

Parmanand v Harbaran

2007 NY Slip Op 33277(U)

October 1, 2007

Supreme Court, Queens County

Docket Number: 0020505/2005

Judge: David Elliot

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT IAS PART 14
Justice

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PARTAB PARMANAND, No. 20505/05
Plaintiff, Motion
-against- Date July 24, 2007

RADESH HARBARAN AND "JOHN DOE" Motion
SAID NAME NAME BEING FICTITIOUS Cal. No. 36
INTENDED TO BE THE OPERATOR
OF SAID MOTOR VEHICLE THAT Motion
FLED THE SCENE, Seq. No. 1

Defendants.

PAPERS
NUMBERED

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Plaintiff commenced this action to recover damages for personal injuries alleged to have been sustained on October 3, 2004 when plaintiff, a pedestrian, was struck by a motor vehicle on Liberty Avenue at the intersection of Pinegrove Street, in the County of Queens, City and State of New York.

Defendant Radesh Harbaran (defendant) moves for an order pursuant to CPLR 3212 granting summary judgment in his favor on the ground that plaintiff has not sustained a serious injury as defined in Insurance Law §§ 5102(d) and 5104(a).

Contentions of the Parties

Defendant asserts that plaintiff's bill of particulars alleges the following injuries: Right ear torn and sutured

with resultant permanent scarring; lumbago; sprain shoulder/arm; sprain of knee and leg; right upper facial lacerations with resultant permanent scarring; cervical and lumbosacral spine strain with concomitant multiple vertebral and costovertebral subluxation of the cervical and lumbosacral spine; urinary bladder collapse requiring surgical insertion of Foley catheter; multiple sprains, strains, swelling, bruises, contusions, pains; limitations of ranges of motion; nerve fiber, sympathetic nerves, muscle and tendon damage; with resultant emotional stress, acute mental anxiety, inability to perform everyday functions, loss of normal pursuits and pleasures of life, and all sequelae resulting therefrom.

Defendant submits affirmed medical reports. Dr. Robert J. Orlandi, an orthopedic surgeon, states that he examined plaintiff on August 10, 2006. He found the cervical spine, shoulders and the lumbar spine to be within normal limits as to range of motion. Specific quantified results were set forth. There was no fixed paraspinal spasm. Straight leg raising was negative. Plaintiff told him that no MRI scanning was performed. He diagnosed previously resolved cervical symptoms with a normal cervical spine and shoulder examination and lumbar strain resolved.

Plaintiff was also examined by Dr. Ravi Tikoo, a neurologist, on August 9, 2006. He noted that prior plain x-rays were negative for fracture and CT scans of the head, abdomen and pelvis did not reveal clear evidence of any traumatic injuries. He found mild tenderness of the cervical and lumbar spine but no associated spasm was noted. Straight leg raising was normal. He diagnosed (1) Subjective complaints of headaches, (2) History of Cervicothoracic Strain, (3) History of Lumbosacral Strain, (4) History of Soft Tissue Injuries, and (5) Status-Post Multiple Trauma.

He further states that the neurological exam was normal. Despite subjective complaints, there were no objective findings to support them. No further treatment or diagnostic testing was needed. Maximal medical improvement had been reached. No permanent injury was sustained.

Dr. Harold Schechter, an internist, reviewed the plaintiff's medical file on October 12, 2006 with respect to an alleged injury regarding a urinary bladder collapse requiring a Foley Catheter. He found that plaintiff did not sustain any urinary bladder injury in the accident based

upon the records reviewed.

Dr. Carlos C. Bazan, a plastic surgeon, examined plaintiff on July 28, 2006 with respect to scars of the right eye, eyebrow and cheek and the left knee and leg. He found said scars to be cosmetically acceptable and not requiring any further treatment. However, they should be considered permanent.

Plaintiff's counsel opposes the motion and asserts that plaintiff sustained deep lacerations to his face particularly his right eyebrow, cheek and ear all of which required surgical intervention and suturing. He has permanent disfiguring scars thereto. In addition, counsel asserts that plaintiff has a confirmed diagnosis of cervical and lumbar paraspinal muscle and ligament sprain, fibromyalgia and left knee contusion and derangement.

