

Giraldo v Mandanici

2004 NY Slip Op 30096(U)

July 23, 2004

Supreme Court, Suffolk County

Docket Number: 0006260/6260

Judge: William L. Underwood

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SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART XIV - SUFFOLK COUNTY

PRESENT:

Hon. WILLIAM L. UNDERWOOD, JR.

JORGE A GIRALDO,

Plaintiff(s),

-against-

JOSEPH J. MANDANICI, TOWN OF ISLIP and
LUBIN H. PEREZ,

Defendant(s).

ORIG. RETURN DATE: 03/16/04
FINAL RETURN DATE: 05/04/04
MTN. SEQ. #: 001-MG
#: 002-MG CASEDISP

PLTF'S/PET'S ATTORNEY:

CANNON & ACOSTA
1923 New York Avenue
Huntington Station, New York 11746

DEFT'S/RESP ATTORNEY:

CURTIS, VASILE, DEVINE & MCELHENNY
Attorneys for Mandanici & Town of Islip
BY: MICHAEL J. DORRY
2174 Hewlett Avenue
PO Box 801
Merrick, New York 11566

OCCISANO & LARKIN
Attorneys for Perez
400 West Main Street
Riverhead, New York 11901

Upon the following papers numbered 1 to 18 read on this motion for summary judgment
Notice of Motion/Order to Show Cause and supporting papers 1-8; Notice of Cross Motion and supporting papers 9-10 ;
Answering Affidavits and supporting papers 11-15; Replying Affidavits and supporting papers 16-17 ; Other 18 ; (~~and~~
~~after hearing counsel in support of and opposed to the motion~~) it is,

ORDERED that the motion by defendants Joseph J. Mandanici and the Town of Islip
for summary judgment dismissing the complaint are granted under the circumstances
presented (CPLR 3212). It is further

ORDERED that the cross motion by defendant Lubin H. Perez for summary judgment
dismissing the complaint is granted under the circumstances presented (CPLR 3212).

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This action arose from a motor vehicle accident, occurring on April 23, 2001, on Second Avenue at or near its intersection with Broadway in the Town of Islip. Plaintiff, Jorge A. Giraldo, allegedly sustained serious personal injury while he was riding as a passenger in the vehicle owned and operated by defendant Lubin H. Perez. Perez' vehicle was allegedly struck by the vehicle owned by the Town of Islip and operated by defendant Joseph J. Mandanici in the course of his employment. Defendants Town of Islip and Mandanici move and defendant Perez cross-moves for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury as defined by Insurance Law 5102(d).

Under the Insurance Law “[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” (Insurance Law 5102(d)). In the context of the plaintiff’s claims, the term “consequential” means important or significant (*Kordana v Pomellito*, 121 AD2d 783, 503 NYS2d 198, 200

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[1986], *app. dis.*, 68 NY2d 848, 508 NYS2d 425). The term, “significant”, as it appears in the statute, has been defined to “mean something more than a minor limitation of use” and the term, “substantially all” has been construed to mean “that the person had been curtailed from performing his usual activities to a great extent rather than some slight curtailment” (*Licari v Elliott*, 57 NY2d 230, 236, 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 defendant “to present evidence, in competent form, showing that plaintiff has no cause of action” (*Rodriguez v Goldstein*, 182 AD2d 396, 396, 582 NYS2d 395 [1992]). Once 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 [1991]). Such proof in order to be in a competent or admissible form, shall consist of affidavits or affirmations (*Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692 [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 [1990]).

Plaintiff alleges in his bill of particulars that he sustained disc herniations at C4/5, C5/6 and C6/7; disc herniation at L1/2; disc bulge at L5/S1; cervical sprain and strain; cervical radiculopathy; thoracic derangement and lumbosacral derangement with radiculopathy. Plaintiff further alleges that the injuries appear to be permanent in nature.

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Plaintiff claims that he sustained injuries in the following serious injury categories: 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; and 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.

In support of their motion and cross motion defendants submit, *inter alia*, the pleadings, plaintiff's deposition testimony, plaintiff's bill of particulars; the emergency department medical record of Southside Hospital; and a sworn report by William A. Healy, III, M.D., an orthopedic surgeon. Initially, the court finds Dr. Healy's affirmation to be defective since he has failed to submit copies of the reports by plaintiff's health care providers upon which he is relying (*Merisca v Alford*, 243 AD2d 613, 663 NYS2d 853 [1997]). However, to the extent that Dr. Healy has relied on his own personal examinations of plaintiff and not on the unsubmitted reports, his opinion was considered.

