

Galante v Masterwood Finishing Inc.

2007 NY Slip Op 32626(U)

August 9, 2007

Supreme Court, Suffolk County

Docket Number: 0023031/2005

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 5-15-07 (002)

6-6-07 (003)

ADJ. DATE 7-16-07

Mot. Seq. # 002 - MD

003 - XMD

-----X
 ANTHONY GALANTE, :
 :
 Plaintiff, :
 :
 - against - :
 :
 MASTERWOOD FINISHING INC., SAMUEL :
 FLAGG, SUFFOLK REGIONAL OFF TRACK :
 BETTING and BRIAN E. CONTEY, :
 :
 Defendants. :
 -----X

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Upon the following papers numbered 1 to 34 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11; Notice of Cross Motion and supporting papers 12 - 21; Answering Affidavits and supporting papers 22 - 24; 25 - 32; Replying Affidavits and supporting papers 33 - 34; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants Suffolk Regional Off Track Betting and Brian Conley for summary judgment dismissing the complaint against them is denied; and it is further

ORDERED that the cross motion by defendants Masterwood Finishing, Inc. and Samuel Flagg for summary judgment dismissing the complaint against them on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is denied.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Anthony Galante when his vehicle was rear-ended by a vehicle owned by defendant Masterwood Finishing, Inc. ("Masterwood Finishing") and operated by defendant Samuel Flagg on the eastbound lanes of the Sunrise Highway between exits 52 and 53 in the morning of February 2, 2005. The

following facts are undisputed. Prior to the accident, while defendant Brian Conley, s/h/a Brian Contey, who was driving a vehicle owned by defendant Suffolk Regional Off Track Betting (“Suffolk Regional”), was traveling eastbound in Sunrise Highway, a ladder which was secured to the roof of his vehicle fell to the roadway.

Defendants Suffolk Regional and Brian Conley now move for summary judgment dismissing the complaint against them, asserting that they bear no liability for plaintiff’s accident. In support, the aforementioned defendants submit, *inter alia*, the pleadings and the transcripts of the deposition testimony given by plaintiff and defendant Conley.

At his examination before trial, plaintiff testified to the effect that he had been traveling in the center lane of the eastbound of Sunrise Highway at approximately 55 miles per hour, and “noticed an object in the road,” blocking his lane. When plaintiff first saw the object approximately 150 feet away, he “started to slow down [and] took [his] foot off the gas [pedal].” He was first able to determine that the object was a “closed flat” fiberglass ladder, about 100 feet away. At the time, he “started feathering the brakes hoping the cars [in the right and left lane] would pass by and [he] could go around [the ladder].” Plaintiff was about 50 feet away from the ladder when he “applied the brakes in a heavier fashion.” Two or three seconds thereafter, he felt a heavy impact to the rear of his vehicle. As a result of the impact, plaintiff’s vehicle spun out of control and hit the guardrail. At the time of the first impact, plaintiff’s vehicle was moving.

At his deposition, defendant Conley testified to the effect that he is an employee of Suffolk Regional and does electrical work for the company. On the day of the subject accident, he drove a company van and a ladder was securely mounted on the top of the van. While he was traveling in the center lane of the eastbound of Sunrise Highway at approximately 55 to 60 miles per hour, he heard a noise -- “banging sound” -- from the back of his vehicle. While driving, he “looked in [his] sideview mirror and did not see the ladder [he] had secured to the van.” He pulled over to the shoulder and found that the ladder had disappeared. After he reported the incident to his supervisor, he traveled back west on Sunrise Highway.

To establish a prima facie case of negligence, a plaintiff must show that a defendant’s negligence was a substantial cause of the events which produced the injury (*see, Boltax v Joy Day Camp*, 67 NY2d 617, 499 NYS2d 660 [1986]; *Pironti v Leary*, 2007 NY Slip Op 6102, 2007 NY App Div Lexis 8557 [2007]). Liability may not be imposed upon a party who merely furnishes the condition or occasion for the occurrence of the event but is not one of its causes (*see, Pironti v Leary, supra; Katz v Klagbrun*, 299 AD2d 317, 750 NYS2d 308 [2002]). Generally, the questions of proximate cause and the foreseeability of intervening events are properly to be decided by the jury (*see, Noviczki v Homeyer*, 238 AD2d 860, 656 NYS2d 557 [1997]) whose determination should not be disturbed unless it could not have been reached on any fair interpretation of the evidence (*see, Potter v Korfhage*, 240 AD2d 717, 659 NYS2d 323 [1997]).

The adduced evidence indicates that, while defendant Conley was driving, a ladder which was secured to the roof of his vehicle fell to the roadway and that, while driving, plaintiff found the ladder; reduced the speed and applied his brakes to avoid hitting it; and was struck in the rear by the flag

vehicle. There are several issues of fact as to whether defendant Conley's negligence was a proximate cause of the subject accident and whether the accident was foreseeable. Under these circumstances, there is a question of fact as to whether the action of defendants Suffolk Regional and Brian Conley contributed to any injuries sustained by plaintiff (*Viggiano v Camara*, 250 AD2d 836, 673 NYS2d 714 [1998]). Thus, the aforementioned defendants have failed to sustain the initial burden of establishing a prima facie entitlement to judgment as a matter of law. Accordingly, their motion for summary judgment dismissing the complaint against them is denied.