Plaintiff submits his affidavit with respect to his limited activities following the accident, continuing pain and his scars.

An affirmation by Dr. Richard Yaldizian states that he specializes in the treatment and care of injuries to the spine. He initially examined plaintiff on October 8, 2004. There was bilateral muscle spasm of the cervical spine and tenderness of the cervical paraspinal musculature and trapezius. Vertebral subluxations were found at C5-C7. Compression tests and Soto-Hall were positive. Range of motion testing resulted in losses below normal. As to the lumbosacral spine, there was right muscle spasm and tenderness of the right lumbar paraspinal musculature. Vertebral subluxations were found at L3-L5. Range of motion testing resulted in severe restriction in all planes with specific degrees of loss of range of motion below normal. He diagnosed cervical and lumbosacral spine strain with concomitant subluxations of the cervical and lumbar spine. Plaintiff treated with a chiropractor from October 4, 2004 to January 26, 2005 at four to five times per week. At the end of treatment, his prognosis was guarded due to unresolved orthopedic and neurologic findings.

Dr. Yaldizian recently examined plaintiff on May 10, 2007. His condition was at best mildly improved. Range of motion testing of the cervical and lumbar spine again resulted in specified degrees of loss of range of motion. Straight leg raising was positive. Plaintiff also had loss of range of motion in his left knee. The doctor

states that the restrictions and decreased muscle strength is not only significant but permanent and are causally related to the subject motor vehicle accident. Treatment was discontinued in January 2005 as plaintiff had reached maximum medical benefit from the course of physical therapy and chiropractic and medical treatment. In addition, the scars to plaintiff's right eyebrow, cheek and ear were also caused by the accident and are permanent, disfiguring and incapable of revision. Each of the injuries had been sutured after he was admitted to the hospital at the time of the accident.

In reply, defendant argues that Dr. Yaldizian did not specifically incorporate by reference uncertified medical records and additional records from his facility. Plaintiff's attorney's affirmation and plaintiff's affidavit are not admissible probative evidence on medical issues. As to the scars, no photographs are offered by plaintiff. Plaintiff has offered no legally significant description or photograph that would tend to support his position. In addition, plaintiff has not submitted sufficient proof with respect to his other injuries to show that he sustained a serious injury.

Decision of the Court

The motion by defendant is denied.

"A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, producing sufficient evidence to demonstrate the absence of

any material issue of fact. Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." Giuffrida v. Citibank, 100 NY2d 72 at 81.

In the instant case, the defendant has established his entitlement to judgment as a matter of law. Defendant has submitted medical evidence in admissible form with respect to the plaintiff's scars and spine injuries. Defendant's plastic surgeon indicates that the scars, while permanent,

are cosmetically acceptable. The affirmed reports by the neurologist and the orthopedist set forth the objective tests conducted and the specific results thereof which were within normal limits.

However, in opposition to the motion, plaintiff has submitted sufficient evidence so as to raise a triable issue of material fact which warrants denial of the motion. Plaintiff's examining and treating doctor sets forth the objective tests he performed shortly after the accident and in a recent evaluation. The results thereof were all below normal levels and were indicative of loss of range of motion in the cervical and lumbar spine. The gap in treatment is explained in that plaintiff reached maximum medical benefit so that treatment was discontinued.

As to the scars, plaintiff's doctor states that such are permanent, disfiguring and incapable of revision. Indeed, defendant's plastic surgeon indicates that the scars are permanent. None of them are obscured by the plaintiff's hairline as shown in the photograph. As noted by the court in Prieston v. Massaro, 107 AD2d 742; "The acknowledged presence of a scar raises the question of whether a reasonable person viewing plaintiff's forehead in its altered state would regard the condition as unattractive, objectionable, or as the subject of pity or scorn [citations omitted]."

In the instant case, upon the photograph showing several scars on plaintiff's face, reasonable people could differ as to whether they constitute a significant disfigurement.

Accordingly, the motion by defendant is denied.

Dated: October 1, 2007

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HON. DAVID ELLIOT