The medical record reveals that plaintiff was treated and released. X-rays of the chest, cervical spine and thoracic spine were performed. The chest x-ray was normal. The cervical spine x-ray revealed degenerative changes at C5/6 and C6/7 and the thoracic spine x-ray

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revealed mild degenerative changes throughout the thoracic spine.

Dr. Healy opines, in his report dated December 1, 2003, that upon examination, plaintiff was able to heel to toe walk without difficulty and exhibited full flexion, extension, lateral rotation and bending with only mild cervical paraspinal spasm. He also demonstrated full range of motion of both shoulders, elbows, wrists and fingers. He found no impingement findings and no motor or sensory deficits in the upper and lower extremities. He did note some thoracolumbar spasm and some limitation in range of motion in the lumbar spine. Dr. Healy further avers that he performed and reviewed x-rays upon plaintiff's cervical spine, left shoulder and lumbar spine. The cervical spine x-ray revealed diffuse degenerative changes at C5/6 and C6/7. He noted that the left shoulder x-ray was negative. The lumbar spine x-ray revealed diffuse arthritic changes and significant degenerative disc disease at L5/S1 and degenerative changes at T11/12 and T12/L1. In light of these findings, Dr. Healy opines that his clinical findings are consistent with the diffuse degenerative changes in the cervical and lumbar spines. He also states that there is no evidence of radiculopathy in either the upper or lower extremities. Plaintiff should have fully recovered from the cervical and lumbar sprains that he may have sustained in the accident. Based upon the foregoing, the court finds that defendants have demonstrated, as a matter of law, that plaintiff has not sustained a serious injury. (*Reeves v. Scopaz*, 227 AD2d 606, 643 NYS2d 620 [1996]; *Horan v. Mirando*, 221 AD2d 506, 633 NYS2d 402 [1995]).

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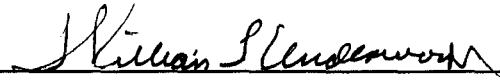
In opposition, plaintiff submits, *inter alia*, a sworn affirmation of Michele Rubin, M.D., a radiologist; and a sworn affirmation of Socorro Vicente, M.D., a rehabilitation specialist. Dr. Rubin affirms that she reviewed the magnetic resonance imaging (“MRI”) films of the cervical spine on May 8, 2001 and the lumbar spine on May 9, 2001. She opines that the cervical spine MRI reveals herniated discs at C4/5, C5/6 and C6/7. She also avers that the lumbar spine MRI reveals a herniated disc at L1/2 and a bulge at L5/S1 with spurring. Dr. Vicente opines in his affirmation dated April 19, 2004, that plaintiff was seen in his office by another physician shortly after his accident who objectively quantified limitations in the range of motion in the cervical spine. Dr. Vicente states that he examined plaintiff on March 18, 2004 and noted that plaintiff complained of moderate neck stiffness and soreness and lower back stiffness. He noted moderate pain on cervical range of motion as well as moderate pain on lumbar range of motion. His impression is that plaintiff has sustained cervical radiculopathy with spasm, lumbar radiculopathy, disc herniations at C4/5, C5/6 and C6/7, L1/2 and L5/S1 as a direct result of the trauma received on April 23, 2001. The court finds that plaintiff’s expert completely failed to address defendants’ medical evidence attributing the condition of plaintiff’s lumbar spine to a preexisting degenerative condition (*see Shinn v Catanzaro*, 1 AD3d 195, 198, 767 NYS2d 88 [2003]; *Lorthe v Adeyeye*, 306 AD2d 252, 253, 760 NYS2d 530 [2003]). Therefore, his findings that the

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plaintiffs' current restrictions of motion were causally related to the subject accident were mere speculation (*see Ginty v MacNamara*, 300 AD2d 624, 751 NYS2d 790 [2002]).

Accordingly, defendants' motion and cross motion are granted.

Dated: July 23, 2004



HON. WILLIAM L. UNDERWOOD, JR.
J.S.C.

CHECK ONE: FINAL DISPOSITION DO NOT SCAN NON-FINAL DISPOSITION