Defendants Masterwood Finishing and Samuel Flagg cross-move for summary judgment in their favor dismissing the complaint against them on the ground that plaintiff has not sustained a serious injury as defined in Insurance Law § 5102 (d). In support, the aforementioned defendants submit, *inter alia*, the pleadings; a bill of particulars; the affirmed report dated May 23, 2006 of their examining neurologist, Dr. Warren Cohen; and the affirmed MRI report dated September 23, 2006 of Dr. David Milbauer concerning plaintiff's cervical spine, taken on February 24, 2005.

By his bill of particulars, plaintiff alleges that he sustained serious injuries as a result of the subject accident, including herniated discs at C2-C3, C3-C4, C4-C5, C5-C6, C6-C7 and C7-T1; straightening of the curvature of the cervical spine; cervical radiculopathy at left C6; cervical spine sprain/strain; myofascial pain; nasal contusion; neck pain and numbness; and numbness and tingling in left arm. In addition, plaintiff claims that he has been confined to bed and home intermittently. At the time of the accident, plaintiff was unemployed.

Insurance Law § 5102 (d) defines "serious injury" as "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."

In order to recover under the "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (*Oberly v Bangs Ambulance*, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed, or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]).

It is for the court to determine in the first instance whether a prima facie showing of "serious injury" has been made out (*Tipping-Cestari v Kilhenny*, 174 AD2d 663, 571 NYS2d 525 [1991]). The

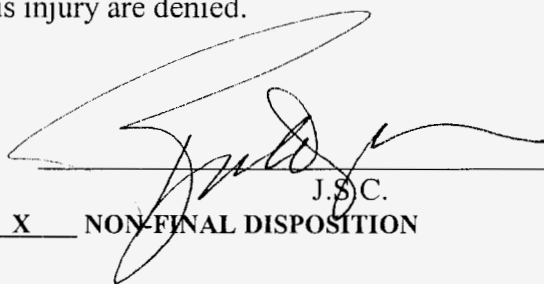
initial burden is on the defendant “to present evidence, in competent form, showing that the plaintiff has no cause of action” (*Rodriguez v Goldstein*, 182 AD2d 396, 582 NYS2d 395, 396 [1992]). Once defendant has met the burden, plaintiff must then, by competent proof, establish a prima facie case that such serious injury exists (*Gaddy v Eyley*, 79 NY2d 955, 582 NYS2d 990 [1992]). 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 nonmoving party, here, the plaintiff (*Cammarere v Villanova*, 166 AD2d 760, 562 NYS2d 808 [1990]).

Here, defendants Masterwood Finishing and Samuel Flagg failed to make a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) (*see, Cruz v Williams*, 34 AD3d 719, 825 NYS2d 510 [2006]; *Nembhard v Delatorre*, 16 AD3d 390, 791 NYS2d 144 [2005]). On May 23, 2006, approximately one year and four months after the subject accident, their examining neurologist, Dr. Cohen, examined plaintiff, using certain orthopedic and neurological tests including Foraminal Compression test, Spurling test, Jackson’s Compression test, Soto-Hall test and Cervical Distraction test. Dr. Cohen found that all the test results were negative and that there was no trigger points or spasm in plaintiff’s cervical spine, although there was diffuse tenderness in the neck and bilateral scapular regions. He reported his findings with respect to the various ranges of motion of plaintiff’s cervical spine. Dr. Cohen found range of motion restrictions when compared to normal range of motion with respect to plaintiff’s cervical spine: 20 degrees flexion (45 degrees normal), 20 degrees extension (45 degrees normal) and 45 degrees rotation (60 degrees normal). On September 23, 2006, their examining radiologist, Dr. Milbauer, reviewed the MRI film of plaintiff’s cervical spine, taken on February 24, 2005. Dr. Milbauer opined that plaintiff’s diffuse cervical spondylosis throughout the cervical spine was degenerative and long standing, “which pre-exist the date of [the subject] accident” and there are no findings to indicate the presence of a traumatic injury to the cervical spine, attributable to the subject accident. Dr. Milbauer, however, failed to submit evidence to support his conclusion that plaintiff’s injuries were not causally related to the accident, or that they were not serious, within the meaning of Insurance Law § 5102 (d) (*see, Tricarico v Vicale*, 5 AD3d 761, 773 NYS2d 572 [2004]).

Thus, defendants Masterwood Finishing and Samuel Flagg failed to establish, prima facie, their entitlement to judgment as a matter of law. Accordingly, their cross motion for summary judgment dismissing the complaint against them on the ground that plaintiff has not sustained a serious injury as defined in Insurance Law § 5102 (d) is denied. Under the circumstances, it is unnecessary to consider the sufficiency of plaintiff’s opposition papers (*see, Barrett v Jeannot*, 18 AD3d 679, 795 NYS2d 727 [2005]).

Accordingly, the motion by defendants Suffolk Regional and Brian Conley for summary judgment on the issue of liability and the cross motion by defendants Masterwood Finishing and Samuel Flagg for summary judgment on the issue of serious injury are denied.

Dated: AUG 09 2007



J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION