there is not focal bright signal in the region of the disc herniation to indicate a recently torn annulus fibrosis or other post-traumatic inflammatory edema. However, Dr. Greenfield fails to state whether post-traumatic edema would resolve over the four month lapse between the accident and the date of the study, leaving this court to speculate with regard to his opinion. Additionally, at no point has Dr. Greenfield opined as to the duration of the "long-standing" discopathy and degeneration, and fails to correlate a time or duration of this finding, or to relate the findings to clinical onset of the plaintiff's symptoms.

Based upon the foregoing, the defendant has failed to establish prima facie entitlement to summary judgment on the basis that the plaintiff did not sustain a serious injury as defined by Insurance Law § 5102 (d) concerning the first category of injury.

Additionally, the defendant's examining physicians did not examine the plaintiff during the statutory period of 180 days following the accident, thus rendering defendants' physicians' affidavits insufficient to demonstrate entitlement to summary judgment on the issue of whether the plaintiff was unable to substantially perform all of the material acts which constituted his usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident (***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]), and the examining physicians do not comment on this time period. The defendants have submitted only several pages of the plaintiff's deposition testimony for this court to determine whether or not the plaintiff suffered

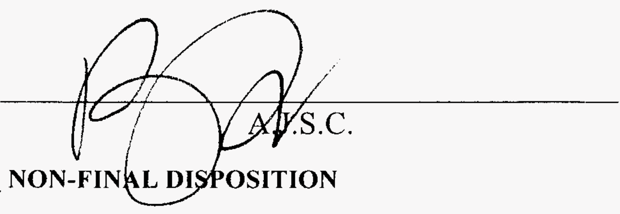
any inability relating to this category of injury and have offered no evidentiary submissions or opinions as well, thus leaving this court to speculate as to the plaintiff's testimony and why a complete copy of the plaintiff's transcript was not provided for this court to review the plaintiff's entire testimony. However, the plaintiff submitted a copy of his testimony wherein he testified that following the accident, he attended chiropractic treatment two to three times a week for six months due to the pain in his neck. He was employed full-time (48 to 50 hours a week) as a compounder at a pharmaceutical company at the time of the accident. Since the accident, he cannot do heavy lifting and has to sit down at work. His boss now gives him easy work to do. Prior to the accident, he had no problems with his neck or back. If he exercises or runs and jogs he gets pain in his neck and back. He has pain when using the stairs. He can only drive for about 45 minutes at a time, then has to stop the car and stretch due to his back pain. He cannot play with his children due to the pain. Thus, there are factual issues concerning whether the plaintiff has been able to substantially perform his usual and customary activities for a period in excess of 90 out of 180 days following the accident.

Based upon the foregoing, the defendant has not established prima facie entitlement to summary judgment on the second category of injury set forth in Insurance Law § 5102 (d).

These factual issues raised in defendant's moving papers preclude summary judgment. The defendant failed to satisfy the 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 has failed to establish its prima facie entitlement to judgment as a matter of law in the first instance on the issue of "serious injury", 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: 2/25/13



A.J.S.C.

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