Pratnicki v Chatelain

2013 NY Slip Op 31020(U)

April 26, 2013

Supreme Court, Suffolk County

Docket Number: 06-34039

Judge: Joseph C. Pastoressa

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SHORT FORM ORDER

INDEX No. 06-34039

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

MOTION DATE 1-30-13 (#007 & #008)
MOTION DATE 3-6-13 (#009 & #010)
ADJ. DATE 3-27-13
Mot. Seq. # 007 - MD
008 - MD
009 - XMD
010 - XMD

MICHAEL PRATNICKI, Plaintiff, - against - LINDA CHATELAIN, PHILIANA LIMA, and ELRAC, INC., Defendants.	G. RONALD HOFFMAN, ESQ. Attorney for Plaintiff 250 West Main Street Bay Shore, New York 11706 DEIRDRE TOBIN & ASSOCIATES Attorney for Defendant Chatelain 901 Franklin Avenue, P.O. Box 9330 Garden City, New York 11530 BRAND GLICK & BRAND Attorney for Defendants Lima & Elrac 600 Old Country Road, Suite 440 Garden City, New York 11530

Upon the following papers numbered 1 to 45 read on this motion and cross motions for summary judgment and sanctions; Notice of Motion/ Order to Show Cause and supporting papers (007)1 -8; (008) 9-20 ; Notice of Cross Motion and supporting papers (009) 21-29; and (010) 30-38; Answering Affidavits and supporting papers 39-40; Replying Affidavits and supporting papers 41-45 ; Other _; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (007) filed prior to the filing of the Note of Issue, by defendant Linda Chatelaine, pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that the plaintiff, Michael J. Pratnicki, did not sustain a serious injury as defined by Insurance Law § 5102 (d), is denied; and it is further

ORDERED that motion (008) by defendants Philiana Lima and ELRAC Inc., pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that the plaintiff, Michael J. Pratnicki, did not sustain a serious injury as defined by Insurance Law § 5102 (d), is denied; and it is further

ORDERED that cross motion (009), by plaintiff, Michael J. Pratnicki, pursuant to 22 NYCRR 130-1.1 for sanctions, costs, disbursements, and attorney's fees as against defendant Philiana Lima is denied; and it is further

ORDERED that cross motion (010) by plaintiff, Michael J. Pratnicki, pursuant to 22 NYCRR 130-1.1 for sanctions, costs, disbursements, and attorney's fees as against defendant Linda Chatelaine is denied.

This action arises out of a motor vehicle accident wherein the plaintiff, Michael J. Pratnicki, alleges he sustained serious personal injury. The accident occurred on October 11, 2005 on Southern Parkway, three-tenths of a mile west of Exit 40, in Suffolk County, New York. The plaintiff alleges that while driving in the right westbound lane on Southern Parkway, his vehicle was sideswiped by the vehicle operated by defendant Linda Chatelaine, which had been struck by the vehicle driven by defendant Philiana Lima, and owned by defendant Elrac, Inc. Both the plaintiff's vehicle and the vehicle driven by defendant Chatelaine, went off the roadway, each striking a tree. The plaintiff's vehicle overturned, rendering him unconscious.

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 [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 [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 [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 [3d Dept 1990]).

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 [1982]).

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 [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 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott***, *supra*).

By way of the bill of particulars, the plaintiff alleges that as a result of this accident injuries have been sustained consisting of acromioclavicular separation of the left shoulder; trauma to the chest wall; fractured sternum; trauma to the left clavicle; trauma to the right shin and ankle; trauma to the neck; head trauma; loss of consciousness; torn tendon right wrist; right elbow injury; locking of the right elbow; left pectoral muscle tear; pleura injury; brachial plexus injury; brachial plexus palsy; brachial plexitis; sternoclavicular joint disruption; subacromial bursitis; shoulder derangement; left sternoclavicular separation; left shoulder impingement; patent distal left brachiocephalic vessel; right shoulder bony impingement upon the supraspinatus outlet; tear of humeral surface fibers; anterior labral tear; tendinitis; down sloping acromion with narrowing of subacromial

