

Gastaldi v Jin P. Chen
2007 NY Slip Op 32040(U)
July 6, 2007
Supreme Court, Richmond County
Docket Number: 0101166/2005
Judge: Philip G. Minardo
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

-----X **DCM Part 6**

**PETER GASTALDI, BRENDA MARIE PICONE,
and FRANKLIN PICONE,**

Plaintiffs,

Present

-against-

HON. PHILIP G. MINARDO

DECISION and ORDER

JIN P. CHEN and FA S. CHEN,

Defendants.

**Index No. 101166/05
Motion No. 351-002**

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The following papers numbered 1 to 4 were used on this motion the 31st day of May, 2007:

	Papers Numbered
Notice of Motion for Summary Judgment (Affirmation in Support).....	1
Affirmation in Opposition.....	2
Reply Affirmation.....	3
Affirmations/Affidavits of Medical Providers Submitted in Sur-Reply.....	4

Upon the foregoing papers, defendants' motion for summary judgment dismissing the complaint of plaintiffs Peter Gastaldi and Brenda Marie Picone on the ground that the injuries which they purportedly sustained fail to meet the statutory threshold set forth in Insurance Law §5102(d) is granted as to plaintiff Brenda Marie Picone, and otherwise is denied.

This matter arises out of a two vehicle accident which occurred on July 22, 2004, on State Highway 36 in Union Beach, New Jersey. As a result, the three plaintiffs each claim to have sustained “serious” personal injuries, i.e., “significant disfigurement; a fracture; permanent loss of use of a body organ or member; significant limitation of use of a body function or system; and/or a medically determined injury or impairment of a non-permanent nature which prevented plaintiff(s) from performing substantially all of the material acts which constitute their usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence” (Plaintiffs’ August 2, 2005 Verified Bill of Particulars, para 7 [Defendants’ Exhibit B]). More particularly, plaintiff Peter Gastaldi claims to have sustained, *inter alia*, a “herniated intervertebral disc at L5-S1, lumbar and cervical disc displacement with radiculopathy, and left shoulder derangement” (*id.* at para 6), while plaintiff Brenda Marie Picone claims to have sustained, *inter alia*, “bilateral C6 root irritation, right ulnar neuropathy, cervical sprain/strain cervical radiculopathy, bilateral L5 root irritation/radiculopathy, axonal loss of the left peroneal nerve, and lumbar sprain, strain, and radiculopathy” (*id.*). It appears undisputed that the wife, plaintiff Brenda Marie Picone, had sustained spinal injuries in a prior automobile accident (*see* October 6, 2006 Deposition of Brenda Marie Picone, p 10, ll 9-22; Defendants’ Exhibit G; *see also* Affirmation of Dr. Lindenbaum, p 2; Defendants’ Exhibit D). It is also conceded that co-plaintiff, Peter Gastaldi, a chiropractor, was the sole provider to render medical treatment to his wife.

In support of their motion for summary judgment, defendants have submitted the affirmations of an orthopedist, Dr. Joseph Y. Margulies, and a neurologist, Dr. Yelena Lindenbaum¹. To the extent relevant, Dr. Margulies found upon examination that each plaintiff exhibited full range of motion of the

¹Each of defendants’ experts has submitted a separate affirmation for each plaintiff.

cervical and lumbar spines when compared with the accepted “norms”, and that plaintiff Peter Gastaldi similarly demonstrated full range of motion in both shoulders, as well (*see* Defendants’ Exhibits E, H). According to Dr. Margulies, the cervical and lumbar sprains sustained by each plaintiff had “resolved”, and neither plaintiff suffered from a “functional disability” as a result of the accident (*id.*). The affirmations of Dr. Lindenbaum set forth that neither plaintiff sustained a “neurological disability.” Nevertheless, she concurred with the findings of disc herniation at L5-S1 relative to plaintiff Peter Gastaldi, whom she diagnoses as “status post L5-S1 herniation, resolved” (*see* Defendants’ Exhibits F, I).

