

**Cuni v Kunis**

2007 NY Slip Op 31289(U)

May 14, 2007

Supreme Court, Suffolk County

Docket Number: 0001403/2005

Judge: Robert W. Doyle

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

**PRESENT:**

Hon. ROBERT W. DOYLE  
Justice of the Supreme Court

MOTION DATE 12-4-06  
ADJ. DATE 3-27-07  
Mot. Seq. # 001 - MG  
002 - XMG; CASEDISP

-----X  
ROBERT F. CUNI, :  
 :  
 :  
 Plaintiff, :  
 :  
 - against - :  
 KEVIN J. KUNIS and JEFFREY N. GUERCHIO, :  
 :  
 Defendants. :  
-----X

KELLY DANIELE, P.C.  
Attorney for Plaintiff  
181 West Main Street, Suite 100  
Babylon, New York 11702  
  
TADDONIO & HEED, P.C.  
Attorneys for Defendant Kunis  
114 Old Country Road  
Mineola, New York 11501  
  
SHAYNE, DACHS, STANISCI et al.  
Attorneys for Defendant Guerchio  
250 Old Country Road  
Mineola, New York 11501

Upon the following papers numbered 1 to 10 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 7; Notice of Cross Motion and supporting papers 8 - 10; Answering Affidavits and supporting papers \_\_\_\_\_; Replying Affidavits and supporting papers \_\_\_\_\_; Other \_\_\_\_\_ (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that the motion (001) by defendant, Jeffrey N. Guerchio, for summary judgment dismissing the action as against him on the ground that plaintiff did not sustain a serious injury pursuant to NY Insurance Law §5102(d) is granted; and it is further

**ORDERED** that the cross motion (002) by defendant, Kevin J. Kunis, for summary judgment dismissing the action as against him on the ground that plaintiff did not sustain a serious injury pursuant to NY Insurance Law §5102(d) is granted.

In this negligence action, plaintiff seeks to recover damages for allegedly sustaining serious injuries in a motor vehicle accident which occurred on October 27, 2002. Plaintiff alleges that his vehicle was struck by a vehicle owned by defendant, Kevin J. Kunis, and operated by defendant, Jeffrey N. Guerchio at the intersection of Route 25 and East Deer Park Road in the Town of Huntington, New

Cuni v Kunis  
Index No. 05-1403  
Page No. 2

York. Before the court are a motion and cross motion for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury. By letter dated April 26, 2007, plaintiff's attorney informed the Court that she has been directed by plaintiff not to submit opposition to the motion and cross motion.

In the bill of particulars, plaintiff alleges that he sustained the following injuries: disc protrusion at C6/7; muscle spasms and pain in the lower back and sprain/strain of the left knee. He also alleges that he was incapacitated from daily activities and work for approximately one week. The Court construes that plaintiff is alleging that he sustained injuries in the following serious injury categories: permanent consequential limitation of use of a body organ or member; and significant limitation of use of a body function or system.

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” (NY Insurance Law § 5102 [d]).

In order for plaintiff to prove that she sustained the serious injury category of permanent loss, she must demonstrate that she sustained a total loss of a body organ, member, function or system (*Oberly v Bangs Ambulance Inc.*, 96 NY2d 295, 727 NYS2d 378 [2001]). 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 [1986], *app. dis.*, 68 NY2d 848, 508 NYS2d 425 [1986]). 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 Elliott*, 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 defendants “to present evidence, in competent form, showing that plaintiff has no cause of action” (*Rodriguez v Goldstein*, 182 AD2d 396, 397, 582 NYS2d 395, 396 [1992]). Once defendants have 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]).

In support of the motion, defendant Guerchio submits, *inter alia*, the pleadings; bill of particulars; a sworn report by Edward Weiland, M.D., a neurologist; and a sworn report by S. Farkas, M.D., an orthopedic surgeon. Defendant Kunis adopts Guerchio's arguments and submissions. Dr. Weiland avers that he examined plaintiff on January 31, 2006 and quantified the range of motion in the

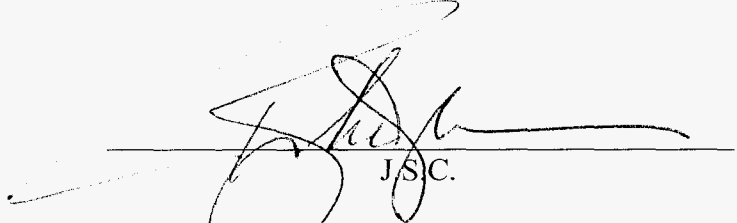
Cuni v Kunis  
Index No. 05-1403  
Page No. 3

cervical spine, shoulders and left knee and after comparing those ranges of motion to the normal function he concluded that the ranges of motion were normal. He diagnosed plaintiff as having sustained cervical sprain/strain, thoracic sprain/strain, lumbar sprain/strain and left knee contusion which have resolved. He concluded that the examination was normal and there was no neurological disability.

Dr. Farkas averred that he examined plaintiff on January 31, 2006. He also concluded that plaintiff's ranges of motion in the cervical and lumbar spines and left knee were normal as compared to the normal functions. He also concluded that plaintiff sustained sprains and strains to the cervical spine, lumbar spine and left knee which were all resolved. He opined that plaintiff sustained no orthopedic disability and that there were no objective findings. This evidence is sufficient to establish a prima facie case for the defendants (*see, Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 746 NYS2d 865 [2002], *rearg den Manzano v O'Neil*, 98 NY2d 728; *Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]).

In failing to oppose this motion, plaintiff did not satisfy his burden of coming forward with sufficient evidence to overcome defendants' motion and cross motion by demonstrating that plaintiff sustained a serious injury within the meaning of the No-Fault Insurance Law (*see, Gaddy v Eyler, supra*). Accordingly, the motion and cross motion for summary judgment are granted.

Dated:     MAY 14 2007    

  
\_\_\_\_\_  
J.S.C.  
    X     FINAL DISPOSITION         NON-FINAL DISPOSITION