

**Gopen v Estrade**

2007 NY Slip Op 31296(U)

May 14, 2007

Supreme Court, Suffolk County

Docket Number: 0010670/2004

Judge: Robert W. Doyle

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

**P R E S E N T :**

Hon. ROBERT W. DOYLE  
Justice of the Supreme Court

MOTION DATE 1-25-07  
ADJ. DATE 3-26-07  
Mot. Seq. # 002 - MD  
003 - XMotD

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SCOTT J. ESTRADE and JACK L. CUTLER, JR.,	:		:	ESCHEN, FRENKEL & WEISMAN, LLP
	:		:	Attorneys for Defendant Cutler
	:	Defendants.	:	20 West Main Street
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Upon the following papers numbered 1 to 40 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 17 ; Notice of Cross Motion and supporting papers 18 - 22 ; Answering Affidavits and supporting papers 23 - 29 ; Replying Affidavits and supporting papers 30-31; 32-33; 34-36 ; Other 37 - 40 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that this motion (001) by defendant Jack L. Cutler, Jr. pursuant to CPLR 3212 and Insurance Law §§5102(d) and 5104(a) for an order granting summary judgment dismissing the complaint, asserting plaintiff's injuries do not meet the serious injury threshold, and pursuant to CPLR 3126 to preclude plaintiff from offering evidence of MRI films at trial, opposed by plaintiff, is denied, but plaintiff is directed to provide defendants with access to the MRI films so that the same may be copied and reviewed; and it is further

**ORDERED** that this motion (002) by defendant Scott Estrada s/h/a Scott Estrade pursuant to CPLR 3212 and 3126 for an order granting summary judgment dismissing the complaint and cross claim against the moving defendant on the basis they are without merit, is denied; and that part which seeks an order granting the moving defendant leave to file a motion for summary judgment on liability within thirty days of being served a copy of the deposition transcript of defendant Estrada, is granted to the

extent that defendant Estrada may make such motion for summary judgment on the issue of liability within thirty days of the date of this order.

This is an action sounding in negligence arising out of an motor vehicle accident which occurred on May 30, 2002, on Route 347, 400 feet east of Woodhull Avenue, Town of Brookhaven, County of Suffolk, State of New York (defendant's exhibit A). As a result of this accident, plaintiff is claiming injury to his cervical spine with demonstrated straightening of the upper cervical spine with fusion at C4 and C5, and injury to his lumbar spine with demonstrated decreased disk signal at L1-2 and L2-3; decreased disk signal height at L4-5 with central disk herniation impinging upon the thecal sac; decreased disk signal and disk height at L5-S1 with left sided disk herniation impinging upon the epidural fat, left lateral recess and abutting the S1 nerve root.

Defendant Jack L. Cutler, Jr. claims entitlement to an order granting summary judgment dismissing the complaint, asserting plaintiff did not sustain serious injury sufficient to meet the threshold pursuant to Insurance Law of the State of New York §§5102(d), 5104(a), and that plaintiff should be precluded from offering evidence of MRI films at trial.

Pursuant to Insurance Law §5102(d), “‘[s]erious injury’ means a personal injury which results in 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” (*Rodriguez v Goldstein*, 182 AD2d 396, 582 NYS2d 395, 396 [1<sup>st</sup> Dept 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 [1<sup>st</sup> 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 [2<sup>nd</sup> 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 [3<sup>rd</sup> Dept 1990]).

In support of motion (001) defendant Cutler has submitted, *inter alia*, a copy of the summons and complaint; defendant’s verified answer with cross claim against defendant Scott J. Estrada; a copy of the

bill of particulars; a copy of plaintiff's deposition transcript; sworn letters of defendant's examining physicians: orthopedist Joseph L. Paul, M.D., dated August 20, 2002; chiropractor Ellen Lori Nausbaum, dated August 20, 2002; orthopedist Alan Zimmerman, M.D., dated September 7, 2006; neuro-psychiatrist C.M. Sharma, M.D. and affidavit of radiologist Mark Armstrong, M.D., dated December 21, 2006; fax from ROIS; affidavit of chiropractor, Jack Tesoriero; and a copy of a letter dated December 20, 2006 from Eschen, Frenkel & Weisman, LLP to Steven D. Dollinger & Associates.

Dr. Joseph Paul, defendant's examining orthopedist, examined plaintiff on August 20, 2002 (defendant's exhibit F). He found claimant had a history of a pre-existing injury to his neck and back from a car accident in August 2000. Upon examination of plaintiff, Dr. Paul found no paraspinal or trapezius muscle spasms, cervical compression was negative, and there was normal, quantified range of motion in the cervical spine set forth. Neurological examination was done. Examination of the lumbar spine revealed the range of motion was found to be normal with no radiation of pain, numbness or tingling. It was Dr. Paul's diagnosis that plaintiff had resolved cervical and lumbosacral sprains, that he no disability at this time, and he is capable of working and performing all of his normal activities of daily living without any limitations. Dr. Paul further stated further treatment was not medically necessary from an orthopedic point of view and there was no need for physical therapy, massage therapy, acupuncture, diagnostic testing, medical supplies, household help or special transportation. Surgery is not indicated. It is noted that insurance forms, a narrative report of Dr. Robert Hecht, and a health insurance claim form were reviewed by Dr. Paul for this examination. Dr. Paul did set forth that there is probable causality between the injuries sustained and the accident report.

Dr. Nausbaum performed a chiropractic examination of plaintiff on behalf of defendant on August 20, 2002 (defendant's exhibit G). She indicates plaintiff complained of headaches, neck, thoracic, and lower back pain and presented to Island Muscular Skeletal Care the day following the accident. Upon presentation to Dr. Nausbaum, plaintiff states he still has persistent headaches as well as persistent neck, thoracic and lower back pain. She indicates she reviewed an MRI report of the cervical spine dated July 16, 2002 demonstrating straightening and congenital fusion at C4-5; an MRI report of the lumbar spine dated July 16, 2002, which she did not reveal the results of; health insurance claim form; initial report dated June 6, 2002 by Kurt Tempkins, D.C.; and a progress note. Dr. Nausbaum's examination revealed no spasticity in the thoracic region with normal range of motion of the thoracic spine. Lumbar flexion was ninety degrees, extension was thirty degrees and right and left lateral extension was twenty degrees, but the normals are not stated. Straight leg raising, although negative on the right, was positive on the left. Cervical examination revealed flexion of sixty degrees, extension fifty degrees, rotation 80 degrees bilaterally, and lateral flexion forty degrees, but the normal was not set forth. Her diagnosis was that of cervical spine sprain-strain syndrome resolved; thoracic spine sprain-strain syndrome resolved; lumbar spine sprain-strain syndrome resolved; and aggravation of preexisting cervical and lumbar condition. It was Dr. Nausbaum's opinion that the motor vehicle accident reported on May 30, 2002 is causally related to the symptoms described, but she finds claimant did not exhibit any objective evidence of disability in relation to the automobile accident of record. She found no need for further chiropractic care; no further diagnostic testing; no need for medical supplies, special transportation or household help or acupuncture treatment or massage therapy. She further opined that the claimant is capable of engaging in normal activities of daily living and work activities without restrictions.

Defendant Cutler has also submitted the report of orthopedist, Dr. Alan J. Zimmerman who examined plaintiff on defendant's behalf (defendant's exhibit H) on September 7, 2006. Plaintiff Gopen advised Dr. Zimmerman that he is currently working at his same job on a full time basis, with limitations due to pain from sitting or standing for long periods of time. Dr. Zimmerman's examination of the cervical spine was positive for tenderness of the paraspinals, but range of motion findings were quantified as normal. Examination of the lumbar spine was quantified as normal and various testing was reported negative. Dr. Zimmerman's diagnosis was that Mr. Gopen had preexisting cervical and lumbar spine sprains which were aggravated by the injury of record and have resolved, and that he is capable of working and performing activities of daily living without restrictions. Dr. Zimmerman stated Mr. Gopen "has reached an end result in my specialty, Orthopedics; there is no need for further physical therapy, massage therapy; treatment to date has been excessive in duration, and in his opinion, there is no need for household help, diagnostic testing, durable medical equipment and any special transportation. If the history is accurate, then causal relationship exists between the injuries sustained and the accident of May 30, 2002 superimposed on a prior injury to the lumbar spine in August of 2001.

Dr. C.M. Sharma, whose specialty is psychiatry and neurology, examined plaintiff on defendant's behalf on September 9, 2006 and made a diagnosis of subjective lumbar pain, that the symptoms of pain are causally related, and there are no causally related neurological problems. Dr. Sharma found no neurological disability and no neurological limitations to continuation of usual work and activities of daily living. No permanent neurological problems of a causally related nature were found, and it was Dr. Sharma's opinion that claimant reach pre-accident status and has no need for neurological testing or treatment, and no need for household help, special supplies or special transportation.

Based upon the foregoing, it is determined defendant has demonstrated prima facie entitlement to an order granting summary judgment on the issue of whether plaintiff sustained serious injury pursuant to Insurance Law §5102(d).

Plaintiff, in opposing motions (002) and (003), has submitted, *inter alia*, a copy of plaintiff's bill of particulars with annexed authorizations and disclosure; affidavit of Dr. Ralph Castiglione, D.C.; affirmation Dr. Mark Armstrong, M.D.; copy of plaintiff's deposition transcript; and the affidavit of plaintiff Michael Gopen.

The affirmation of Dr. Mark Armstrong, M.D. (plaintiff's exhibit C) sets forth that Michael A. Gopen had cervical and lumbar spine MRI's on July 16, 2002. The MRI of the cervical spine demonstrated straightening of the upper cervical spine with fusion at C4 and C5. The MRI of the lumbar spine demonstrated decreased disk signal at L1-2 and L2-3; decreased disk signal height at L4-5 with central disk herniation impinging upon the thecal sac; decreased disk signal and disk height at L5-S1 with left sided disk herniation impinging upon the epidural fat, left lateral recess and abutting the S1 nerve root.

Dr. Ralph Castiglione, D.C., plaintiff's treating chiropractor, sets forth in his affidavit (plaintiff's exhibit B) that Mr. Gopen came to his office on November 7, 2007 exhibiting antalgic lean, difficulty ambulating and breathing due to severe lower back pain that initiated following emesis while stooped over a lavatory. Dr. Castiglione stated this was the onset of the most severe exacerbation of his

discogenic lumbar condition over nearly three years, and on November 22, 2006, while lying down as recommended, he sneezed which created severe muscle spasms, radiating pain and initiated another exacerbation in his condition. Plaintiff was recommended use the of a portable electro-muscle stimulation unit, limited periods of sitting, frequent periods of recumbent rest and doing work from home whenever possible, these offer slow but steady improvement in his symptomatology. Dr. Castiglione sets forth that as history shows, the most meager activity of daily living may spurn weeks of severe pain and limitation. Mr. Gopen's condition was assessed by Dr. Castiglione using questionnaires he states are widely used and accepted among researchers and practitioners for determining disability with regard to daily function. On the Roland Morris Disability Index, Mr. Gopen rated as a severe disability; on the Revised Oswestry Disability Index, he rated a 58% disability. Dr. Castiglione further stated that he continues to experience these symptoms suggest that secondary to the disc herniation and ligamentous instability incurred from the motor vehicle accident, there has been scar tissue deposition and possibly the onset of degenerative arthrosis. Dr. Castiglione performed range of motion testing on Mr. Gopen and found quantified limitations as set forth in his report in the cervical and lumbar spine. Dr. Castiglione found the disc herniations on the MRI to be causally related to the motor vehicle accident of May 30, 2002 and further finds the injuries to be permanent.

