

Smiroldo v Gosman

2007 NY Slip Op 30116(U)

March 5, 2007

Supreme Court, Suffolk County

Docket Number: 0001687

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 11-21-06
ADJ. DATE 1-16-07
Mot. Seq. # 001 - MG; CASEDISP

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JOSEPH O. SMIROLDO,	:	SIBEN & SIBEN, LLP
	:	Attorneys for the Plaintiff
Plaintiff,	:	90 East Main Street
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- against -	:	
	:	ABAMONT & ASSOCIATES
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Defendant.	:	Garden City, New York 11530-9250
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Upon the following papers numbered 1 to 10 read on this motion by defendant for summary judgment dismissing the complaint on the ground that plaintiff has failed to satisfy the serious injury threshold set forth in Insurance Law § 5102(d); Notice of Motion/ Order to Show Cause and supporting papers 1 - 4; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 5 - 7; Replying Affidavits and supporting papers 8 - 10; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the defendant’s motion for summary judgment is granted and the complaint is dismissed.

Plaintiff seeks to recover damages for injuries allegedly sustained in a motor vehicle accident on October 31, 2000, on Route 25 near the Costco Wholesale exit in Lake Grove, New York. In his complaint as amplified by his bill of particulars, plaintiff alleges that he sustained serious injuries to his neck, back and right knee which have resulted in a significant limitation, and permanent loss of use of these portions of his body.

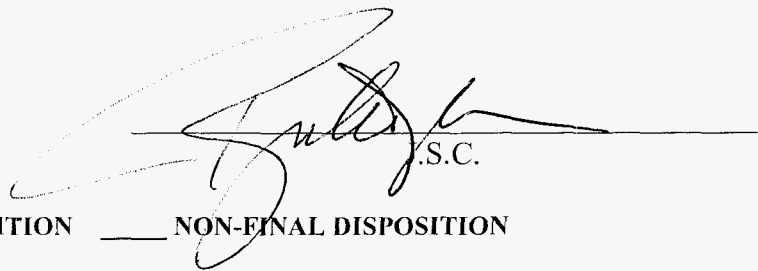
In support of her motion for summary dismissal of the complaint, defendant submits the pleadings, a transcript of plaintiff’s deposition taken on April 8, 2005 and the affirmed report of Frank D. Oliveto, M.D., a specialist in orthopedic surgery. Dr. Oliveto, defendant’s doctor, affirms that on June 22, 2005, he conducted an examination of plaintiff, as well as reviewed the pleadings and medical records, reports and tests. Dr. Oliveto states that plaintiff declined to answer any questions regarding his symptoms, complaints, past history, work history, treatment or medication; however, plaintiff stated that he was not having any neck problems. Dr. Oliveto attests that plaintiff’s physical examination, which included performing objective tests of the neck, back and knee, the results of which are quantified in the report, was normal and that there is no disability or permanency. Dr. Oliveto also reports that there is no need for further treatment or follow-up care and that plaintiff can participate in his normal activities without restrictions.

Based on Dr. Oliveto's affirmation, defendant has satisfied her initial burden of establishing as a matter of law that plaintiff did not sustain a permanent injury or a significant limitation or use of a body function or system (*see, Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 746 NYS2d 865 [2002]; *Gaddy v Eycler*, 79 NY2d 955, 582 NYS2d 990 [1992]; *Omar v Goodman*, 295 AD2d 413, 743 NYS2d 568 [2002]). Thus, the burden shifts to plaintiff to submit competent evidence based upon objective medical findings and diagnostic tests to raise an issue of fact necessary to satisfy the threshold requirement that a serious injury was sustained (*see, Gaddy v Eycler, supra*). Plaintiff has failed to satisfy this burden.

In opposition, plaintiff relies on the affirmation of David Panasci, M.D., dated November 15, 2006. In the affirmation, Dr. Panasci states that on November 1, 2000, plaintiff had a scan of his cervical and lumbosacral spine. Annexed to Dr. Panasci's affirmation are reports of the scans, which he affirms he prepared and are true to the best of his knowledge and belief. The reports, however, are insufficient to raise an issue of fact, as Dr. Panasci does not express an opinion as to causation (*see, Collins v Stone*, 8 AD3d 321, 778 NYS2d 79 [2004]). Moreover, plaintiff has not proffered any medical evidence to show initial range of motion limitations performed contemporaneous with the subject accident (*see, Bell v Rameau*, 29 AD3d 839, 814 NYS2d 534 [2006]), has not submitted any competent medical evidence to demonstrate the nature of his treatment since the date of the accident (*see, Kearsse v New York City Trans. Auth.*, 16 AD3d 45, 789 NYS2d 281 [2005]), or presented a report of a recent examination to establish the duration of his injuries (*see, Houston v Gajdos*, 11 AD3d 514, 782 NYS2d 839 [2004]).

Furthermore, unavailing is plaintiff's argument that defendant failed to address the 90/180 category in Insurance Law § 5102(d). The pleadings do not contain any allegations that the plaintiff sustained a medically determined injury or impairment of a nonpermanent nature which prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for a period of not less than 90 days during the 180-day period immediately following the accident (*see generally, Coon v Brown*, 192 AD2d 908, 596 NYS2d 597 [1993]). In any event, when asked about the length of time he was confined to his bed or to his home after the accident, plaintiff responded, he could not remember. Although questioning elicited testimony that he was self-employed in the computer field at the time of the accident and did not return to work until February 2004, questioning also revealed that due to a slow down in the computer industry there was a lack of opportunities. Thus, the self-serving testimony that he was unable to work or to perform most of his usual and customary activities for the statutory time frame, without any medical evidence which connects this purported inability with the alleged accident-related injuries, is insufficient to raise an issue of fact (*see, Taylor v Jerusalem Air, Inc.*, 280 AD2d 466, 721 NYS2d 67, *lv denied* 96 NY2d 716, 730 NYS2d 32 [2001]).

Dated: MAR 05 2007


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