space; right cartilage destruction; crushed left clavicle; crushed sternum; posterior subluxation of the medial aspect of the head of the left clavicle; posterior subluxation at left sternoclavicular joint; inferior subluxation of left clavicle at the sternoclavicular joint; posterior subluxation of the medial aspect of the head of the right clavicle; posterior subluxation at right sternoclavicular joint; inferior subluxation of right clavicle at the sternoclavicular joint; left brachicephalic vein injury; hematoma posterior to the left sternoclavicular joint; downsloping of acromion process; narrowing of the subacromial space; partial tear of humeral surface; concussion; left sternoclavicular sprain; left shoulder sprain; loss of strength of left shoulder; sprain; right side rotator cuff frayed; loss of range of motion, grip and strength; traumatic myalgia; thickening of biceps tendon; tendinosis of musculotendinosis junction; subacromial bursitis and pain; cardiac contusion; left ventricular hypertrophy; retrosternal hematoma; sinus tachycardia; right leg contusion; traumatic subluxation causing a heart bleed; bruised heart; arterial injuries; axillary vein injury; narrowing of neural foramen at C5-6, both sides; central spinal canal stenosis at C5-6; disc desiccation from C2-T1; C2-T1 vertebral disc injury; cervical sprain; cervicalgia; loss of range of motion of the cervical spine; loss of range of motion of the left shoulder; right leg contusion; nerve damage; loss of sensation; loss of motor function; numbness of right extremity; recurring nightmares; loss of concentrative powers; swelling and tenderness, severe pain, soreness, discomfort, weakness; loss of appetite; headaches; and fatigue.

In support of motion (007), defendant Chatelaine has submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, her answer with demands, and plaintiff's bill and supplemental bill of particulars; and the sworn reports of John C. Killian, M.D. dated June 4, 2012 concerning his independent orthopedic examination of the plaintiff, and Clifford Beinart, M.D. dated November 7, 2006 concerning his independent radiological review of plaintiff's cervical spine MRI of November 25, 2005, CT of the manubrium and sternoclavicular joint dated November 28, 2005, and CT of the left sternoclavicular joint post contrast dated December 2, 2005.

In support of motion (008), defendants Lima and Elrac, Inc. have submitted, inter alia, an attorney's affirmation; copy of the summons and complaint, their answer with demands, and plaintiff's bill and supplemental bill of particulars; and the sworn reports of John C. Killian, M.D. dated June 4, 2012 concerning his independent orthopedic examination of the plaintiff, and Clifford Beinart, M.D. dated November 7, 2006 concerning his independent radiological review of plaintiff's cervical spine MRI of November 25, 2005, CT of the manubrium and sternoclavicular joint dated November 28, 2005, and CT of the left sternoclavicular joint post-contrast dated December 2, 2005.

Based upon a review of the foregoing evidentiary submissions, it is determined that in both motions (007) and (008) the defendants have 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 numerous factual issues and inconsistencies in some of the expert's opinions which preclude summary judgment, even if the moving papers were legally sufficient.

Neither of defendants' examining physicians, Dr. Killian and Dr. Beinart, have submitted copies of their respective curriculum vitae to qualify as experts in this matter. None of the medical records, reports, and diagnostic studies performed on the plaintiff, and reviewed by the experts, have been provided in support of the experts' respective opinions as required pursuant to CPLR 3212. Expert testimony is limited to facts in evidence (*see* ***Allen v Uh,*** 82 AD3d 1025 [2d Dept 2011]; ***Marzuillo v Isom,*** 277 AD2d 362 [2d Dept 2000]; ***Stringile v Rothman***, 142 AD2d 637 [2d Dept 1988]; ***O'Shea v Sarro***, 106 AD2d 435 [2d Dept 1984]; ***Hornbrook v Peak Resorts,*** Inc. 194 Misc2d 273[Supreme Court, Tomkins County 2002]). Thus, defendants' moving papers are insufficient as a matter of law.

Although the plaintiff alleges to have sustained neurological or nerve injuries, vascular injuries, and cardiac injuries, no report from a neurologist, surgeon or vascular surgeon, pain management specialist, or cardiologist who examined the plaintiff on behalf of the defendants has been submitted (***Browdame v Candura***, 25 AD3d 747 [2d Dept 2006]), raising further factual issues and leaving this court to speculate as to these conditions and whether they are causally related to the subject accident. Dr. Killian notes that the plaintiff was admitted to the hospital for three days where he was seen by a cardiologist to rule out a cardiac contusion. Dr. Killian set forth that the plaintiff's treating orthopedist, Dr. Tabershaw, indicated at the visit of December 8, 2005, that Dr. Tabershaw was waiting for clearance from a vascular surgeon regarding further treatment and activity. No report from a vascular expert has been submitted by defendants. Dr. Killian further set forth that the plaintiff was diagnosed with cervicalgia, and brachial plexitis. The plaintiff alleges to have sustained radiculopathy. Dr. Killian set forth that the EMG and nerve conduction studies of the upper extremities done on December 1, 2007 demonstrated bilateral carpal tunnel syndrome, and right C5-6 radiculitis. No report from a neurologist has been submitted by defendants. Posterior and inferior subluxation of the left clavicle at the left SC joint was demonstrated on the CT scan of November 28, 2005. Among other things, the MRI study of July 31, 2006 revealed mild bony impingement upon the supraspinatus outlet of the right shoulder, and partial tearing of the humeral surface fibers of the supraspinatus tendon at the insertion, and tendinosis of the of the muscular tendinous junction. Dr. Killian does not comment upon, or rule out, these injuries as being causally related to the subject accident. The plaintiff saw a pain management specialist, Dr. Kirschen, and had a number of steroid injections to his neck through June 2011. No report from a pain management specialist has been submitted by the defendants.