Plaintiff's affidavit (plaintiff's exhibit E) sets forth that during his course of treatment with Dr. Tesoriero, his prior treating doctor, he was sent for MRI's of the neck and lower back. He states he did not have an MRI for the prior accident of August 17, 2001. Since the accident of May 30, 2002, he states there are numerous activities that he can not do as he was able to do before the accident. He is a financial advisor and is required to sit for numerous lengths of time, and after sitting for a short length of time, he begins to feel a driving pain in his lower back. He states he did not have this pain before the accident. He refers to the activities that he spoke about in his deposition and adds that picking up a laundry basket will hurt, sitting for any length of time as well as rotating or extending his lower back.

Pursuant to the deposition of Michael A. Gopen (defendant's exhibit E), after the accident of May 30, 2002, he did not feel any pain, but about forty five minutes later, he felt slight pain in his lower back and neck. He sought medical treatment the following day, May 31 from chiropractor, Jack Tesoriero, whom he had seen before after a prior accident on August 17, 2001, in which he sustained injury to his neck and back. He also was treated by Michael Lehrar, a chiropractor, Ralph Castiglione, a chiropractor, and a neurologist in Deer Park following that accident. On the date of the May 30, 2002 accident, plaintiff stated he was still seeing Jack Tesoriero, chiropractor, for the injuries sustained in the prior accident. After the May 30<sup>th</sup> accident, he was receiving electric stimulation and adjustments to his back, as well as some physical therapy. Plaintiff testified that as a result of the injuries he is claiming in this accident, he cannot stand for long periods of time, walk for long periods of time, drive for long periods of time, bend over to pick things up: laundry baskets, bags of clothes, bending down picking up his niece and nephews. He can only drive for about two hours without having to stop the car and walk around, and depending upon the day, has limitations climbing stairs. He has neck pain with bad weather such as bad storms. As a financial consultant, he uses a computer screen, reads books and literature on a regular basis and this causes pain in his neck. He feels lower back pain with almost everything he does. He often takes three Advil more than once a day for the pain. There are no activities he cannot do as a result of the injuries sustained in this accident. He was generally having neck issues prior to this accident. Prior to this accident, he was seeing the chiropractor for maintenance for his neck. He had

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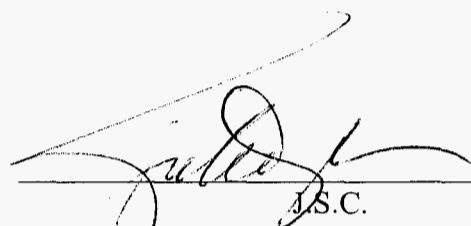
3212 dismissing codefendant Cutler's cross claim as being without merit, it is determined that that part of the motion is unsupported by any admissible evidence except an answer. There is no affidavit from defendant Estrada (CPLR 3212 [a],[b]). The motion (003) is determined to be insufficient on its face on that issue.

Accordingly, that part of motion (003) which seeks an order dismissing the cross claim asserted by defendant Cutler is denied.

In motion (003), defendant Estrada also seeks an order granting summary judgment on the issue that plaintiff did not sustain serious injury within the meaning of Insurance Law §5102(d), and has adopted defendant Cutler's arguments. Plaintiff demonstrated in opposing motion (002) the existence of material issues of fact on the issue of serious injury within the meaning of Insurance Law §5102(d). Motion (002) was denied and therefore, defendant Estrada's motion must be denied as well.

Accordingly, that part of defendant's motion pursuant to CPLR 3212 for an order dismissing plaintiff's complaint on the issue that plaintiff did not sustain serious injury within the meaning of Insurance Law §5102(d) is denied.

Dated:     MAY 14 2007    

  
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J.S.C.

         FINAL DISPOSITION      X   NON-FINAL DISPOSITION