In opposition, the plaintiffs argue that their respective spinal injuries are “serious” within the meaning of Insurance Law §5102(d), and attach, *inter alia*, personal affidavits detailing their subjective complaints and the course of physical therapy and treatment that each has pursued (*see* Plaintiffs’ Exhibits A, B). As is relevant, plaintiff Brenda Marie Picone attaches the April 27, 2007 notarized “affirmation” of her chiropractor-husband, who opines that plaintiff’s prognosis is “guarded” due to the “permanent disability” she sustained in her cervical and lumbar spine (*see* Plaintiffs’ Exhibit E). For his part, plaintiff Peter Gastaldi has attached: (1) the May 14, 2007 affidavits of his treating chiropractor, Dr. Timothy Barber, who concludes that this plaintiff’s spinal injuries are “permanent in nature” (Plaintiffs’ Exhibit C); (2) the May 9, 2007 affirmation of a radiologist, Dr. Alan Berlly, who interpreted plaintiff’s August 17, 2004 lumbar MRI to reveal a “centrally herniated intervertebral disc at the L5-S1 level” and that “clinical correlation” should be attempted (Plaintiffs’ Exhibit D); and (3) the May 11, 2007 affidavit of another chiropractor, Dr. Gregg Scudero, who attached, *inter alia*, his office notes regarding the treatment of this plaintiff since July 26, 2004.

In the opinion of this Court, defendants have made a *prima facie* showing that neither plaintiff sustained a serious injury within the meaning of Insurance Law §5102(d) through the affirmations of

their medical experts (*see* Nagbe v. Minigreen Hacking Group, 22 AD3d 326; Holmes v. Hanson, 286 AD2d 750, *citing* Duldulao v. City of New York, 284 AD2d 296; Villalta v. Schechter, 273 AD2d 299; Nisnewitz v. Renna, 273 AD2d 210; Guzman v. Michael Mgt., 266 AD2d 508; Kosto v. Bonelli, 255 AD2d 557). Accordingly, it became incumbent upon plaintiffs to come forward with sufficient evidence demonstrating the existence of a triable issue of fact that each sustained a serious injury (*see* Gaddy v. Eyler, 79 NY2d 955). Here, plaintiff Brenda Marie Picone has failed to meet this burden.

The affidavit of plaintiff's chiropractor fails to establish a causal relationship between her alleged injuries and the accident of July 22, 2004. Moreover, although plaintiff claims that she advised Dr. Gastaldi of her prior spinal injury, the lack of any reference thereto in the doctor's affidavit, his records or reports, suggests that its possible effect on causation was never considered (*see* Franchini v. Palmieri, 307 AD2d 1056, *affd* 1 NY3d 536). Likewise, there is no reference to plaintiff's subsequent pregnancy and the effect, if any, that it may have had on her lumbar spine. The foregoing renders Dr. Gastaldi's opinion as to cause of his wife's injuries speculative and, therefore, insufficient to raise a triable issue of fact (*id.*). As a result, the allegations in the complaint pertaining to this plaintiff must be severed and dismissed.²

Plaintiff Peter Gastaldi, however, has successfully met his burden of demonstrating the existence of a triable issue of fact as to the seriousness of his injury. When read together, the affidavit of Dr. Scudero and the affirmation of radiologist Dr. Berrly suggest that the clinically correlated herniated disc at L5-S1 is causally related to the accident of July 22, 2004. Plaintiff has satisfactorily explained his financial need to work notwithstanding the extent of his injury, and the purported gap in treatment is adequately addressed in the affidavits of plaintiff's colleagues which were submitted, with leave of the

²Insofar as it appears, the complaint fails to contain any derivative cause of action, e.g., for loss of services on behalf of this plaintiff.

court, in plaintiffs' sur-reply.

“It is well established that conflicting expert opinions may not be resolved on a motion for summary judgment” (Corbett v. County of Onondaga, 291 AD2d 886, 887, *quoting Williams v. Luciantelli*, 259 AD2d 1003, 1003 [*internal quotation marks omitted*]).

Accordingly, it is

ORDERED, that defendants' motion for summary judgment dismissing the complaint of plaintiff Brenda Marie Picone is granted, and so much of the complaint as seeks damages on behalf of said plaintiff is severed and dismissed; and it is further

ORDERED, that the balance of defendants' motion is denied; and it is further

ORDERED, that the Clerk enter judgment accordingly.

E N T E R,

Dated: July 6, 2007

/s/ Philip G. Minardo

J. S. C.