

Gonzalez v Dix Hacking Corp.
2007 NY Slip Op 33403(U)
October 18, 2007
Supreme Court, Queens County
Docket Number: 0005874/2006
Judge: David Elliot
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.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT IAS PART 14
Justice

-----	Index
ROGER GONZALEZ AND	No. 5874/06
DANYELLE GONZALEZ,	
	Motion
Plaintiffs,	Date August 7, 2007
-against-	
	Motion
DIX HACKING CORP. AND	Cal. No. 14
SANDEEP KAUSHAL,	
	Motion
Defendants.	Seq. No. 1

PAPERS
NUMBERED

Notice of Motion-Affid-Exhib..	1-4
Answering Affid-Exhib.....	5-10
Reply.....	11-12

Plaintiffs commenced this action to recover damages for personal injuries alleged to have been sustained on September 11, 2005 when plaintiff Roger Gonzalez, a pedestrian, was struck by a motor vehicle owned by defendant Dix Hacking Corp. and driven by defendant Sandeep Kaushal at the intersection of Hudson Street and Morton Street, in the County, City and State of New York.

Defendants move for an order pursuant to CPLR 3211(a)(7) and 3212 dismissing the complaint as against them on the ground that plaintiff Roger Gonzalez has not sustained a serious injury as defined in Insurance Law § 5102(d).

Contentions of the Parties

Defendants assert that plaintiff's bill of particulars sets forth the following injuries: "Swelling of the right knee bilateral; tenderness on the lateral joint line of the right knee; medial and lateral meniscis tear; prepatellar soft tissue edema; right knee derangement; left

knee bruising [sic] on the medial aspect; tenderness on the medial joint line area; bilateral knee pains; tenderness on the right lower ribcage area; rightsided ribcage pain; tenderness to the left buttock posterior aspect; left buttock pain."

Defendants submit the affirmation of Dr. Jonathan Levin, an orthopedic surgeon. He states that he examined plaintiff on January 31, 2007. As to the thoracic spine/rib cage, there was minimal tenderness to palpation over the trapezius and over the spinous process from T1 through T12 on the right side. Sensation was intact. Lateral bending and rotation were complete and painless. As to the right and left knee, there was no effusion, atrophy or evidence of patello-femoral crepitus. Range of motion on flexion and extension was normal. McMurray Test, anterior and posterior drawer, and pivot shift tests were all negative. Both knees were stable on valgus and varus stressing. As to the right knee, he noted that decreased ranges of motion were due to subjective complaints of pain and there was mild joint line tenderness. Although there were complaints of subjective tenderness to the mid-back and right knee, the rest of the examination was within normal limits.

Defendants also submit the affirmation of Dr. Audrey Eisenstadt, a radiologist. She reviewed the MRI film of plaintiff's right knee on October 4, 2005, three and ½ weeks after the subject accident. She stated her impression as: "Examination degraded by equipment utilized. Red Marrow Replacement to the Fatty Marrow." She concluded that: review of the right knee MRI examination performed three and a half weeks following the accident reveals red marrow replacement to the fatty marrow. This is related to the patient habitus. It can be related to smoking. It, however, has no traumatic relationship, clinical significance or association with the accident. The osseous structures reveal no post-traumatic changes. The ligaments, tendons, and menisci are entirely normal. Not even a joint

effusion to suggest any recent injury is seen. Any injury associated with the accident of 9/11/05 would certainly have an associated joint effusion."

In opposition to the motion, plaintiffs submit the plaintiff's affidavit wherein he states that he was under the care of Dr. David H. Delman from "September 14, 2007 [sic] to January 6, 2007." He claims that he still suffers

from pain of his knees and right ribcage while he had no such complaints prior to the accident.