Dr. Killian continued that the MRI of the cervical spine of November 25, 2005 revealed central spinal canal stenosis at the C5-6 level with degenerative disc disease from C2-T1, and no evidence of a herniated disc at C5-6. However, Dr. Killian stated that the plaintiff was seen by a spinal specialist, Dr. Schwartz in early 2006, whose note indicated that the same cervical MRI of November 25, 2005 demonstrated disc herniation on the right side at C5-6, and slight right sided herniation at C6-7 with degenerative disc disease at both levels. Dr. Killian's report raises factual issues with regard to Dr. Schwartz's findings of a herniated disc at C5-6, and slight right sided herniation at C6-7 with degenerative disc disease at both levels, of which Dr. Killian opined there was no evidence.

Dr. Killian set forth that his review revealed that while under the care of Dr. Tabershaw, Dr. Tabershaw found positive impingement tests and diagnosed that the plaintiff had subacromial bursitis for which five or six subacromial injections were given. He continued that Dr. Tabershaw also diagnosed a posterior dislocation of the sternoclavicular joint, however Dr. Killian has not commented on this injury to rule it out. An MRI of the neck and CT scan of the chest were necessary to determine if there was a pseudo aneurysm increasing in size, or if the posteriorly displaced fragment was pushing on the plaintiff's brachial plexus. Dr. Killian does not comment on this injury. The plaintiff was also diagnosed with carpal tunnel syndrome on the right side. Facet blocks and epidural injections were to be administered and arthroscopic surgery to the shoulder was discussed.

Thus, not only are there factual issues which preclude summary judgment, but the defendants failed to submit the expert opinions of a cardiologist, surgeon or vascular surgeon, pain management specialist, and neurologist, as set forth above, to rule out the alleged injuries associated with those specialties.

In performing his independent orthopedic examination of the plaintiff, Dr. Killian set forth that all ranges of motion were tested visually and measured with a goniometer when possible, leaving this court to speculate which range of motion values were obtained with the use of a goniometer. Dr. Killian found "mild" restrictions with 35 to 40 degrees of cervical flexion out of the normal 50/60 degrees. Whether a limitation of use or function is significant or consequential relates to medical significance and involves a comparative determination

of the degree of qualitative nature of an injury based on the normal function, purpose and use of the body part, which Dr. Killian has not addressed in his conclusory statement that such limitations were minor (***Dufel v Green***, 84 NY2d 795, 622 NYS2d 900 [1995]. Dr. Killian compare some of his range of motion findings to a spectrum or range of normal motion values. When the normal range of motion is set forth within a range or spectrum, it leaves it to this court to speculate as to the actual normal ranges of motions without variations, and under which conditions such variations would be applicable (*see* ***Hypolite v International Logistics Mgt., Inc.***, 43 AD3d 461 [2d Dept 2007]; ***Somers v Macpherson***, 40 AD3d 742 [2d Dept 2007]; ***Browdame v Candura***, 25 AD3d 747 [2d Dept 2006]; ***Manceri v Bowe***, 19 AD3d 462 [2d Dept 2005]; *see also* ***Rodriguez v Schickler***, 229 AD2d 326 [1st Dept 1996], *lv denied* 89 NY2d 810 [1997]). Dr. Killian also found restriction of range of motion of the plaintiff's cervical spine, however, he did not set forth his findings, leaving this court to speculate to the same and the basis for his opinion that the restriction was due to degenerative disease. With regard to Dr. Killian's opinion that the cervical range of motion restrictions were due to degenerative disease, he does not indicate what degenerative disease is, or the cause or duration of such "degenerative" disease (*see* ***Sigh v Universal Leasing Inc.***, 24 Misc3d 1207(A) [Supreme Ct, Queens County 2009]).

While Dr. Killian cited to the diagnosis of bilateral carpal tunnel, he found that compression testing was negative. Dr. Killian noted that Dr. Tabershaw, upon examining the plaintiff on October 18, 2005, found bilateral paracervical tenderness with tenderness over the left SC joint and left posterior shoulder with guarded range of motion limited by pain, and that there was about 10 degrees of forward elevation compared to the other side. Upon examination of the plaintiff, Dr. Killian found restriction of ten degrees in forward flexion of both shoulders on both sides. Palpable prominence of the SC joint on the left was found when compared to the right. He continued that the irregularity of the SC joint found upon his examination was of no clinical significance, however, he does not set forth a basis for this conclusory opinion and does not address whether or not the prior posterior displaced fragment is still present. While Dr. Killian found that his review of the records revealed brachial plexus damage, he did not attribute this injury to the SC joint injury, and gave no explanation to rule out the cause for the brachial plexus injury. Dr. Killian found that the plaintiff was fully recovered from all the problems for which he was treated shortly after this incident, however, that opinion does not reconcile with his review or findings as set forth.

In his radiological review, Dr. Beinart does not set forth a basis for his opinion that the findings at C5-6 and C6-7 demonstrate degenerative and hypertrophic changes. Dr. Beinart does not opine to the duration of such degenerative changes and whether or not they preceded the accident, or whether the accident was the cause of such degenerative changes. Also, Dr. Beinart set forth that he found degenerative changes at C6-7 and the presence of a hemangioma which were not mentioned by plaintiff's treating radiologist, thus raising factual issues. While Dr. Beinart indicates that there is no fracture noted on the CT of the left manubrium and sternoclavicular films, he does not address the separation at that joint noted by Dr. Killian, or plaintiff's claim of a fractured sternum.

Dr. Killian set forth in his report that the plaintiff was out of work for a period of five months following the accident due to the injuries sustained in this accident, thus raising factual issues concerning the plaintiff's ability to substantially perform all the material acts constituting the plaintiff's usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident. Defendants have offered no evidentiary proof in support of their motion to dismiss as to this category of injury.

These factual issues raised in defendants' moving papers preclude summary judgment. The defendants 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 [2006]); *see also* ***Walters v Papanastassiou***, 31 AD3d 439 [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 [2d Dept 2008]); ***Krayn v Torella***, 40 AD3d 588 [2d Dept 2007]; ***Walker v Village of Ossining***, 18 AD3d 867 [2d Dept 2005]).

Accordingly, the defendants' motions (007) and (008) for summary judgment dismissing the complaint on the basis that the plaintiff did not sustain a serious injury as defined by Insurance Law § 5102 (d) is denied.

Turning to motions (009) and (010) wherein the plaintiff seeks sanctions, costs, and attorney's fees pursuant to 22 NYCRR 130-1.1 on the basis that "[d]efendants' motion for summary judgment is frivolous, made in bad faith, burdens this Court, the taxpayers, and further penalizes the plaintiff." The plaintiff, however, offers no further statements as to how the defendants' motions were frivolous, made in bad faith, burdens the court, and penalizes the plaintiff, and merely set forth a conclusory and unsupported one sentence statement in support of these applications.

A motion is frivolous within the meaning of 22 NYCRR § 130-1.1(a) when the motion is completely without merit in law or fact and cannot be supported by any reasonable argument for an extension, modification, or reversal of existing law, or is undertaken primarily to delay or prolong the resolution of the litigation (***Minister, Elders and Deacons of the Reformed Protestant Dutch Church of the /city of New York ve 198 Broadway, Inc.***, 76 NY2d 411 [1990]), or to prolong the litigation, or to harass or maliciously injure another, or it asserts material factual statements that are false (***Levy v Carol Management Corporation***, 260 AD2d 27 [1st Dept 1999]). A baseless cross motion for the imposition of sanctions against a moving party is a form of frivolous warranting the imposition of sanction within the meaning of rule 130 (***Liles v Abraham***, 2009 NY Slip Op 32475(U) [Supreme Court, New York County 2009]).

It is determined that defendants' motions, although insufficient on their face as set forth above, are supported by the parties' expert physicians opinions set forth in their sworn reports upon which the defendants base their respective motions. There has been no demonstration that motions (007) and (008) were brought in bad faith, or to prolong the litigation, harass, or maliciously injure or penalize the plaintiff, nor has such injury been asserted by the plaintiff. No basis for the imposition of sanctions, attorney's fees, or costs has been demonstrated by the plaintiff.

Accordingly, plaintiff's cross motions (009) and (010) for sanctions are denied.

Dated: April 26, 2013

HON. JOSEPH C. PASTORESSA, J.S.C.

____ FINAL DISPOSITION _X_ NON-FINAL DISPOSITION