Dr. Delman's affirmation, dated July 10, 2007, affirms statements set forth in his final narrative report dated June 20, 2007. He first examined plaintiff on September 14, 2005 with plaintiff's chief complaint being bi-lateral knee pain, right ribcage pain and left buttock pain. No facial asymmetry was noted; sensation was intact; deep tendon reflexes were symmetrical; motor strength was within normal limits for the bilateral upper and lower extremities except for some weakness and pain on movement of bi-lateral knees. Upon palpation, there was no tenderness or muscle spasm noted in the cervical and lumbar spines. There was tenderness noted on the left buttock area and right lower ribcage. There was some swelling in the right knee and tenderness on the lateral joint line area and left knee bruising and crepitation. As to range of motion, there was full range of motion of the left hip. Plaintiff complained of pain in the right knee on end-range of flexion to about 100 degrees. It was difficult to accurately assess the right knee secondary to pain. Range of motion of the left knee was restricted in flexion to about 110-115 degrees with pain at end-range. Homan's was negative in the bi-lateral knees. Certain test results were reviewed concerning x-rays taken which were within normal limits.

Dr. Delman followed up with plaintiff on November 2, 2005, February 2, 2006, March 21, 2006 and most recently on June 20, 2006. The final diagnosis was as follows: "Post traumatic right knee internal derangement with signal changes seen within both the medial and lateral menisci consistent with tears. Post traumatic bilateral knee pains. Internal derangement of the right knee with clinical evidence for medial meniscal tear, per Dr. Crone [an orthopedist]." He states that plaintiff sustained significant injuries to his right knee and sustained a disability which is partial, permanent and has resulted in chronic localized pain with progressive remission and exacerbation during overuse of the right knee. Plaintiff was advised to discontinue his physical therapy regiment as it was felt he had reached a plateau.

In reply, defendants argue that they sustained their initial burden by submission of sufficient evidentiary proof in admissible form. Plaintiffs fail to sustain their burden as plaintiff's testimony and his attorney's affirmation are not admissible probative evidence on medical issues.

Plaintiff's doctor relies on unsworn reports and records, particularly the MRI examination of plaintiff's right knee and the reports of Dr. Crone. Further, Dr. Delman, although stating the range of motion of plaintiff's knees, does not compare such testing to normal ranges. The examination of November 2, 2005 does not show any range of motion testing. Plaintiff does not explain the gap in his medical proof. There is no report of a recent examination as his last treatment with Dr. Delman was on June 20, 2006. Plaintiff merely sets forth subjective complaints of pain and tenderness.

Decision of the Court

The motion by defendants is granted. The complaint is hereby dismissed.

"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 defendants have established their entitlement to judgment as a matter of law. Defendants have submitted affirmed medical reports from an orthopedist and a radiologist. The orthopedist set forth the specific results of his range of motion testing and related them to normal limits. All such testing was within the normal range. All other objective tests resulted in negative findings without spasm and only mild tenderness in the right knee. No evidence of any orthopedic disability was found. The radiologist reviewed the MRI film and found that any injury to the right knee had no traumatic relationship, clinical significance or association with the accident. There was no evidence to suggest any recent injury. The court notes that there is reference in the defendant's orthopedist's affirmed report to a healed rib fracture as per history, however, plaintiff's bill of particulars does not claim a rib fracture.

In opposition to the motion, plaintiffs have failed to submit sufficient proof in admissible form so as to raise a

triable issue of material fact. The court notes that plaintiffs initially submitted Dr. Delman's unsigned affirmation. However, in a supplemental affirmation in opposition, the signed affirmation was submitted to the court with an explanation for the failure to initially provide it. In any event, the doctor's affirmation and incorporated report do not sustain plaintiff's burden. Dr. Delman fails to set forth the normal ranges with respect to the claimed loss of range of motion either in his initial evaluation or subsequent evaluations of plaintiff. Indeed, the initial examination results obtained shortly after the accident were, in the majority, within normal limits. Dr. Delman did not review the MRI film and relied upon unaffirmed medical reports which were not submitted to the court. Further, no recent examination of plaintiff by plaintiff's treating or an examining physician has been submitted in opposition to the motion. Neither plaintiff's affidavit nor his doctor's affirmation set forth sufficient proof so as to raise an issue of fact as to whether plaintiff sustained a serious injury. Ranzie v. Abdul-Massih, 28 AD3d 447.

Accordingly, the motion by defendants is granted. The complaint is hereby dismissed.

Dated: October 18, 2007

.....
HON. DAVID ELLIOT